No. 17-10330

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ALVIN FLORIDA, JR.,
Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Honorable James Donato
District Court No. 4:14-cr-00582-JD

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28 U.S.C. § 1291 1

STATEMENT OF JURISDICTION

The government agrees with Appellant's statement of jurisdiction, Br. 1, except that this Court's jurisdiction rests exclusively on 28 U.S.C. § 1291. 18 U.S.C. § 3742 does not apply because Florida is not challenging his sentence.

BAIL STATUS

Appellant Alvin Florida is incarcerated at Atwater USP in Atwater, California, and has an expected release date of April 27, 2019.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred by concluding that its instructions to the jury adequately presented Florida's "multiple conspiracies" defense.
2. Whether the district court plainly erred by failing to intervene *sua sponte* when the prosecutors made several references to homeowners in describing the context of the charged conspiracy to rig bids for homes at foreclosure auctions.

STATEMENT OF THE CASE

On November 19, 2014, a federal grand jury in the Northern District of California returned an indictment charging Alvin (or Al)

Florida, Jr. and others with conspiring to suppress and restrain competition by rigging bids to obtain hundreds of properties offered at public auctions in Alameda County, California, from May 2008 to December 2010, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] ER 270.[2] Chief Judge Phyllis J. Hamilton presided over the first trial, which ended in a mistrial on October 17, 2016, when the jury was unable to reach a verdict. Judge James Donato presided over the retrial, which ended in guilty verdicts against the defendants on December 14, 2016. SER 420-23.

On July 26, 2017, the court sentenced Florida to 21 months imprisonment, a $325,803.00 fine, three years of supervised release, and a $100 special assessment. ER 74-81. On August 8, 2017, Florida noticed his appeal.[3]

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[1] The indictment also included eight counts charging mail fraud in violation of 18 U.S.C. § 1341, which were dismissed on the government's motion before trial.

[2] "ER" refers to Florida's excerpts of record and "SER" refers to the government's supplemental excerpts of record.

[3] Robert Rasheed, John Berry, and Refugio Diaz were tried with appellant and also found guilty. Between May 3, 2017, and May 8, 2017, they noticed their appeals, Nos. 17-10188, 17-10197, and 17-10198, which were consolidated on August 24, 2017. Florida's appeal is not consolidated with those appeals.

I. The Conspiracy to Rig Bids at Alameda County Foreclosure Auctions

A. Real Estate Foreclosure Auctions

The charged conspiracy arose in the context of home foreclosure auctions. Homeowners often finance the purchase of their homes through a mortgage—a loan secured by the home itself. If a homeowner fails to make a mortgage payment, the lender may foreclose on her home in order to "satisfy the debt." SER 80.

The lender "initiate[s] foreclosure" by referring the defaulted mortgage to a trustee, who prepares the necessary paperwork, and sends it to the County Recorder's Office and anyone with an interest in the property. SER 80-85. The homeowner is given several months to make payment. *See* SER 80-81.

If the nonpayment is not cured, the trustee may sell the home at a foreclosure auction. *See* SER 80. The lender sets the opening bid. SER 87. Anyone who can demonstrate sufficient funds may bid at the auction. SER 102-03.

The proceeds from the sale are used to settle the homeowner's debts with any remainder going to the homeowner. SER 92. The lender receives a check sufficient to "pay off their debt." *Id.* Remaining funds

are used to satisfy debts owed to junior lienholders. *Id.* Any money left after that goes to "the person whose home had been foreclosed on." SER 93. In this way, the auction's beneficiaries may include some combination of the lender (usually a bank), junior lienholders, and the homeowner.

B. Defendant's Conspiracy to Rig the Foreclosure Auctions

As multiple witnesses testified, from May 2008 to December 2010, Alameda County foreclosure auctions were "a protected environment . . . in terms of the bidding process," SER 175, and only those who joined the conspirators' "overall" agreement to "suppress bids" were permitted to participate on a regular basis. SER 181; *see also* SER 288-89. Pursuant to that agreement, Florida and his co-conspirators successfully rigged the bidding at more than 100 Alameda County foreclosure auctions. SER 199-201, 214-15, 309-11. Using the structure provided by that agreement, the conspirators paid each other "not to bid" on targeted properties, SER 116, so that they could "purchase[] the property for less money at the public auction" and "split the proceeds"—the difference between the rigged price at the public auction and the

price that would have been paid but for the agreement not to bid. SER 215.

Joining the conspiracy was "a process." SER 174-75. If a new bidder appeared seeking to "legitimate[ly] . . . buy[] properties" the bidder often was permitted to bid "the first few times without any interference." SER 174-75. Once the bidder was established "as competition," however, the conspirators worked to eliminate them, "first and foremost" by making the bidder into a "client[]." *Id.* If that failed, Florida (or others) threatened the bidder with "overbid[ding]" or being "physically . . . blocked" from bidding unless the then-legitimate bidder joined the conspiracy. ER 123-24; *see also* SER 288-90.

Upon joining the conspiracy, the bidder was put through an "education process": "[A] series of meetings and side discussions" through which the new conspirator "learned a little bit more each time." SER 179-80. The conspirator was taught how to signal when the bidding for a particular property should be rigged and the rules for determining who would take the property and who would get paid for not bidding (and how much). SER 138-42, 179-80, 201.

The conspirators used pre-determined verbal and non-verbal signals to indicate when others should refrain from bidding. SER 201. As Florida and another conspirator explained when educating an undercover agent, a conspirator may signal to him that they want to rig an auction by asking "[d]o you want to work" or "are you working." SER 171, or they may state "you're in" or "I'm going to take it," SER 248. Non-verbal signals included making "eye contact to indicate your interest in making a deal, and you nod at the person, and if they nod back, you have a deal," SER 171; *see also* SER 201-02, or "just a nod of the head and a pat on the chest," SER 248. Once one of the conspirators indicated he was "going to take it" or that they were "working," the others typically refrained from bidding against him so that he could secure the property for a lower price. SER 171, 248-49.

After the public auction, the conspirators held a second private auction or "round," at which each made clear what they would have bid at the public auction but for the agreement not to bid. ER 84-85; SER 180-81. Each conspirator had to "agree to stop or not bid in the public auction and to let a designated person win the auction" in order to qualify for the round. SER 109; *see also* SER 210-11. At the round, the

conspirators took turns bidding on the property, generally in "one-hundred-dollar increments," SER 208-10, until they reached the price that they would have been willing to pay at the public auction, SER 180-81. The winner of the round took the property and paid to each losing conspirator a share of the difference between the prices at public auction and the round—funds that should have been gone to the auction's beneficiaries—as determined by a previously agreed-upon formula. ER 180; SER 254.

Florida was one of the conspiracy's ringleaders.[4] SER 179. He and his co-conspirators attempted to hide the rounds by stopping them whenever a "sheriff's deputy went by." SER 279. He discussed past criminal prosecutions for bid rigging in San Jose with a co-conspirator. SER 231. And once, when a round was about to be held in a jury room, Florida even started "making jokes about the irony of being in that room and going to do a round." SER 282.

[4] Co-defendants Rasheed, Berry, and Diaz, *see supra* n.3, were employees of Florida, although Rasheed later left and continued in the conspiracy as a separate investor. ER 149; SER 143-144, 179-80, 183-185, 225, 244-45, 258, 262-64, 272, 286.

The purpose of the conspiracy was "to make additional money," SER 209, and it was successful. New real estate investors were "invited" to Florida's offices to "hear his sales pitch about what kind of services he could provide." SER 112. Florida offered to "control the costs" of purchase and get his client a "better price" at auction by "tak[ing] care of" the other bidders by "pay[ing] them not to bid against us." SER 115-16.

Florida and his conspirators profited by rigging auctions. For example, the conspirators rigged the bidding for "a property on Little Court in Fremont." ER 174. Conspirator Danli Liu agreed with Florida and others to refrain from bidding at the public auction and hold a round for this property. ER 176. Liu, who was new to the conspiracy, won the property at the round and then went to the bank—"escorted" by Florida and two other conspirators—to secure cashier checks, which Liu used to pay the other conspirators $15,000 for agreeing not to bid. ER 176-78. Later, Liu learned of and participated in the conspiracy's "offset system" under which "if [a conspirator] owes me on one property and I owe him on another property, the n we offset with each other." SER 297. Another example is 1618 6th Street. Pursuant to their

agreement, the conspirators stopped bidding on this property during the public auction when it reached $326,700. SER 188. Conspirator Roemer won the property at the private round and testified that, he would have been "willing to pay 326,700 plus the 36,000 that [he] bid in the round at the private auction" to the seller, but, due to the bid-rigging agreement, he paid only $326,700 to the trustee, and divided the remaining $36,000 among the conspirators. SER 188-89.

II. The District Court's Rulings and Findings

1. In the first trial, the court instructed the jury on the elements of a bid-rigging conspiracy, and then instructed the jury on the general elements of a conspiracy using slightly modified versions of three of this Circuit's pattern instructions on conspiracies, 8.20, 8.22, and 8.23. SER 465-67. A modified version of pattern 8.22 addressed the issue of multiple conspiracies:

> Now, you must unanimously decide whether the specific conspiracy charged in count one of the indictment existed, and, if so, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict even though you may find that some other conspiracy or conspiracies existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty even though that defendant may have been a member of some other conspiracy or conspiracies.

ER 235.

At a conference before the second trial, the court stated that it did not anticipate giving these three modified pattern instructions because the "bid rigging instruction amply covers all the elements [the jury] need[s] to find for a Count One conviction," and, accordingly, giving instructions on the general elements of conspiracy alongside instructions describing the specific elements of a bid-rigging conspiracy would "confuse and mystify the jury." ER 5-7. The court permitted argument at the conference; made clear that the change would not impact the scope of admissible evidence; and ultimately asked the parties to further consider the issue and state any objections at the start of the second trial. ER 3-8.

At the start of the second trial, the government requested shortened versions of pattern instructions 8.20 and 8.23, ER 11, and the defendants requested a modified version of 8.22 on multiple conspiracies, ER 13. The court reserved ruling. ER 16.

After the close of evidence, the court heard argument on jury instructions again. The government continued to seek to include portions of pattern instructions 8.20 and 8.23. ER 17-18. But

Rasheed's counsel, speaking on behalf of all the defendants, changed their position and agreed with the court's proposal to eliminate all three instructions: "I wasn't a big fan when Your Honor first mentioned withdrawing those three instructions,"—including the multiple conspiracies instruction—"but with the passage of time, I came to realize that the Court was correct that it was redundant to have those three instructions dealing with conspiracy included." ER 18. Florida's counsel did not disagree or express a different view at that time. Following a brief discussion, the court decided not to give any of the three pattern instructions. ER 19-20.

After that ruling and while a different issue was being discussed, Florida's counsel objected to the lack of a multiple conspiracies instruction and explained the multiple conspiracies defense she sought to raise. ER 21-23. Having heard Florida's explanation, the court reaffirmed its prior ruling stating that "I think the bid rigging instruction adequately captures all of that." ER 23.

The court instructed the jury that in order to convict Florida "the Government must prove . . . beyond a reasonable doubt: 1) That the conspiracy described in the indictment existed at or about the time

alleged, 2) That the defendant knowingly became a member of the conspiracy, and 3) That the conspiracy described in the indictment occurred within the flow of interstate commerce." ER 196. The court also instructed that the indictment charges that the conspiracy began at least as early as May 2008 and continued to at least December 2010. The court had used language agreed upon by the parties to describe the conspiracy in the indictment to the jurors at the start of voir dire: "This is a criminal case in which the defendants – Alvin Florida, Robert Rasheed, John Berry, and Refugio Diaz – are charged in one count of the following offense: Entering into and engaging in a combination and conspiracy to suppress and restrain competition by rigging bids to obtain selected properties offered at public foreclosure auctions in Alameda County in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act." SER 54; *see also* SER 445-46. On December 15, 2016, the jury returned guilty verdicts. SER 420-23.

2. On January 13, 2017, co-defendant Rasheed moved for acquittal or new trial. Rasheed argued, among other things, that there was a variance between the indictment and the proof at trial. SER 42-

43. The motion contended that "the indictment listed a single overarching conspiracy, [but] the trial evidence showed numerous agreements with different properties . . . ." SER 42. Florida joined Rasheed's motion on May 31, 2017. SER 22-23.

The district court denied Rasheed's motion on March 6, 2017, SER 28-36, and subsequently denied it with respect to Florida for the same reasons on June 14, 2017, ER 343. As "a prefatory matter," the court explained, the "defendants face a steep climb in challenging the overall sufficiency of the evidence and the soundness of the verdict" because this "was not a trial where weak facts were served in small portions." SER 30. It rejected the variance argument, finding that "[t]he evidence at trial amply established one overall agreement of conspiracy." SER 30-31 (internal quotation omitted). While the conspirators "handled specific bids or rounds in smaller configurations," the "evidence showed consistency in 'the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals.'" SER 30-31 (quoting *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984)).

The "uncontroverted facts showed that, over the life of the conspiracy, defendants had a shared understanding of the rules of the scheme and engaged in common conduct to realize its goals." SER 31. The evidence established that 1) "defendants agreed not to competitively bid at public auctions and instead to allow a single conspirator to win the auction"; 2) they "agreed that the winning conspirator would take the property to a nonpublic round for rebidding, where the conspirator willing to pay the most for the property would get the property and the other conspirators would receive payoffs"; 3) the "central actors in the scheme -- defendants Florida, Rasheed, Berry, and Diaz -- remained constant"; and 4) "all of this was done for the shared purpose of making money from the rigged bids." SER 31.

On September 26, 2017, Florida moved the district court for bail pending appeal, arguing for the first time that three specific statements made by the prosecutors during closing arguments referencing homeowners improperly invoked facts not in evidence and appealed to the jurors' passions, and thus that the district court plainly erred in not intervening despite the absence of any objection. SER 14. On October 27, 2017, the district court denied bail because, even assuming

arguendo that prosecutors' references to homeowners were "in some way improper," "it would go beyond the bounds of reason to find that they unfairly tilted the jury against Florida in light of the strong evidence the government presented, including videotapes and witness testimony, showing Florida's deep involvement in the bid rigging." SER 3. Thus, "[n]o reasonable jurist would take the position that the jury's verdict would have been different had the prosecutors not referred to homeowners at all." *Id.*

On October 30, 2017, Florida filed an emergency motion asking this Court for release pending appeal. Two days later, under General Order 12.10, the district court submitted a comment to this Court "because Florida's emergency motion is misleading as to the record and as to Florida's own representations to the district court about the basis for his motion." Letter from Hon. James Donato, Dkt. 16, 3 (Nov. 1, 2017). The district court stated that the motion incorrectly "implies that Florida cited more than three references [to homeowners] to the district court." *Id.* at 1. It also "noted that the eyewitness testimony and videotape evidence at trial established Florida's deep involvement

in bid rigging" and that "this evidence was overwhelming and largely uncontroverted." *Id.* at 2.

On November 17, 2017, this Court denied Florida's motion for lack of a "substantial question" and because the asserted question if "determined favorably to defendant on appeal" was not "likely to result in a reversal or an order for a new trial." Order Denying Motion for Bail Pending Appeal, Dkt. 19 (Nov. 17, 2017).

SUMMARY OF ARGUMENT

Florida and his co-conspirators carried out their conspiracy "in the shadow of the Alameda Courthouse," in "contempt [for] the rule of law and disrespect for the criminal justice system." SER 26. Motivated "purely by greed and the desire for easy money," *id.*, they rigged the bidding for more than 100 properties at Alameda County foreclosure auctions. SER 199-201, 214-15, 302-03. Neither of Florida's two challenges to his conviction warrant reversal. To the contrary, he received a fair trial where the government proved the existence of, and his participation in, the charged conspiracy with overwhelming and largely uncontroverted evidence.

1. Florida is incorrect to argue that the district court was required to give an instruction on multiple conspiracies. The district court declined to give Florida's requested instruction based on its correct conclusion that it was redundant. Florida's proposed instruction was redundant, and the district court's instruction was adequate, because the court charged the jury that, in order to convict Florida, the government must prove, beyond a reasonable doubt, that Florida knowingly joined the conspiracy charged in the indictment. The scope of the charged conspiracy was described to the jury repeatedly over the course of the trial by the court and counsel. Because juries are presumed to follow their instructions and the jury could convict only if it found the charged conspiracy, it was not essential to further instruct, as Florida proposed, that the jury could not convict if it found only that some other conspiracy or conspiracies existed.

In any event, Florida was not entitled to a multiple conspiracies charge because the evidence at trial would not have permitted a rational juror to find for Florida on this defense. To distinguish single from multiple conspiracies, courts in this Circuit consider the nature of the scheme; the quality, frequency, and duration of each conspirator's

transactions; commonality of time and goals; and the identity of the participants. The uncontroverted evidence at trial demonstrated that the nature of the conspiracy was an ongoing agreement to certain rules for rigging Alameda County foreclosure auctions that provided a permanent mechanism for activating smaller groups interested in rigging the bidding for any particular property. The common goal of the agreement was to make as much money from rigging auctions as possible. And the link between different auctions was established by, among other things, undisputed evidence that the conspirators offset the result of multiple auctions and paid each other in lump sums accordingly. That Florida was among the leaders of the criminal enterprise is also not in dispute. And while it is true that the conspirators carried out the conspiracy in different subgroups for each property, this Court has already held that such proof, on its own, is insufficient to support a multiple conspiracies instruction.

Finally, the failure to instruct on multiple conspiracies is reversible error only if the defendant was prejudiced, which Florida was not. This Court has held that there can be no prejudice from failure to give a multiple conspiracies instruction unless the evidence at trial gave

rise to a variance, that is, the evidence was insufficient to support a finding of the single charged conspiracy. *See United States v. Zemek*, 634 F.2d 1159, 1168-69 & n.11 (9th Cir. 1980); *United States v. Shabani*, 48 F.3d 401, 403 (9th Cir. 1995). For the same reasons that the evidence at trial was insufficient to support a multiple conspiracies instruction, it was more than sufficient to permit a rational juror to find the existence of the single conspiracy described in the indictment.

2. Florida's prosecutorial misconduct claim based on statements made in closing and rebuttal arguments also fails. Br. 46-60. Florida's claim is subject to plain error review, which requires him to show 1) particularly egregious statements by prosecutors, 2) that substantially prejudiced his rights, and 3) that seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In the challenged statements, the prosecutor explained that the foreclosure auctions were supposed to be competitive and to benefit lenders and homeowners, but that the conspirators eliminated that competition by rigging the auctions to benefit themselves. These statements provided appropriate context for the charged bid rigging

based on admitted evidence and did not impermissibly appeal to the jurors' passions.

The record supports the challenged statements because it establishes that homeowners owned the homes sold at foreclosure auctions and that foreclosure auctions were intended to be competitive. Witness testimony or a reasonable inference therefrom supports each of these points. Indeed, the points were not controverted and were relied on by defense counsel.

The challenged statements were also not an appeal to jurors' passions. While prosecutors are permitted to strike hard blows during argument, they are not permitted to ask a jury to convict on a basis other than fact. Here the challenged statements were not even hard blows. They provided context that was not inflammatory, inappropriate, or even controversial. The prosecutors in this case never sought a conviction on any basis other than the facts; to the contrary, they specifically admonished the jury to focus on the facts and not to punish defendants for reasons unrelated to their guilt or innocence.

In any event, as the district court correctly found, the defendant suffered no prejudice even assuming the statements were improper.

The references to homeowners during closing did not affect the trial's outcome because the evidence of guilt was overwhelming. Moreover, the district court also admonished the jury—as did the prosecutors—to base its verdict on evidence and explained that closing argument is not evidence, further diluting any possible prejudice from the challenged statements.

ARGUMENT

I. The District Court Correctly Instructed the Jury and Defendant Suffered No Prejudice from the Lack of a Multiple Conspiracies Instruction

A. Standard of Review

This Court reviews "de novo whether jury instructions omit or misstate elements of a statutory crime or adequately cover a defendant's proffered defense." *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016) (internal quotation omitted). A "defendant is not entitled to any particular form of instruction, nor is he entitled to an instruction that merely duplicates what the jury has already been told." *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992); *see also Kaplan*, 836 F.3d at 1215.

The failure to instruct a jury on multiple conspiracies requires reversal only if it prejudices the defense. *Zemek*, 634 F.2d at 1168-69 &

n.11. This Court assesses prejudice by determining whether the proof at trial varied from the charge in the indictment. *Id.* To do so, the Court "view[s] the evidence in the light most favorable to the prosecution to see whether any rational juror could have found a single conspiracy beyond a reasonable doubt." *Shabani*, 48 F.3d at 403; *see also Zemek*, 634 F.2d at 1163.

B. The District Court Correctly Determined That the Proposed Instruction Was Unnecessary Because Its Instructions Adequately Covered the Multiple Conspiracies Theory of Defense

It "is not error to reject a multiple conspiracies instruction if the other instructions, when viewed in their entirety, cover that theory." *United States v. Anguiano*, 873 F.2d 1314, 1317 (9th Cir. 1989); *see also United States v. Aubrey*, 800 F.3d 1115, 1131 (9th Cir. 2015). Instructions adequately cover a theory of defense where the instructions, if followed, would lead the jury to acquit based on the asserted defense assuming relevant factual disputes are resolved in the defendant's favor. *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991); *see, e.g., United States v. Thomas,* 612 F.3d 1107, 1122 (9th Cir. 2010) (upholding refusal to give a separate instruction on a literal truth defense to perjury because instructions adequately covered it where

they "explicitly required the jury to find, beyond a reasonable doubt, that 'the testimony described above was *false*' and further required the jury to find (again beyond a reasonable doubt) that 'defendant *knew* that the testimony described above was *false*.'").

As the district court recognized, its instructions "adequately capture[]" Florida's multiple conspiracies defense by requiring the jury to find the conspiracy charged in the indictment, ER 23, as even counsel for Florida's co-defendant conceded, ER 18. A multiple conspiracies defense asserts that the defendant was "*only* involved in separate conspiracies unrelated" to the conspiracy charged in the indictment. *United States v. Torres*, 869 F.3d 1089, 1101 (9th Cir. 2017); *see also United States v. Payne*, 591 F.3d 46, 62 (2d Cir. 2010) (explaining that a multiple conspiracies defense requires the jury to determine the "matter of whether there existed a single conspiracy as charged in the indictment, or instead multiple conspiracies that did not include the conspiracy alleged" (internal quotation marks omitted)). The jury instructions sufficiently presented Florida's multiple conspiracies defense because they told the jury that it may "not convict [Florida] unless the government proved beyond a reasonable doubt that the

defendant knowingly joined in the *conspiracy described in the indictment*." *United States v. Johnson*, 68 F.3d 899, 904 (5th Cir. 1995).

Specifically, the instructions told the jurors that to convict they must find that the government has proven "each of these elements beyond a reasonable doubt: 1) That the *conspiracy described in the indictment existed* at or about the time alleged; 2) That the defendant knowingly became a member of the conspiracy; and 3) That the conspiracy described in the indictment occurred with the flow of interstate commerce." ER 203-204 (emphasis added).

Over and over, the charges repeated the refrain that this case was about the conspiracy charged in the indictment. The court instructed the jury that "[i]f the conspiracy charged in the indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all competition"; that the "Government must prove beyond a reasonable doubt that the conspiracy charged in the indictment occurred in the flow of interstate

commerce"; and "[i]f there was in fact a conspiracy as charged in the indictment, it was illegal."[5] ER 205-07, 209.

The jury was also instructed—and repeatedly reminded throughout the trial—what the indictment charged. At the opening of voir dire all the potential jurors were read a description of the charge that was agreed upon by the parties: "This is a criminal case in which the defendants – Alvin Florida, Robert Rasheed, John Berry, and Refugio Diaz – are charged in one count of the following offense: Entering into and engaging in a combination and conspiracy to suppress and restrain competition by rigging bids to obtain selected properties offered at public foreclosure auctions in Alameda County in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act." SER 54; *see also* SER 445-46. The

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[5] Florida is wrong to suggest that the court did not understand the charged offense based on its comment at a pretrial conference that "defendants were 'not charged with a conspiracy.'" Br. 41 (quoting ER 4). Read in context, the court was explaining that it made little sense to have two instructions purporting to list the elements for conviction given that defendants were being tried for a single crime of bid rigging, and the reference to a lack of conspiracy charges appears to have been directed at the dismissed mail fraud charges. *See* ER 4-7. In any event, the trial record and jury instructions make clear that the district court understood the charged offense was a conspiracy to rig bids. *See* ER 203-04.

Court also later instructed the jury that the "indictment charges that the conspiracy began at least as early as May 2008 and continued to at least December 2010," ER 208-09. And counsel for both prosecution and the defense repeatedly framed the question for the jury during opening statements and closing arguments as "whether there was one overarching conspiracy to rig bids at real estate foreclosure auctions in Alameda County from May 2008 to December 2010, and whether Mr. Florida became a member of this conspiracy knowing of at least one of its objects and intending to help accomplish it." SER 71-72; *see also* SER 68, 71-72, 73-74, 329, 339, 345, 346, 386, 387, 394, 395.

The conclusion that the jury understood Florida's defense in light of the instructions and trial is further "underscor[ed]," *Thomas*, 612 F.3d at 1122-23, by the actions of Rasheed's counsel, who, as Florida explains, raised this defense for all defendants, Br. 45. At the final charge conference, Rasheed's counsel agreed that "the Court was correct that it was redundant to have those three instructions [one of which was the multiple conspiracies instruction] dealing with conspiracy included." ER 18.

And, contrary to Florida's assertion, Rasheed's counsel did not "eschew[] the multiple conspiracies defense" in his summation, Br. 45. He pressed it vigorously. He told the jury that "an indictment is not evidence, folks . . . [but w]e can't just disregard it, because it sets the contours and sets the restrictions of what the Government must prove." SER 393. He continued, "what the Government tried to show here is there was a one long-time, 30-some-month conspiracy that ran from May 2008 to December 2010" but "the evidence they brought in was essentially a bucket of paint with all these documents and all these things, and then spilled it all over the floor and said this was the conspiracy. Oh, yeah, sure, it happened in Alameda County, but that's fairly large." SER 394. "We're going to get into, as I go through this, how they ignored the fact -- and I tried to bring out during my cross-examination of the witnesses -- that each one of these auctions is a separate event in and of itself. You cannot just somehow or another throw them on the floor and say it's the same for everything. Different properties. Different individuals. Different bidders. Different amounts." *Id.* He returned to the theme later, arguing that the government's evidence proved multiple conspiracies and that was

insufficient for a conviction because "that's not the precision we are looking for." SER 398-99.

The prosecutors recognized that defendants were raising a multiple conspiracies defense and responded accordingly. In rebuttal, the prosecutor explained that the "defendants have argued . . . that there maybe was a conspiracy, but that it wasn't just one; it was many" and proceeded to refute that argument. SER 408-09.

Moreover, the language of the instructions given conveys the same principle which Florida complains was omitted. Contrary to Florida's complaints, there is no substantive difference between the proposed multiple conspiracies instruction that the jury "'decide whether the specific conspiracy charged in Count One,' existed," Br. 43 (quoting Model Instruction 8.22), and the given instruction that the jury must find beyond a reasonable doubt that "the conspiracy described in the indictment existed" in order to convict Florida on the single count for which he stood trial, ER 227.

Under the circumstances, it was not essential for the court to append the language instructing that the jury "must acquit if the charged conspiracy is not proven, 'even though you may find that some

other conspiracy or conspiracies existed.'" Br. 43 (quoting ER 235, 244). The instructions already required the jury to acquit if the charged conspiracy is not proven. In *United States v. Aubrey*, 800 F.3d 1115 (9th 2015), this Court made clear that such a requirement is enough. There, the defendant was convicted of stealing funds "belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization," 18 U.S.C. § 1163. The defendant contended that the district court erred by instructing that the government must prove that the funds at issue "belonged to an Indian tribal organization or was intrusted to the custody or care of an agent of an Indian tribal organization" without including at the end of the sentence his proposed language, "rather than belonged to defendant William Aubrey or someone else." 800 F.3d at 1131. This Court found no error because "[n]othing would be gained by adding Aubrey's proposed language." *Id.* Under "the plain meaning of the instruction, if the jury found [as Aubrey contended] that the funds

belonged to subcontractors, it could not convict Aubrey, because then the funds would not belong to a tribal organization." *Id.* at 1132.[6]

Likewise nothing would be gained by adding Florida's proposed language "'even though you may find that some other conspiracy or conspiracies existed,'" Br. 43 (quoting ER 235, 244), to the requirement that the jury can convict only if the charged conspiracy is proven beyond a reasonable doubt. *Aubrey*, 800 F.3d at 1132; *see also United States v. Calderon*, 127 F.3d 1314, 1329–30 (11th Cir. 1997).

"A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The instructions to Florida's jury told it not to return a guilty verdict unless it found, beyond a reasonable doubt, that Florida knowingly joined the conspiracy charged in the indictment, ER 48-49, and "in the context of the whole trial"—the court's jury instructions, counsels' arguments, and the evidentiary presentations—the jury would have understood that the charged conspiracy was a single conspiracy to rig bids for selected properties at Alameda County

[6] *Aubrey* was decided under plain error review, but the opinion is clear that it would have reached the same conclusion were the challenge preserved, explaining that "[w]ithout error, there can be no plain error." 800 F.3d at 1132.

foreclosure auctions running from May 2008 to December 2010. *Thomas*, 612 F.3d at 1122; *see also United States v. Mundi*, 892 F.2d 817, 819 (9th Cir. 1989). Thus, the jury could not have convicted Florida by finding his participation in "any agreement to rig bids," as he contends, Br. 43. The instructions therefore covered Florida's defense: If the jury accepted Florida's multiple conspiracies defense, then it could not have convicted him. *See Thomas*, 612 F.3d at 1122-23.

C. A Multiple Conspiracies Instruction Was Not Warranted Based on the Evidence at Trial

Even if the district court's instructions had not adequately covered the asserted defense, the court did not err unless the requested instruction also "had an evidentiary foundation." *Thomas*, 612 F.3d at 1120. Because the record lacks a sufficient evidentiary basis, Florida's challenge fails for this reason as well.

This Circuit uses a "factors analysis to distinguish single from multiple conspiracies." *Bibbero*, 749 F.2d at 587. "The relevant factors include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." *Id.*; *see also United States v. Arbelaez*, 719 F.2d 1453, 1458 (9th Cir. 1983). Applying this test in

response to defendants' motions for an acquittal or new trial, the district court rejected the underlying multiple conspiracies defense, finding that "[o]n all of these points, the trial record is substantial." SER 31. The "uncontroverted facts showed that, over the life of the conspiracy, defendants had a shared understanding of the rules of the scheme, and engaged in common conduct to realize its goals." *Id.*

Florida now recasts this issue as one of jury instructions. A defendant is entitled to a multiple conspiracies instruction only if the trial record reflects "evidence from which the jury could rationally conclude that [the defendant] was not involved in the conspiracy described in [the indictment], but was *only* involved in separate conspiracies unrelated to the [charged] conspiracy." *United States v. Torres*, 869 F.3d 1089, 1101 (9th Cir. 2017). "A single conspiracy may involve several subagreements or subgroups of conspirators," *Torres*, 869 F.3d at 1102, and evidence of such subgroups and subagreements does not entitle a defendant to a multiple conspiracies instruction, *United States v. Mincoff*, 574 F.3d 1186, 1197 (9th Cir. 2009). Thus, a multiple conspiracies instruction is not warranted if the only evidence in support of it is a "change in participants and a lapse of time." *United*

States v. Taren-Palma, 997 F.2d 525, 530 (9th Cir. 1993) *overruled on other grounds by United States v. Shabani*, 513 U.S. 10 (1994). Accordingly, Florida's arguments that he was engaged in subagreements related to the charged conspiracy do not support a multiple conspiracies instruction, and he has no credible argument that he was involved only in conspiracies unrelated to the one charged.

Nature of the conspiracy. The nature of the charged conspiracy, ER 286, was an ongoing agreement not to bid on select properties sold at Alameda County foreclosure auctions, without determining at the conspiracy's outset which properties would be subject to the agreement, because the available properties changed day to day. The charged conspiracy was an agreement that provided "a permanent mechanism for activating smaller groups," *United States v. Lyons*, 670 F.2d 77, 79 (7th Cir. 1982), interested in rigging the bidding at Alameda County foreclosure auctions to do so on an as-needed basis.

The uncontroverted proof at trial demonstrated a consistent set of rules used and understood by the conspirators to identify which properties would be rigged and how to determine each conspirator's payoff, without any need to re-explain or agree to these rules in advance

of rigging each auction. *E.g.*, SER 215 ("Q: Each time that you made a nod or a gesture, did you have to explain it to the other bidders? A: No."); *see also* SER 174-80, 303. As Florida himself concedes, he and his co-conspirators used "a consistent 'method of operation,'" Br. 35, across the transactions that he contends were entirely "separate, discreet agreements," Br. 43.

The conspirators identified properties to be rigged using pre-determined verbal or non-verbal signals shortly before or during each auction. SER 138-42, 201. The signals were ambiguous (to anyone not in the conspiracy) in order to hide from "law enforcement" and others, that the conspirators stopped bidding pursuant to an agreement. SER 206-07; *see also* SER 249. Absent the ongoing agreement, there is no way that one bidder would have understood that when another "tap[ped] him on the shoulder," SER 171, or made "eye contact" with him and gave a "brief nod of [the] head," that the nodding or tapping bidder was signaling an agreement to stop bidding in exchange for a payoff later, SER 201.

The conspirators' overarching agreement also set the rules for determining payouts. Without re-discussing the method of payment

before each rig, *see* SER 219, the conspirators held a "round" after the public auction at which the conspirators would "go around and take turns bidding on the property." ER 84. The high bidder took the property and paid the other conspirators pursuant to a complex "formula." ER 180; SER 254. The formula took "where you dropped out" and "divided [that number] by the members that were in the round-robin, and . . . then it would be added up for the next person where he dropped, and that would be divided from what was left from the first person that subtracted from that amount, and that would be given to the next person, and so on." SER 253-54. In addition to rules governing payouts, there were rules for qualification in a round, SER 294, and for purchasing "insurance" from another conspirator to protect against an adverse outcome in a round, SER 222.

Such evidence proves the overarching conspiracy because it shows that defendants did not "approach each new bid-letting occasion in search of some dishonest accommodation with the great care or caution which might reasonably be anticipated in an isolated instance." *United States v. Consol. Packaging Corp.*, 575 F.2d 117, 121 (7th Cir. 1978). To be sure, in a few instances, the conspirators negotiated direct payoffs or

sought to extort a toll from bidders who wanted to bid competitively (before inviting them to join the conspiracy); and illegal bid rigging accompanied by rounds occurred in neighboring counties. Br. 35-37. But those instances are not relevant to Florida's multiple conspiracies defense because they do not tend to show that Florida was "only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." *Mincoff*, 574 F.3d at 1196. The occasional direct payoff, which occurred when two conspirators "make eye contact, we both nod at each other, we stop bidding, one of us wins the public auction, then we just – afterwards we say . . . How much do [you] want to pay for it?" instead of engaging in a formal two-person round, are consistent with the overarching conspiracy and were charged as a part of it. ER 86-87 (internal quotation marks omitted); *see also* ER 286. And even assuming, as Florida contends, that proof of direct payoffs or conspiracies in other counties demonstrates that he committed additional crimes or that others committed similar crimes, it would in no way suggest that Florida participated only in conspiracies unrelated to the crime charged in the indictment. *Consol. Packaging*, 575 F.2d at 128 (proof of conspiracy not negated by the fact that the "government

might also have proceeded piecemeal with numerous indictments against each conspirator alleging the lesser conspiracies" because "[t]hat was not necessary"). As such, the proof of the nature of the conspiracy provided no evidentiary basis to instruct the jury that Florida may have participated only in other, unrelated conspiracies rather than the single conspiracy charged.

Commonality of time and goals. The conspirators in this case shared the common goal of "making money from the rigged bids" by restraining competition to purchase select Alameda County properties at non-competitive prices. SER 31. That is, the conspirators sought to make "more profit by price manipulation than could be anticipated from legitimate bidding." *Consol. Packaging*, 575 F.2d at 128. To achieve this goal, each conspirator joined a large group that rigged the bidding on properties at Alameda County foreclosure auctions on an as-desired basis. Each rigged auction advanced the goal of achieving maximum profit, and the conspirators derived additional profit by using the overarching agreement to press honest bidders into becoming their clients or co-conspirators.

The conspirators used the overarching agreement to make additional money by soliciting clients. As Florida explained to a then-undercover agent that he met at the Alameda County foreclosure auctions, ER 88, a buyer could ensure that "guys are not gonna bid against you too high on stuff," SER 429,[7] by agreeing to work with Florida. Florida could get a good price because he had the means—the overarching conspiracy—to "control the price at the public auction." SER 113.

The common goal was further demonstrated by uncontroverted evidence showing that the conspirators paid each other in lump sums reflecting net amounts owed across multiple rigs, when convenient. The conspirators called this an offset system, and under it, "if [one conspirator] owes me on one property and I owe him on another property, then we offset with each other." SER 297; *see also* SER 238-40. The fact that the conspirators "kept records" that amalgamated their bid-rigging activities and totaled these offsets further proves a single conspiracy. *See United States v. Fischbach and Moore, Inc.*, 750

[7] Exhibits referenced in this motion that are labeled #T are transcripts that accompanied an audiovisual or audio recording that was introduced at trial.

F.2d 1183, 1190 (3d Cir. 1984). As a co-conspirator testified about such a record, he created it to reflect "rounds that I was involved in in 2009" in order to "keep track of monies that I owed to other people from rounds," SER 275-76, and the record stated that certain payments were "offset." ER 185; *see also* SER 440 (record conspirator used to reconcile his payments, including a lump sum payment to Florida covering 21 instances of bid rigging).

Florida's claim of evidence demonstrating that each auction resulted in "a single payment" from one conspirator to the other for agreeing not to bid, is belied by the record. Br. 38 (citing ER 84-85, 141-42, 151, 170-71, 183). Witnesses explained that each rigged auction resulted in each conspirator being owed a distinct amount. But that does not mean these individual debts were treated as separate transactions: As the testimony Florida cites, Br. 38, explains, the conspirators would sometimes "group [these amounts] together and pay in a bundle." ER 142; *see also* SER 261. The evidence of common timing and goals therefore unequivocally points to a single conspiracy and cannot support a theory that Florida's acts were related to a distinct, unrelated conspiracy. *See Arbelaez*, 719 F.2d at 1458.

Quality, frequency, and duration of each conspirator's transactions. Florida was "heavily involved in the criminal enterprise." *Arbelaez*, 719 F.2d at 1458. As one conspirator explained at trial, Florida was a "leader of the group," who was in "control [of] the round-robins" whenever he was present. SER 255. That testimony was confirmed by another conspirator who labeled Florida the conspiracy's "vocal leader." SER 179. Florida took frequent part in the conspiracy, whether by himself or through one of his employees: He would rig auctions "on a daily basis, anywhere from zero to five to ten." SER 217; *see also* SER 225, 258. Florida does not identify any evidence to the contrary or argue that he was not heavily involved in rigging auctions. *See* Br. 29-40. The undisputed evidence on this factor also does not support a multiple conspiracies instruction.

Identity of the participants. The key participants in the charged conspiracy also "remained relatively constant." *Bibbero*, 749 F.2d at 587. Witness testimony established that the conspiracy was carried out by a regular group of insider bidders, including Florida. ER 156; SER 182, 214-16, 228-29. For example, as one co-conspirator explained, the conspiracy turned the Alameda County foreclosure auctions into "a

protected environment" at which a select group "decide[d] who would be allowed to bid." ER 122-23. In addition, as detailed above, it is uncontested that Florida's participation in the conspiracy was common and consistent, *see supra* p. 40.

Florida wrongly contends that variation among the individuals within the conspiracy who rigged each auction undermines such evidence and would permit a rational jury to find the presence of multiple unrelated conspiracies. Br. 32-33. Florida's argument is premised on a "misapplication of the law of conspiracy," which does not support the argument that defendants "should be acquitted of the general conspiracy charge just because some of them met singly with other defendants [or uncharged co-conspirators] and conspired with them to carry out the overall common" plan. *United States v. Perry*, 550 F.2d 524, 533 (9th Cir. 1977). Indeed, subgroups are not uncommon in bid-rigging conspiracies, like the one here, because the conspiracy often applies to many commercial opportunities, which will be of varying interest to each conspirator. *See, e.g.*, *Lyons*, 670 F.2d at 78; *Consol. Packaging*, 575 F.2d at 128.

As this Court has held, proof of a "mere change in participants and a lapse of time, without more" is not sufficient to support to a multiple conspiracies instruction. *Taren-Palma*, 997 F.2d at 530. That a different amalgamation of a regular group of conspirators engaged in the rigging of each individual property "is not inconsistent with a 'single overall agreement.'" *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980). It shows only that this conspiracy was carried out by subgroups of conspirators. That does not "mean there are separate conspiracies" or entitle Florida to a jury instruction on his multiple conspiracies defense. *United States v. Job*, 871 F.3d 852, 868 (9th Cir. 2017); *Taren-Palma*, 997 F.2d at 530.

D. Florida Was Not Prejudiced by the Lack of a Separate Instruction on Multiple Conspiracies Because There Was No Variance at His Trial

Even if the court should have given the proposed instruction, Florida would not be entitled to reversal because its absence did not prejudice his defense. *Zemek*, 634 F.2d at 1168-69; *Perry*, 550 F.2d at 533. The refusal to instruct on multiple conspiracies is prejudicial only if there is a variance between the indictment and the evidence adduced at trial. *Zemek*, 634 at 1168-69. Florida's argument that he need not

show prejudice but is instead entitled to "*per se* reversal," Br. 41, is foreclosed by this Court's precedents on multiple conspiracies instructions, *Zemek*, 634 F.2d at 1168-69 & n.11; *Perry*, 550 F.2d at 533.[8] Those cases are controlling here, not the cases that Florida relies upon that involved reversals for failure to instruct on other theories of the defense.[9] In addition, this Court's rule requiring a defendant to establish a variance in order to show prejudice from a failure to instruct on multiple conspiracies makes good sense. The "recurrent issue of multiple conspiracies" can be asserted many ways, *Zemek*, 634 F.2d at 1167, *see also Bibbero*, 749 F.2d at 586, and it can nearly always, if not always, be raised as a challenge to the adequacy of the jury

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[8] Other circuits also deem failure to instruct on multiple conspiracies reversible error only if prejudicial. *See*, *e.g.*, *United States v. Maldonado-Rivera*, 922 F.2d 934, 964 (2d Cir. 1990); *United States v. Calderon*, 127 F.3d 1314, 1330 (11th Cir. 1997); *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996).

[9] *See* Br. 40-45 (citing *United States v. Zuniga*, 6 F.3d 569, 571 (9th Cir. 1993) (alibi defense); *United States v. Morton*, 999 F.2d 435, 440 (9th Cir. 1993) (self-defense); *United States v. Marguet-Pillado*, 648 F.3d 1001, 1004-10 (9th Cir. 2011) (derivative citizenship); *United States v. Bello-Bahena*, 411 F.3d 1083, 1087 (9th Cir. 2005) (official restraint defense); *United States v. Kayser*, 488 F.3d 1070, 1076-77 (9th Cir. 2007) (no tax deficiency defense); *United States v. Escobar De Bright*, 742 F.2d 1196, 1199-1201 (1984) (no agreement defense in conspiracy case where the defendant arguably conspired only with a government agent); *Thomas*, 612 F.3d at 1120 (literal truth defense)).

instructions, *cf. Anguiano*, 873 F.2d at 1317-18 (purpose of issuing a multiple conspiracies instruction is to eliminate the possibility of a prejudicial variance). It would make little sense to permit a defendant to circumvent the requirement of showing a prejudicial variance by repackaging her variance challenge as a challenge to jury instructions.

When a defendant asserts error for failure to "instruct[] the jury . . . on multiple conspiracies," this Court "treat[s] this claim as a sufficiency of the evidence issue" in order to determine whether there was, in fact, a "variance" at trial. *United States v. Shabani*, 48 F.3d 401, 403 (9th Cir. 1995). The Court does so by "view[ing] the evidence in the light most favorable to the prosecution to see whether any rational juror could have found a single conspiracy beyond a reasonable doubt." *Id.*; *see also Perry*, 550 F.2d at 530.

In their post-trial motions, defendants asserted a claim of variance which the district court correctly rejected using the above standard. The district court analyzed the relevant factors and held that the evidence at trial "amply established 'one overall agreement' of conspiracy." SER 30 (citing *Zemek*, 634 F.2d at 1167). The evidence discussed in detail above strongly confirms the district court's

conclusion. *See supra* Part I.C. Not only could a rational juror have found a single conspiracy based on the evidence; no rational juror could have failed to find a single conspiracy based on the evidence. *See supra* Part I.C. As the court explained, the uncontroverted facts adduced at trial revealed a common method of operation, an ongoing and overarching conspiracy, substantial involvement in the conspiracy by Florida, and a consistent set of central actors who carried out the conspiracy in subgroups. *See* SER 31; *supra* Part I.C.

II. The Court Did Not Plainly Err by Not Intervening, *Sua Sponte*, When the Prosecutors' Closing Arguments Referred to Homeowners Because They Did Not Constitute Misconduct or Result in Prejudice

A. Standard of Review

As Florida concedes, Br. 51, he did not object to the statements he challenges on appeal, and thus review is for plain error. He must show 1) "that the district court plainly erred when it did not intervene *sua sponte* to address the alleged misconduct" by prosecutors during the closing argument, and 2) that this error substantially prejudiced his trial. *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2001); *United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011). Even if he makes these two showings, "the plain error doctrine authorizes the

Courts of Appeals to correct only particularly egregious errors . . . that seriously affect the fairness, integrity or public reputation of judicial proceedings." *Sanchez*, 639 F.3d. at 1256 (internal quotation omitted).

B. The Challenged Statements Neither Invoke Facts Outside the Record nor Improperly Appeal to the Jury's Passions

In closing argument and rebuttal, the prosecutors stated (among many other things) that the foreclosed homes, which were the subject of the bid rigging, once belonged to homeowners; that the auctions were designed to get the best price for the foreclosed homes on behalf of the lenders and homeowners; and that, referring to a specific instance of bid rigging, the conspirators' payouts to one another at the post-auction rounds did not go to the lender or homeowner. There was no need for the court to "intervene sua sponte to address" these statements. *Henderson*, 241 F.3d at 652. Under the plain error standard, this Court reviews the challenged statements to determine whether they "were particularly egregious." *People of Territory of Guam v. Quichocho*, 973 F.2d 723, 726 (9th Cir. 1992) (internal quotation marks omitted).

The challenged statements were not particularly egregious—indeed, they can hardly be characterized as what courts deem permissible "hard blows," *Henderson*, 241 F.3d at 652. The statements

told the jury what was obvious from the witness testimony: foreclosed homes were once owned by homeowners, foreclosure auctions are intended to get a competitive price to benefit the lenders and homeowners, and the conspirators rigged the auctions for their own gain and to the potential detriment of the auctions' beneficiaries. It is telling that none of the four defense counsel made a contemporaneous objection, apparently all failing to perceive the egregiousness of the statements that Florida now asserts. Similarly telling is the failure of Florida's current counsel, when briefing this issue to the district court in his motion for bail on appeal, to identify most of the statements he now claims constitute such plain errors that the district court should have immediately intervened. *See* Letter from Hon. James Donato 1-2.

1. The Statements Made During Closing Were Supported by Record Evidence

Florida's claim that the statements were unsupported because the evidence did not show specific "individual foreclosed homeowners [who] had suffered actual financial losses from the defendants' conduct," Br. 52-53, misconstrues both the challenged statements and the requisite evidentiary basis. Because the government never argued that a specific homeowner suffered a loss, no such proof was necessary. The

government did argue that the auctions were intended to benefit lenders and homeowners through competitive bidding and that the defendants conspired to suppress competition by rigging the bidding. That argument is fully supported by the evidence.

The "prosecution must have reasonable latitude to fashion closing arguments" and "[i]nherent in this latitude is the freedom to argue reasonable inferences based on the evidence." *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). Prosecutors thus "have considerable leeway to strike hard blows based on the evidence and all reasonable inferences from the evidence." *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (internal quotation omitted); *see United States v. Macias*, 789 F.3d 1011, 1023 (9th Cir. 2015). Each of the challenged statements rests directly on admitted evidence or a reasonable inference therefrom.

Most of the challenged statements concerned the purpose of holding competitive auctions for the foreclosed homes. Separated by several lines, the prosecutor stated first that auctions were "designed to get the highest possible price for a foreclosed home for the lenders and the homeowners" and then that the "auctions in this case were the last

opportunity for lenders and homeowners to recover anything from the home, and that process was supposed to be competitive." Br. 46 (quoting ER 214) (emphasis omitted). These two statements rest on uncontroverted testimony that the foreclosure auctions were supposed to be a "competitive bidding process," SER 196; *see also* ER 139; SER 168, 203, 205, and that auctions proceeds went to the lender, junior lienholders, and homeowners, SER 92-93. The testimony also established that, when a property is sold at auction, it has a new owner after the sale is complete and thus the auction is the old owner's last chance to get anything of value out of the property. SER 90, 99, 106, 234-35, 266.

Similarly, the prosecutor stated that the conspiracy "'deprived homeowners of the opportunity of a fair price for probably their most valuable possession,'" Br. 47 (quoting ER 222) (emphasis omitted), immediately after explaining, correctly, that "[b]id rigging is per se illegal because it deprives consumers the right to prices set by a competitive marketplace," ER 221. The challenged statement is supported by testimony of co-conspirators admitting that the conspiracy allowed them to pay less at auction then they otherwise would have due

to the bid-rigging agreement. *See, e.g.*, SER 180-81, 189, 215-16, 283. From this testimony, it is reasonable to infer that the price but for the bid rigging would have been more competitive and thus the conspiracy denied the homeowners an opportunity to get that price for their home. And the testimony also established that if the price was greater than the liens on the home, then the homeowner would receive the remainder. SER 93. By its nature, the bid rigging reduced the opportunity for the homeowner to receive any remainder proceeds.

The prosecutor also stated that "[e]ach of these properties was someone's foreclosed home, and each of these properties was an opportunity for the defendants to line their pockets." Br. 46 (quoting ER 215). The evidence, not surprisingly, showed that every home sold at a foreclosure auction belonged to someone prior to the foreclosure sale. SER 80, 96 (Q: "And when a homeowner's loan goes into default, for whatever reason, JP Morgan Chase, as you testified, can put the home on the foreclosure auction block; right? A: . . . yes."); *see also* SER 77 (defense opening stating that each rigged auction involved "a distinct homeowner"). The evidence further established that the conspirators viewed the auctions as an opportunity for profit through testimony that

the purpose of the conspiracy was to make money by rigging foreclosure auctions. SER 167-68, 181 ("Q: Now, why not just bid at the public auction? Why take part in the rounds? A: You know, I would say it's sort of two parts to that. One would definitely be financially."), 192-93, 208, 215, 283. It is reasonable to infer that the conspirators rigged bids to line their pockets. Indeed, it is "inconceivable . . . that anybody would attempt to restrain trade [by rigging bids] without also having the further goal of financial self-enrichment by virtue of the restraint of trade." *United States v. Dynalectric Co.*, 859 F.2d 1559, 1568 (11th Cir. 1988); *accord United States v. Northern Improvement Co.*, 814 F.2d 540, 542 (8th Cir. 1987).

When explaining why the interstate commerce element of the offense was met, the prosecutor stated that "of course the activities charged in this case were an essential part of the real estate transaction," ER 218, because the "entire purpose of the foreclosure auction was to receive a competitive price for the property to compensate the lender, the homeowner, and others, and the defendants' conduct prevented that from happening," Br. 46-47 (quoting ER 218). The auction's purpose of compensating its beneficiaries through

competitive bidding and the conspirators' purpose of suppressing competition through bid rigging were well established, *see supra* pp. 49, 50.

The prosecutor stated that "[n]ot a single dollar of that payoff went to the homeowner or the lienholder or anyone else with a legal connection to the property," Br. 46 (quoting ER 217), in connection with the foreclosure auction for 1007 41st Street in Emeryville. The prosecutor directed the jury's attention to the evidence supporting the statement. ER 217. That evidence—testimony and relevant trial exhibits—showed that co-defendant Rasheed was paid approximately $4,890 to refrain from bidding on this property and not because of any legitimate interest he had in it. SER 147-52, 425-26, 427-28. It was reasonable to infer—it could hardly be more obvious—that Rasheed did not share this pay off with the homeowner or lienholder.

Lastly, on rebuttal, the prosecutor repeated the factual context of the bid rigging, stating that "there are people behind these homes, people who have fallen on hard times, and now on top of that are losing their homes." Br. 47 (quoting ER 219-20) (emphasis omitted). The fact that foreclosed-upon homes previously belong to someone is a fact that

was supported by direct evidence and relied upon by defense counsel. *See supra* p. 50. The statement also rests on the evidence showing that a home goes into foreclosure when the homeowner falls behind on payments, SER 80, and the reasonable inference that, in this circumstance, the homeowner has fallen on hard times.

Florida appears to suggest that a pretrial order barring the literal use of the word "victim[]," SER 529, and a representation by the government that it did not intend to prove market-wide price suppression, SER 536-38, prevented him from contending that homeowners were not harmed by his conduct. Br. 48-51. Florida does not explain how this argument, were it true, would demonstrate that the challenged statements were not supported by the evidence or appealed to the jury's passions.[10] Regardless, the underlying premise is

[10] Florida also seems to suggest that the government violated the order and representation. No violation occurred. The prosecutors' closing arguments never used the word "victim," and the government introduced no evidence of market-wide harm, which would be irrelevant to a bid rigging prosecution, *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940). The government did, as it said it would before trial, introduce evidence of the "result of that particular agreement . . . on that subset of selected properties" so that it could argue "look, what should have happened is monies should have gone to certain people, but that's not what happened," SER 527-28, and the

not true, as the actions of Florida's counsel below demonstrate. While Florida now presses a claim that the lack of this evidence prejudiced him, Florida's counsel made tactical use at trial of the absence of this evidence, urging the jury to infer that Florida harmed only banks and not homeowners based on the lack homeowner-victim testimony. "[H]ere we are in the prosecution where the banks are the complaining party," she told the jury; the government "could have presented to you a homeowner as a witness who would have said but for the actions at the public auction, I would have received some money. They didn't do that, and that's a reasonable inference from that that you can take that that testimony would not have existed." SER 390 (emphasis omitted). Florida's suggestions regarding the pretrial order and representation are both incorrect and irrelevant.

2. The Statements Made During Closing Were Not Improper Appeals to the Jury's Passions

The prosecutors' closing and rebuttal arguments, including the statements challenged on appeal, did not ask the jury to convict Florida

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district court agreed that such evidence was potentially admissible and relevant, SER 528-29. Accordingly, the evidence of which Florida now complains did not violate any order and was no surprise to Florida.

on any basis other than a factual assessment of his guilt. The prosecutors focused on whether the evidence showed the defendants joined the charged conspiracy, and they specifically admonished the jury not to convict the defendants because people's homes were foreclosed on or due to the financial crisis. Florida is therefore wrong to claim that the prosecutors impermissibly "appealed to the jurors' passions by suggesting that the defendants preyed upon homeowners who had 'fallen on hard times,'" Br. 53.

Florida's claim is based on a mischaracterization of the prosecutors' statements and a misunderstanding of what constitutes an improper appeal. An improper appeal to the passion of the jury is a statement "clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009). "In particular, prosecutors 'may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking.'" *Id.* A prosecutor may not "point to a particular crisis in our society and ask the jury to make a statement," *United States v. Leon-Reyes*, 177 F.3d 816, 823 (9th Cir. 1999); "encourag[e] a conviction to protect other

individuals in the community" regardless of the defendant's guilt, *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005); or point to inflammatory facts unrelated to the offense charged. *Nobari*, 574 F.3d at 1077. But it is "unquestionably true as a general matter" that the prosecutor can offer evidence and evidence-based arguments to present "a colorful story with descriptive richness" with "concrete and particular" facts related to the offense. *Old Chief v. United States*, 519 U.S. 172, 187 (1997); *cf. Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000) (noting that misconduct occurred when prosecutor delivered "a soliloquy in the voice of the victim" discussing the victim's experience and personality but "had the prosecutor delivered exactly the same speech in the third person, it would have been proper").

In assessing Florida's claim of misconduct, this Court does "'not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" *Leon-Reyes*, 177 F.3d at 822-23 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974)). Reviewed in this light (or any other), the challenged statements do not come close to making

improper emotional appeals. Every statement challenged by Florida is related to the offense charged and none of the prosecutors' statements comes close to "tell[ing] the jury it had any obligation other than weighing the evidence." *Nobari*, 574 F.3d at 1077.

The prosecutors' closing and rebuttal argument sought a conviction on the facts. In closing, the first prosecutor emphasized that "what is said in closing is not evidence. That's because the facts are the facts, and the facts as presented by the United States show beyond a reasonable doubt that the defendants are guilty of a conspiracy to rig bids at the Alameda County foreclosure auctions." SER 369.

On rebuttal, the second prosecutor told the jury *not* to convict Florida simply for taking part in the foreclosure process, instead explicitly validating the legal purchase of homes at foreclosure sales: "look, if they had done it the legitimate way, we wouldn't have faulted them. The economy needed people like them to fix these properties, buy them, fix them, and then resell them." ER 220. And far from asking the jury to convict defendants out of anger for the subprime mortgage crisis or to save individuals in the community from future foreclosures, the prosecutor asked the jurors to focus on what defendants did: "They

didn't cause a financial crisis, but they benefited from it. They didn't foreclose on these people, but they found a way to make money and benefit from those foreclosures . . . . This case is about what the defendants did." SER 402-03.

None of the cases Florida cites support his argument that the prosecutors' statements referring to homeowners were improper. They do not involve any even remotely analogous statements. Most of the cases involve improper vouching, Br. 52—a claim that Florida does not (and could not) make here. *See United States v. Alcantara-Castillo*, 788 F.3d 1186, 1195-96 (9th Cir. 2015); *United States v. Combs*, 379 F.3d 564, 572 (9th Cir. 2004); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997); *United States v. Kerr*, 981 F.2d 1050, 1053-54 (9th Cir. 1992); *United States v. Smith*, 962 F.2d 923, 933-36 (9th Cir. 1992); *United States v. Roberts*, 618 F.2d 530, 534 (9th Cir. 1980). The other misconduct cases are also inapplicable. In *United States v. Sanchez*, the prosecutor's argument that failing to convict would "send a memo" to all future drug traffickers on how to avoid conviction improperly asked jury to convict for fear "that an acquittal might lead to future lawbreaking . . . by drug couriers throughout the United States and

Mexico." 659 F.3d 1252, 1257 (9th Cir. 2011). And in *Weatherspoon*, the prosecutor improperly vouched and repeatedly encouraged a conviction regardless of the facts by telling the jury that "[c]onvicting Mr. Weatherspoon is gonna make you comfortable knowing there's not convicted felons on the street with loaded handguns." 410 F.3d 1142, 1149 (9th Cir. 2005). The prosecutors here made no such improper appeals.

C. Any Error Did Not Seriously Affect Florida's Substantial Rights

Even if the district court plainly erred by failing to intervene *sua sponte* to address prosecutors' references to homeowners, the Court should still affirm because the challenged statements did not cause substantial prejudice. Considering "all circumstances at trial including the strength of the evidence against the defendant," *United States v. Romero-Avila*, 210 F.3d 1017, 1022 (9th Cir. 2000), Florida's contention that he suffered substantial prejudice as a result of a handful of statements that can hardly be classified as inflammatory and that comprise less than two pages of text, *see* Br. 46-47, when assessed in the context of 52 pages of the prosecutors' arguments and seven-day trial, must fail.

Florida bears the burden to show that the challenged statements, if inappropriate, resulted in substantial prejudice. *United States v. Olano*, 507 U.S. 725, 734 (1993). To show prejudice, Florida primarily relies on the fact that the jury in his first trial could not reach a unanimous verdict. Br. 56-60. But the inability of one or more jurors in the first trial to find him guilty may reflect nothing more than leniency, mistake, or nullification. *Cf. United States v. Powell*, 469 U.S. 57, 65 (1984). As the cases Florida cites recognize, prejudice must be assessed in light of the nature and seriousness of the error and the quality of the evidence at the second trial. *See, e.g.*, *Dow v. Virga*, 729 F.3d 1041, 1050 (9th Cir. 2013) ("The case was a weak one that hinged almost entirely on Sablad's inconsistent eyewitness testimony."); *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691, 698 (9th Cir. 2004) ("Mundell's recollection of Caliendo's confession was the only evidence that Caliendo broke into the car, and the case was close enough that Caliendo's first jury hung.").

The evidence at the second trial differed substantially from the first trial, making any comparison with the outcome of the first uninformative. The government replaced two of its percipient witnesses

in the second trial: Jorge Wong and Miguel De Sanz were replaced by Michael Renquist and Thomas Francoise. Jorge Wong was, according to Florida's counsel "the worst kind of witness," SER 516, and consistent with her statement, Florida's counsel spent more time using Wong's testimony to challenge the government's case than any other cooperator in her closing at the first trial, *see* SER 504-516.[11]

In this case (unlike those cited by Florida), the district court explicitly found the evidence of guilt in the second trial was "overwhelming and largely uncontroverted," Letter from Hon. James Donato at 2; *see also* SER 30 ("This was not a trial where weak facts were served in small portions."). The government presented "strong evidence . . . including videotapes and witness testimony, showing Florida's deep involvement in the bid rigging." SER 3; *see also* Letter from Hon. James Donato, Dkt. 16, 2-3. As a result, the district court concluded that, even assuming there was an error in connection with the prosecutor's references to homeowners, Florida suffered no

[11] Wong agreed on cross examination that he was testifying in exchange for what he "hoped to be a benefit for [him]self," SER 491; was impeached as to testimony he gave implicating the defendants, SER 483-88, 501; and was impeached as to whether his uncle told him not to work with Florida based on racial animus, SER 494-98.

prejudice. SER 3; *see also* Letter from Hon. James Donato, Dkt. 16, 2-3. The district court's decision is "entitled to deference." *United States v. Wolfswinkel*, 44 F.3d 782, 787 (9th Cir. 1995).

The trial record confirms the district court's finding. The government presented video evidence showing Florida engaged in actual bid rigging and soliciting an undercover agent to join the conspiracy in exchange for money. *See* SER 429-39; *see also, e.g.*, SER 113-35. Seven witnesses testified to Florida's involvement in the bid-rigging scheme. *E.g.*, SER 113-35, 178-80, 216-17, 243-44, 269-70, 286, 301-303. One co-conspirator even testified to rigging auctions with Florida or one of his employees on "a daily basis." SER 217. The testimony and video evidence was corroborated by contemporaneous documentary evidence which included, among other things, Florida's seized round sheets reflecting his records of dozens of rounds that he participated in or that were undertaken at his direction. SER 342-43. Nor was the record lacking in evidence of a "single, overarching conspiracy," Br. 56, as the district court found and the evidence showed, *see supra* Part I.B. This "was not a trial where weak facts were served in small portions," SER 30, so even if an error was made, the plain error

rule would not permit reversal.

Moreover, any impact from the challenged statements was diminished by the district court's instructions to the jury to rely only on evidence introduced at trial as well as the prosecutor's admonishment to do the same. At the start of the trial, the district court issued an instruction warning the jury that "the following things are not evidence, and you must not consider them as evidence in deciding the facts of this case. For example, the statements and the arguments of attorneys are not evidence." SER 60. At the end of the trial, it again instructed the jury: "The following things are not evidence, and you . . . may not consider them in deciding what the facts are: . . . what the lawyers have said in their opening statements, and what they will say in closing argument." SER 315. During closing argument, the prosecutor reminded the jury that "[t]he Court instructed you that the lawyers are not witnesses, and that what is said in closing is not evidence." SER 369. These statements "dilute the potential prejudice arising from improper statements." *United States v. Koon*, 34 F.3d 1416, 1445 (9th Cir. 1994).

Lastly, Florida cannot rely on hostility to banks to show prejudice.

Florida complains that by "casting individual homeowners as having suffered financial harm, the prosecutors provided the jury with a victim who was considerably more sympathetic than a large bank" (or the economy). Br. 54-55. According to Florida, this prejudiced him because a jury might have acquitted him if it believed his crime victimized only banks, which are not "the most sympathetic victim" and who jurors might blame for "caus[ing the mortgage crisis] by trading in high-risk mortgage-backed derivative securities, and [who] were then collectively rewarded for their malfeasance with a transfer of 700 billion dollars from the Federal Reserve's Troubled Asset Relief Program." Br. 55. By this logic, Florida was prejudiced because the challenged statements caused the jury not to engage in nullification. *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (as amended) ("Jury nullification occurs when a jury acquits a defendant, even though the government proved guilt beyond a reasonable doubt."). But a trial's fairness cannot be diminished by an error that impairs a defendant's ability to seek jury nullification, nor should this Court reverse a verdict based on conduct that caused a jury not to engage in nullification. *See Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005); *Kleinman*, 880

F.3d at 1031-36. Finding harm from an error that prejudiced a defendant because it prevented jury nullification would be to "move to a 'system' . . . in which the law has about as much force as the Cheshire Cat's grin." *Zal v. Steppe*, 968 F.2d 924, 931 (9th Cir. 1992) (Trott, J., concurring). This Court should decline to do so.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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February 26, 2018

STATEMENT OF RELATED CASES

This government agrees with Florida that this case is related to the consolidated appeals of his co-defendants. Br. 62. These appeals are *United States v. Rasheed*, No. 17-10188 (9th Cir. filed May 3, 2017); *United States v. Berry*, No. 17-10197 (9th Cir. filed May 8, 2017); and *United States v. Diaz*, No. 17-10198 (9th Cir. filed May 9, 2017).

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Signature of Attorney or Unrepresented Litigant: s/ Jonathan Lasken

Date: 02/26/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I, Jonathan Lasken, hereby certify that on February 26, 2018, I electronically filed the foregoing Answering Brief for the United States of America and the accompanying Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

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February 26, 2018

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