No. 18-10027

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD M. PARKER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
Honorable William B. Shubb
District Court No. 2:11-cr-00511-WBS-3

OPPOSITION OF THE UNITED STATES OF AMERICA TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL

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The United States opposes appellant Donald M. Parker's motion for release pending appeal because it fails to raise a "substantial question of law or fact" likely to result in reversal or a new trial. 18 U.S.C. § 3143(b)(1). Parker's scattershot complaints about jury instructions, post-trial evidence, prejudicial spillover, and cumulative error are all misplaced. Some were not preserved; others misread the record. All are incorrect. And none is a substantial legal or factual issue warranting Parker's release pending appeal.

BACKGROUND

On December 7, 2011, a federal grand jury sitting in the Eastern District of California returned an indictment charging an auctioneer and four real estate investors—Donald Parker, Andrew Katakis, Anthony Joachim, and Wiley Chandler—with conspiring to rig bids, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and conspiring to commit mail fraud, in violation of 18 U.S.C. § 1349. A125[1] (Dkt. 1).

The indictment alleged that, from September 2008 to October 2009, the conspirators participated in a scheme to suppress competition and defraud banks at hundreds of public real estate foreclosure auctions in San Joaquin County, California. The scheme involved agreeing not to compete to purchase certain properties at auction, designating which conspirator would bid for those properties,

[1] Citations to the appendix to appellant's bail motion take the form A##.

refraining from bidding for the properties otherwise, and making payoffs to and receiving payoffs from one another in exchange for not bidding. *See* A2-A7.

On May 8, 2013, the grand jury returned a superseding indictment further charging Katakis alone with obstruction of justice, in violation of 18 U.S.C. § 1519. A135 (Dkt. 136). The superseding indictment alleged that Katakis, upon learning of the government's investigation into the conspiracy, procured and used software to erase electronic records of the conspiracy in an effort to obstruct the investigation and cover up his wrongdoing. A8-A9.

Joachim and Chandler agreed to cooperate and pleaded guilty pursuant to plea agreements. A129 (Dkt. 64), A139 (Dkt. 187), A151-A152 (Dkt. 315). They joined nine other investors who had pleaded guilty prior to indictment. *See* A125 (Dkt. 12). Before trial, Parker moved to sever his case from Katakis's, arguing that the obstruction-of-justice evidence against Katakis would unduly prejudice him. A136 (Dkt. 154). The district court denied the motion, holding that there was no reason to depart from the general principle that defendants charged together should be tried together, particularly in conspiracy cases. A15.

Parker, Katakis, and the auctioneer went to trial. On March 11, 2014, after 23 days of trial, the jury found Katakis and Parker guilty of conspiring to rig bids, found Katakis guilty of obstructing justice, and hung on the mail fraud count as to Katakis and Parker. A146-A147 (Dkt. 264, 277, 278). The jury acquitted the

auctioneer on both the bid rigging and mail fraud counts. A147 (Dkt. 279).

After trial, Katakis moved for a judgment of acquittal on the obstruction-of-justice count, notwithstanding the jury's guilty verdict. A151 (Dkt. 310). The district court granted the motion because it found insufficient evidence that Katakis had successfully deleted or concealed any electronic records, even though he clearly had intended and attempted to do so. A152 (Dkt. 317). The government appealed that ruling, and this Court affirmed. *United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015) (No. 14-10283). Like the district court, this Court found "truly overwhelming" evidence of Katakis's *intent* to obstruct justice, *id.* at 1027, but insufficient evidence that his efforts accomplished what he intended.

Following the appeal, Katakis filed a series of motions for a new trial, pursued post-trial discovery, and presented evidence in multi-day evidentiary hearings. *See* A16-A62. With one exception related to ineffective assistance of counsel, Parker joined all of Katakis's new trial motions. *See* A69. The district court denied them on May 11, 2017. A70-A88.

On January 8, 2018, the court sentenced Parker to a 6-month prison term and ordered him to surrender by June 12, 2018. A181 (Dkt. 690). The district court denied Parker bail pending appeal on February 5, 2018. A182 (Dkt. 700). Katakis's and Parker's appeals have now been consolidated in this Court (Nos. 17-10487, 18-10027).

ARGUMENT

I. Standard for Detention After Conviction and Pending Appeal

Under the Bail Reform Act of 1984, a criminal conviction is presumed correct, and "the burden is on the convicted defendant to overcome that presumption." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (citing S. Rep. No. 98-225, at 26 (1983)). Thus, a defendant convicted and sentenced to a term of imprisonment "shall" be detained pending appeal unless a judicial officer finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). This provision reflects Congress's view that "once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (quoting H. Rep. No. 91-907, at 186-87 (1970)).

The government does not challenge Parker's showing as to risk of flight, danger to community, or delay. The only issue is whether he raises a substantial

question that is likely to result in reversal or a new trial. A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (quoting *Giancola*, 754 F.2d at 901). And a substantial question is likely to result in reversal or a new trial only if the question is "so integral to the merits of the conviction" that an appellate holding to the contrary will likely require a reversal of the conviction or a new trial. *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23). Questions that are substantial yet harmless or insufficiently preserved do not satisfy the Bail Reform Act's requirements. *Id.* at 900-01. The defendant seeking release bears the burden of meeting the Act's requirements. *United States v. Wheeler*, 795 F.2d 839, 840 (9th Cir. 1986).

In reviewing an order denying release pending appeal, this Court reviews the district court's "legal determinations de novo" and the "underlying factual determinations for clear error." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003).

II. Parker Has Not Presented a Substantial Question Permitting Bail.

Piggybacking on prior filings by his co-conspirator Katakis, Parker raises a series of issues that are, at most, only tangentially related to him and are, in any event, unavailing. He complains about a Ninth Circuit model jury instruction that no one objected to at trial. The evidence he points to of a side conspiracy against

Katakis has no conceivable bearing on *Katakis's* involvement in the charged conspiracy, much less Parker's involvement. Other evidence he relies on for prejudice—the Katakis-specific obstruction-of-justice evidence—would have been admitted even without an obstruction charge, and the jury was instructed to compartmentalize evidence by count and by defendant, safeguarding against any possible prejudice to Parker on his separate bid-rigging conspiracy charge. Parker identifies no errors at all, individually or cumulatively, and his arguments provide no basis for granting him bail pending appeal.

A. The Jury Instruction on Aiding and Abetting Was Correct, Unambiguous, and Unobjected To at Trial.

Parker incorrectly contends that a routine jury instruction on aiding-and-abetting liability "was so confusing that it did not adequately guide the jury deliberations." Mot. 8. This complaint was not timely made below. During the charging conference at the close of evidence, defense counsel were given an opportunity to object to the jury instructions. They objected to three instructions, but not the aiding-and-abetting instruction. The district court even discussed one of the aiding-and-abetting instruction's finer points, on which the government and the defense agreed, but defense counsel did not object to any aspect of the instruction at that time. Parker therefore forfeited his objection,[2] and this Court on

[2] In a footnote, Parker misleadingly claims that the defense made "a timely objection on a related issue," Mot. 8 n.4, but doing so does not preserve his

appeal reviews it for plain error. *United States v. Dipentino*, 242 F.3d 1090, 1094 (9th Cir. 2001). That means Parker's conviction must be affirmed unless "(1) there has been an error in the proceedings below; (2) that error was plain; (3) it affected substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Teague*, 722 F.3d 1187, 1190 (9th Cir. 2013). Reversal is highly unlikely because even "[a]n improper instruction rarely justifies a plain error finding." *United States v. Payseno*, 782 F.2d 832, 834 (9th Cir. 1986).

Of course, the only question at this stage is whether there is a substantial question of plain error, but there was no error, let alone a plain one. As the district court observed, the instruction Parker complains about "largely tracks the Ninth Circuit's pattern jury instruction on aiding and abetting." A85. It is a correct statement of law, and Parker does not claim otherwise. He also provides no reason

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objection to the aiding-and-abetting instruction. In fact, the "related issue" appears to be about an instruction (No. 15, explaining a Sherman Act conspiracy, A11-A12) that is separate from the instruction his motion concerns (No. 21, about aiding-and-abetting liability, A13). Moreover, it is not clear what objection Parker is referring to. He cites a docket entry below (No. 618), which has no "Exh. 8" and which, as a post-trial filing, could not have been a timely objection to jury instructions. Parker may be referring to No. 614, a document titled "Exhibit 8" that includes the transcript page he cites ("RT 3523"), yet that source is unenlightening. Page 3523 of the trial transcript does not include any objections, or even any statements, from defense counsel. It comes in the middle of the district court's jury charge on still another issue. Suffice it to say, the argument Parker raises in his bail motion was not preserved.

to think that its combination with another correct instruction, on the elements of a Sherman Act crime, somehow gives rise to a due process violation. Here, as in the district court, "no defendant has presented the court with any authority showing that giving an aiding and abetting instruction along with a Sherman antitrust conspiracy instruction (or the instruction for any type of conspiracy), without further guidance, is improper." *Id.*

Indeed, there is nothing exceptional about including both instructions. *See United States v. Galiffa*, 734 F.2d 306, 309-11 (7th Cir. 1984) (collecting cases); *see also United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994) ("The aiding and abetting statute serves to complement the substantive offense of conspiracy."); *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989) (confirming that aiding and abetting a bid-rigging conspiracy is a crime); *United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir. 1988) ("[A]ll indictments for substantive offenses must be read as if the alternative provided by [the aiding-and-abetting statute] were embodied in the indictment."). None of these cases suggest there is anything "ambiguous" about the combination.

Parker's claim that "juror confusion" was evident when the jury sought clarification on the intent requirement of a Sherman Act violation, Mot. 10, is inapt because, as he concedes, the jury's query arose "even without the aiding and abetting overlay," *id.* at 11. Parker is correct that there is no apparent connection

between the query and the aiding-and-abetting instruction—about which the jury posed no questions. The jury's requested clarification on one instruction cannot support an inference of reversible confusion on another. As the district court pointed out, the jury's question indicated that, if anything, "the jury may have sought to apply a higher burden than necessary," A86—that is, to Parker's benefit. Similarly, "any confusion resulting from this theory [of aiding and abetting a conspiracy] and the related instructions would inure to the benefit of the defendants, not the government." *Id.*

Parker has not explained why it was error to give a textbook aiding-and-abetting instruction, much less why it was plain error. The question he presents does not meet the standards for granting bail pending appeal.

B. The "New Evidence" of a Supposed Side Conspiracy Is Not Pertinent to the Charged Conspiracy or to Parker.

Parker's motion devotes two paragraphs to a spurious argument, based on evidence obtained post-trial, that "the[] conspiracy did not include Katakis or Parker" because "Katakis and Parker's alleged co-conspirators were actually 'conspiring against Katakis.'" Mot. 12-13 (quoting A74).

This argument is wrong in almost every particular, including the standard it asks this Court to apply. Parker posits that "[t]he proper question" is whether the evidence "would have been 'sufficient to raise a reasonable doubt' at a new trial," Mot. 13 (quoting *Mejia v. United States*, 291 F.2d 198, 201 (9th Cir. 1961)), but

the case he relies on for that standard limited its rationale to "the special and peculiar facts here before us" and expressly disavowed that it was "stat[ing] any . . . broad rule," *Mejia*, 291 F.2d at 201 n.3.

The proper standard is "stringent." *United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994). In the district court, the defendant must satisfy each prong of a five-part test: "(1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal." *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005) (quoting *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991)).

Then on appeal, this Court "review[s] a district court's order denying a motion for a new trial made on the ground of newly discovered evidence for abuse of discretion." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc). To overcome that standard, this Court would have to find that the district court's conclusion was "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Id*. at 1251. Thus, the "proper question" for this Court, at this stage, is whether there is a substantial question that the

district court acted within its discretion in concluding that the post-trial evidence did not meet all five prongs of the five-part test.

That is not a difficult question because there is little logic to the argument, especially coming from Parker. *Katakis's* theory is that the new evidence, including a declaration from co-conspirator Chandler, who had testified at trial, establishes that there was a side conspiracy among some of Katakis's co-conspirators, who sought to enrich themselves at Katakis's expense by making him pay inflated prices for properties that were part of the larger scheme. But, as the district court pointed out, evidence of a secondary conspiracy against Katakis would have no bearing on "the persuasive evidence presented at trial tending to show Katakis was a participant in the primary conspiracy of bid rigging." A74-A75; *see also* A75-A77 (running through some of the "ample evidence" that "Katakis knowingly participated in the bid rigging scheme").

The two conspiracies are not mutually exclusive, or even logically related. If anything, Katakis's theory *assumes* Katakis's participation in the primary conspiracy. Moreover, Chandler never claimed that Katakis was not party to the agreements not to bid, or that he was not involved in the payouts that resulted. And Katakis could have come out ahead financially even if his co-conspirators were cheating him on the side, so he had an incentive to be involved and stay involved in the primary bid-rigging conspiracy regardless. *See* A75 n.4.

In any event, none of this has anything to do with Parker. This issue lingers from new trial motions that Katakis filed on his own behalf, which Parker joined. On this issue below, "Parker d[id] not address Katakis' new evidence in his joinder or reply," A74 n.3, but in his motion in this Court, Parker says that evidence of a secondary conspiracy against Katakis was "equally critical to Parker's defense" because, he claims, it casts doubt on the existence of the larger, primary conspiracy. Mot. 12. But both conspiracies can co-exist, and evidence of the secondary one does not detract from evidence of the primary one—which was sufficient for the jury to find Parker guilty of conspiring to rig bids. *See* A87 (noting "the persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy").

In sum, any evidence of cheating among the bid riggers is immaterial to whether Parker knowingly joined the bid-rigging conspiracy of which he was convicted. Thus, there is no substantial question on appeal that the district court was within its discretion to deny Parker a new trial based on the post-trial evidence Katakis presented.

C. Evidence of Katakis's Attempts To Obstruct Justice Is Also Not Relevant to Parker.

Parker makes an equally strained attempt to appropriate Katakis's argument that insufficient evidence on the obstruction-of-justice count against Katakis somehow "infected the trial," Mot. 15, such that the jury could not fairly assess the

evidence of a separate crime against a different defendant, even with instructions to consider the evidence on each count and against each defendant separately.

On appeal, this Court reviews both the denial of a motion to sever and the denial of a new trial motion based on retroactive misjoinder for abuse of discretion. *United States v. Lazarenko*, 564 F.3d 1026, 1042-43 (9th Cir. 2009); *United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir. 1992). Therefore, the issue on the present motion is whether there is a substantial question that the district court acted within its discretion in trying two co-conspirators together and in finding no prejudicial spillover from one count against one defendant to another count against another defendant.

Prejudicial spillover or retroactive misjoinder—closely related concepts that are often used interchangeably—occurs when multiple counts or multiple defendants are properly joined initally, but then subsequent developments, such as the dismissal of some counts for insufficient evidence, render the initial joinder improper. *Lazarenko*, 564 F.3d at 1042-43 & n.10. "[T]he primary consideration" for courts "is whether 'the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants.'" *Cuozzo*, 962 F.2d at 950 (quoting *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980)).

To assess prejudicial spillover, this Court considers several factors: "(1) whether the evidence was so inflammatory that it would tend to cause the jury

to convict on the remaining counts; (2) the degree of overlap and similarity between the dismissed and remaining counts; . . . (3) a general assessment of the strength of the government's case on the remaining counts"; (4) "whether the trial court diligently instructed the jury"; and (5) "whether there is evidence, such as the jury's rendering of selective verdicts, to indicate that the jury compartmentalized the evidence." *Lazarenko*, 564 F.3d at 1044.

These factors all cut against Parker and expose the weakness of his prejudicial spillover claim. As the district court wrote, "it is not at all clear that an obstruction of justice charge based on deleting emails is any more inflammatory than allegations of bid rigging," A78, particularly because the obstruction of justice charge was only against Katakis, not Parker. The bid-rigging charge and the obstruction charge were "very dissimilar" in the district court's view, *id.*, especially considering that the latter resulted from the investigation of the former and necessitated a superseding indictment. And the strength of evidence of the bid-rigging conspiracy is not seriously in question. *Id.*; *see also* A75-A77 (recounting evidence); A87 (citing "the persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy").

In addition, the jury was carefully instructed to consider each count and each defendant individually. The district court instructed the jury that:

> Your verdict on one count should not control your verdict on any other count, and you do not have to return the same verdict for all counts.

> Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendant. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

A78 n.6. The district court's instructions to the jury are a "critical factor" in assessing whether the jury could compartmentalize the evidence against each defendant on each charge, *Cuozzo*, 962 F.2d at 950, and these instructions could not be more clear or more sound.

Finally, "[t]he fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence." *Id.* The jury here made distinctions between the defendants and between the charges. It acquitted the auctioneer of the same bid-rigging charge it found Katakis and Parker guilty of, even as it hung on the mail fraud count against Katakis and Parker. The jury's apparent discernment shows that the jury was capable of making fine judgments based on the evidence, and it reinforces the fact that the obstruction evidence was not so inflammatory that the jury simply threw up its hands and convicted on all counts.

The district court went further and said it "would have admitted evidence regarding Katakis' attempts to delete emails under Federal Rules of Evidence 404(b) and 403 had the obstruction of justice count been dismissed before trial" because that evidence "was highly probative in showing Katakis' consciousness of

guilt, which outweighs any dangers of unfair prejudice" and "tends to show that Katakis knowingly participated in the bid rigging conspiracy." A79-A81. This conclusion makes the prospect that the district court abused its discretion even more remote.

Once again, none of this is especially relevant to Parker. His claim to prejudicial spillover must necessarily be weaker than Katakis's because Parker was not charged with obstruction of justice. The district court observed at Parker's bail hearing that, "[e]ven if for some reason the Court of Appeals should accept every argument Mr. Katakis is making on appeal, there is no way that this court could imagine that they would reverse as to Mr. Parker." A109.

Parker offers no meaningful connection between the obstruction evidence against Katakis and his own bid-rigging conviction. Nor does he explain why the jury could not or did not follow the district court's clear instructions. *See Escalante*, 637 F.2d at 1202 ("[O]ur court assumes that the jury listen[s] to and follow[s] the trial judge's instructions.").[3] This issue, like the prior one, appears to remain in Parker's papers as a vestige of Katakis's district court filings. Whatever

[3] Parker's motion quotes a statement from the government's closing argument about Katakis, but it does not explain why that statement was "improper." Mot. 15. Not knowing what Parker's complaint is, it is difficult to respond, but the statement appears proper on its face. In any event, the statement had no bearing on Parker, and the jury was properly instructed that statements of counsel are not evidence. *See* A83.

its provenance, it does not raise a substantial question about the district court's exercise of discretion to try two co-conspirators together.

D. Parker Has Not Shown a Single Error, Much Less a Cumulative One.

Parker's reliance on the cumulative error doctrine is misplaced. He implausibly asserts that the issues he raises in his motion, which mostly concern Katakis, somehow collectively "undermined [his] defense that he lacked the requisite knowledge and intent to be guilty of the Sherman Act bid-rigging conspiracy." Mot. 16. As previously explained, Parker's so-called "errors" are no such thing.

"[T]he combined effect of multiple trial errors" warrants relief "only where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "If the evidence of guilt is otherwise overwhelming, the errors are considered 'harmless' and the conviction will generally be affirmed" on appeal. *Id.* at 928.

Here, the issues Parker raises barely touch his own conviction and are meritless in any event. Moreover, the evidence of his knowledge of and participation in the bid-rigging conspiracy is overwhelming. Indeed, he is not making a general argument that the evidence presented at trial was insufficient to convict him. That makes this far from the model case of cumulative error, and Parker's presentation

of the issue—a single paragraph—is scant. The district court dispatched this issue when Katakis and Parker were alleging several additional errors, A87, so this Court should have no trouble reaching the same conclusion.

CONCLUSION

For the reasons set forth above, Parker's motion for release on bail pending appeal should be denied.

Respectfully submitted.

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April 6, 2018

CERTIFICATE OF COMPLIANCE

1. This opposition complies with the page limitation in Ninth Circuit Rule 27-1(1)(d) because it does not exceed 20 pages (excluding items listed at Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f)). The opposition also complies with the word limitation based on the conversion in Ninth Circuit Rule 32-3(2) for briefs using proportionally spaced typeface because the word count for this opposition, excluding items listed at Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f), is 4243, which divided by 280 is 15.15—*i.e.*, less than 20, which Ninth Circuit Rule 27-1(1)(d) designates as the page limit.

2. This opposition complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because this opposition has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point Times New Roman font.

April 6, 2018

/s/ *Adam D. Chandler*
Attorney for the
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CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on April 6, 2018, I caused the foregoing Opposition of the United States of America to Appellant's Motion for Release Pending Appeal to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 6, 2018

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