Nos. 17-10188, 17-10197, 17-10198

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,
*Plaintiff - Appellee*,

v.

ROBERT RASHEED, JOHN BERRY III, & REFUGIO DIAZ,
*Defendants - Appellants*.

---

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

---

# ANSWERING BRIEF FOR THE UNITED STATES OF AMERICA

---


MAKAN DELRAHIM
*Assistant Attorney General*

ANDREW C. FINCH
*Principal Deputy Assistant Attorney General*

MARVIN N. PRICE, JR.
*Acting Deputy Assistant Attorney General*

E. KATE PATCHEN
MANISH KUMAR
MICAH LANIELLE RUBBO
ALBERT BILOG SAMBAT
*Attorneys*

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
JONATHAN LASKEN
*Attorneys*
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-305-7420

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES

## FEDERAL STATUTES, RULES, AND SENTENCING GUIDELINES



## MISCELLANEOUS

## STATEMENT OF JURISDICTION

The government agrees with Rasheed and Berry's statement of jurisdiction. Rasheed Br. 2; Berry Br. 1-2.

The district court had jurisdiction over Diaz's criminal case under 18 U.S.C. § 3231. Judgment was entered against Diaz on May 5, 2017. Diaz filed a timely notice of appeal on May 8, 2017. Fed. R. App. P. 4(b)(1)(A)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

## BAIL STATUS

Berry is incarcerated at Atwater USP in Atwater, California, and has an expected release date of April 28, 2018. Rasheed is incarcerated at Sheridan FCI in Sheridan, Oregon, and has an expected release date of July 4, 2018. Diaz is incarcerated at Taft CI in Taft, California, and has an expected release date of February 22, 2018.[1]

## STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in finding the evidence sufficient to establish (a) that Berry knowingly joined the charged

[1] On December 11, 2017, Diaz filed a *pro se* motion for bail pending appeal with the district court and on December 26, 2017, the government filed its response. The motion is currently pending.

conspiracy to rig the bidding at Alameda County foreclosure auctions and (b) that the conspiracy occurred in the flow of interstate commerce.

2. Whether the district court plainly erred by not finding, *sua sponte*, that the indictment was constructively amended by evidence and argument at trial that the offense's interstate commerce element was satisfied by proof that the conspiracy was in the flow of interstate commerce, as was expressly charged in the indictment.

3. Whether the district court erred by increasing Diaz's offense level by two levels under USSG 2R1.1(b)(2) because the volume of commerce attributable to him exceeded $1 million based on the court's finding that value of the properties Diaz purchased pursuant to the bid-rigging conspiracy was $1,158,563.

4. Whether the district court plainly erred by requiring as conditions of supervised release that: (i) Rasheed and Diaz give notice to third parties of risks occasioned by their criminal record or personal history or characteristics; (ii) Rasheed perform 1260 hours of community service; and (iii) Rasheed provide the

probation officer access to his financial information and not open credit lines or incur debt without the officer's permission.

## STATEMENT OF THE CASE

On November 19, 2014, a federal grand jury in the Northern District of California returned an indictment charging Robert Rasheed, John Berry III, Refugio Diaz, 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, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[2] ER 17-25.[3] On October 17, 2016, at the conclusion of defendants' first trial before

---

[2] 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.

[3] "ER" refers to Diaz's excerpts of record, "Rasheed ER" refers to Rasheed's excerpts of record, "Berry ER" refers to Berry's excerpts of record, and "SER" refers to the government's supplemental excerpts of record. Each citation to an excerpt of record is followed by the page number. References to each presentence report ("PSR") are preceded by the name of the defendant whose PSR is being referenced and followed by the appropriate page numbers. Pursuant to Ninth Circuit Rule 30-1.10, defendant Rasheed has submitted his PSR to the Clerk of the Court under seal. Because defendant Diaz has not submitted his PSR but is challenging his sentence, the government has submitted his PSR to the Clerk of the Court under seal. Defendant Berry does not advance any arguments challenging his sentence and, accordingly, has not submitted his PSR to this Court.

Chief Judge Phyllis J. Hamilton, the jury was unable to reach a verdict and the court declared a mistrial. The case was then reassigned to Judge James Donato for retrial. ER 1416. On December 14, 2016, at the conclusion of the second trial, the jury found defendants guilty.

On April 26, 2017, the district court sentenced Rasheed to 14 months imprisonment and 1260 hours of community service (in place of a $126,000 fine); Berry to 10 months imprisonment and 974 hours of community service (in place of a $97,389 fine); and Diaz to 8 months imprisonment and 579 hours of community service (in place of a $57,928 fine). ER 58-60; Rasheed ER 2-4; Berry ER 24-26. The court also imposed a $100 special assessment and three years of supervised release on each of them. ER 59, 61; Rasheed ER 3, 5; Berry ER 25, 27. Between May 3, 2017 and May 8, 2017, Rasheed, Berry, and Diaz noticed their appeals, and on August 24, 2017, this Court consolidated them.[4] *United States v. Robert Rasheed*, No. 17-10188, Dkt. 15 (9th Cir.) (consolidation order).

[4] Alvin Florida was tried with appellants and also found guilty. On August 8, 2017, Florida noticed his appeal, No. 17-10330, which is not consolidated with this case.

On October 25, 2017, and October 30, 2017, defendants filed opening briefs prepared by counsel. On December 17, 2017, nearly two months after the deadline for filing opening briefs, Diaz mailed to this Court a motion for leave to file a pro se supplemental opening brief and that brief. Diaz appears to have relied on electronic notice for service; notice of these filings was electronically mailed to the government on December 26, 2017. If the Court grants the motion for leave, the government would seek leave to file a supplemental brief in response to Diaz's supplemental brief and does not waive its right to respond by not responding herein.

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

### A. Real Estate Foreclosure Auctions

Homebuyers often finance their purchase through a mortgage—a loan secured by the house itself. If a homeowner fails to make a mortgage payment, the lender may foreclose on her home in order to "satisfy the debt." ER 250. It is not uncommon for lenders to be out-of-state banks like JP Morgan Chase in Columbus, Ohio, or Washington Mutual in Jacksonville, Florida. ER 268-69; 273.

The lender "initiate[s] foreclosure" by referring the defaulted mortgage to a trustee. ER 251. The trustee prepares the necessary paperwork, and sends it to the County Recorder's Office and to anyone with an interest in the property. ER 253-55. The homeowner is given several months to make payment. ER 254-55. Trustees at Alameda County foreclosure auctions are also sometimes located out-of-state. ER 1122-25 (discussing trustee Aztec Foreclosure located in "Phoenix, Arizona").

If the nonpayment is not cured after notice, then the trustee may sell the home at a foreclosure auction. ER 255. The lender sets the opening bid, ER 257, which is published in advance of the auction, ER 291-92. Anyone may bid at the auction so long as they are present, provide "some form of identification," and demonstrate sufficient "funds to bid" on the property. ER 296-97.

The proceeds from the sale are used to settle the homeowner's debts. ER 263. First, the lender is sent a check with the amount necessary to "pay off their debt." *Id.* Funds from Alameda County foreclosure auctions were sent to lenders in Ohio, Florida, and Pennsylvania. ER 266-67, 271, 1122-27. Remaining funds are next

used to satisfy debts owed to junior lienholders. ER 263. Any money left after that is returned to "the person whose home had been foreclosed on." ER 264.

### B. Defendants Rig the Foreclosure Auctions

From May 2008 to December 2010, defendants and their co-conspirators rigged the bidding at more than 100 Alameda County foreclosure auctions. ER 698-700, 714-15, 1109-10. The conspirators paid each other "not to bid," ER 352, 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. ER 715.

Alvin (or Al) Florida was the conspiracy's ringleader. ER 563. New real estate investors were "invited" to Florida's offices to "hear his sales pitch about what kind of services he could provide." ER 348. In addition to other services, Florida offered to "control the costs" of properties by getting the investor a "better price" on houses at auction. ER 351. The better price came from "tak[ing] care of" the other bidders at the auction by "paying them not to bid against us." ER 351-52.

Defendants Rasheed, Berry, and Diaz were employees of Florida, although Rasheed later left and continued in the conspiracy as a separate investor. ER 387-409, 563-64, 567-69, 756, 839, 840, 853, 858-61, 918, 1034.

At the public auction, the conspirators used pre-determined verbal and non-verbal signals to indicate when others should refrain from bidding. ER 293-386, 1004-1005. As Berry and Florida explained to an undercover agent, conspirators would ask "[d]o you want to work" or "are you working," ER 520, or they might just say "you're in" or "I'm going to take it," ER 843. 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," ER 520, 700, or "just a nod of the head and a pat on the chest identifying that they're going to take it," ER 843. 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. ER 520, 846-47. If a bidder at auction sought to bid competitively instead of participating in the conspiracy, members of the

Florida group would intimidate them through verbal threats. ER 1037-38; *see also* ER 570-75.

After the public auction, the conspirators held a second private auction or "round," at which each conspirator made clear what they would have bid at the public auction but for the agreement not to bid.[5] ER 343-44, 564-65. 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. ER 341, 708-09. At the round, the conspirators took turns bidding on the property, generally in "one-hundred-dollar increments," until they reached the price that they would have been willing to pay at the public auction. ER 706-08; *see also* ER 343, 564-65. The winner of the round took the property and paid to the losing conspirators a pro rata share of the funds that should have been paid to the homeowner and lender. ER 343-44.

The conspirators knew the rounds were "illegal," and they would stop them whenever a "sheriff's deputy went by." ER 944. And once, when a round was about to be held in a jury room, Florida started

[5] Sometimes, if only a "few people [were] interested in buying the property," they might just "strike a deal." ER 345; *see also* ER 852.

"making jokes about the irony of being in that room and going to do a round." ER 947.

The purpose of the conspiracy was "to make additional money," ER 707, and it was successful. In one instance, the conspirators rigged the bidding for 1618 6th Street. Pursuant to their agreement, Rasheed and others stopped bidding on this property during the public auction when it reached $326,700. ER 597. Having won the property, the conspirators held a round. *Id.* At the round, Rasheed bid $32,200 above the $326,700 purchase price at the public auction. *Id.* Rasheed ultimately lost that round to one of his co-conspirators who bid $36,600 over the public auction price. ER 598. The co-conspirator who won the round 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 lender and homeowner, but, due to the bid-rigging agreement, he paid only $326,700 to the lender and homeowner, and divided the remaining $36,000 among the conspirators. ER 598; *see also* ER 564-65. That remainder included a $5400 payment to Rasheed "[f]or agreeing to stop bidding at the public auction, and for his bidding at the [round]." ER 599.

In another instance, the co-conspirators rigged the bidding for "a property on Little Court in Fremont." ER 1038. Conspirator Danli Liu agreed with Florida, Rasheed, and others to refrain from bidding at the public auction and hold a round for this property. ER 1040. Liu won the property when the conspirators auctioned it off in their private round, and was told that the payments for the round must be made on the same day. *Id.* Liu went to the bank after the auction—"escorted" by Florida, Rasheed, and another conspirator—to secure cashier checks, which Liu used to pay the other conspirators for agreeing not to bid ($15,000 in all). ER 1040-42. Having won the round and paid the relevant conspirators, Liu took title to the Little Court property and payment for the property—$320,000 in cashier's checks—was sent to its trustee, Aztec Foreclosure, in Phoenix, Arizona. ER 1043-45.

Diaz and other conspirators agreed not to bid against a co-conspirator on a property in Brookdale at public auction so that they could have a private auction for the property later. ER 931-32. In the post-public auction round, Diaz offered to pay $23,500 above the public-auction price but ultimately lost the property to another conspirator who was willing to pay even more. ER 932-33. Berry, Florida, Rasheed,

and others also rigged the bidding for 2196 Herrington. ER 1058-59. In the round, Berry offered to pay $20,400 above the purchase price, Florida offered the same, and Rasheed offered $22,200, although they were ultimately outbid by another conspirator. ER 1060.

## II. The District Court's Rulings and Sentencing

After the close of evidence, but prior to the district court instructing the jury, all defendants moved for an acquittal. ER 1146-47. The court denied that motion, finding that "there is more than enough evidence for a rational trier of fact, or a jury, to convict each of the defendants on all of the elements beyond a reasonable doubt." ER 1147.

On January 13, 2017, after a guilty verdict was returned, defendants filed motions for an acquittal or new trial. Rasheed argued, among other things, that the evidence of interstate commerce was insufficient. SER 102-03. Diaz made three arguments, none of which he raises in his counsel-prepared opening brief. ER 32-37. Berry joined his co-defendants' motions but otherwise decided to "forego additional briefing." SER 95-97.

On March 6, 2017, the district court denied their motions. The court explained that "defendants face a steep climb in challenging the

overall sufficiency of the evidence" because this "was not a trial where weak facts were served in small portions." ER 50. "The trial featured substantial evidence from cooperating witnesses who had personally participated in the bid rigging scheme, an undercover FBI agent who infiltrated the conspiracy and worked with the defendants at the auctions, audio and video evidence that captured the defendants' own speech and conduct, and documents prepared by the defendants as business records for the conspiracy." *Id.* And this evidence "was direct and consistent in material part across the witnesses." *Id.*

In particular, the district court rejected defendants' sufficiency of the evidence challenge as to interstate commerce because it "misapprehends the trial record." ER 52. The court found substantial evidence "that the funds defendants tendered for the affected properties entered the flow of interstate commerce," and rejected the contention that a "transitory pass through a California bank account . . . mean[s] that the funds are no longer in commerce." ER 53.

On April 26, 2017, the district court held sentencing hearings for each defendant. As relevant here, the court applied USSG 2R1.1, the guideline for antitrust offenses, and concluded that Diaz's offense level

was 13. SER 4-5. This yielded a "guidelines range of 18 to 24 months," and the court imposed a below-guidelines sentence of 8 months imprisonment. SER 5, 9. The offense level calculation included a two-level upward adjustment under Section 2R1.1(b)(2)(A) because the volume of affected commerce was greater than $1,000,000. That adjustment was based on the court's finding that Diaz was involved in the purchase of eight properties at rigged auctions totaling $1,158,563. SER 5-7.[6]

The district court also required defendants to comply with the "standard conditions for release that have been adopted in this district," SER 38, including a requirement that each "notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics. . . ," Rasheed ER 3.

The district court also imposed on Rasheed several special conditions of release, including 1260 community service hours and

[6] The district court "carr[ied] over to Mr. Diaz's sentencing the same findings and analysis that [it] made for Mr. Rasheed and Mr. Berry with respect to volume of commerce." SER 2. As a result, citations to Rasheed and Berry's sentencing hearings for volume of commerce analysis apply equally to Diaz.

financial monitoring. First, because Rasheed could not pay the minimum guidelines fine of $126,000, the court followed Comment 2 to Section 2R1.1 and imposed community service equally as burdensome as the fine by crediting Rasheed as working off that fine at the rate of $100 per hour. SER 36-37. Second, the court imposed financial monitoring conditions based on "consider[ation] of the factors set forth in 18 U.S.C. § 3553(a)." Rasheed PSR 47-48. These conditions require Rasheed to secure the probation office's permission to open new lines of credit and allow that office access to his financial information "to ensure [Rasheed's] income is from legitimate sources." *Id.*

## SUMMARY OF ARGUMENT

Defendants carried out their conspiracy "in the shadow of the Alameda [County C]ourthouse," in "contempt [for] the rule of law and disrespect for the criminal justice system." SER 34. Motivated "purely by greed and the desire for easy money," *id.*, defendants rigged the bidding for more than 100 properties at Alameda County foreclosure auctions. ER 698-700, 714-15, 1109-10. Consistent with the indictment's allegations, the government offered testimony from cooperating witnesses, who had personally participated in the bid

rigging with defendants, and from an undercover FBI agent who infiltrated the conspiracy; audio and video evidence capturing defendants' own words and actions; and contemporaneous records documenting their bid rigging and the interstate nature of the rigged real estate transactions. After hearing all of this evidence, the jury rendered guilty verdicts, and the district court carefully considered and lawfully imposed sentences on each defendant. None of the defendants' arguments demonstrates that the evidence for conviction was insufficient, that the indictment was constructively amended, or that their sentences were improper. Indeed, defendants make many of their arguments for the first time on appeal, and all of defendants' arguments are meritless.

1. Defendants' sufficiency of the evidence challenges rest on a misunderstanding of the law and a mischaracterization of the overwhelming and largely indisputable evidence against them. As the district court recognized, this "was not a trial where weak facts were served in small portions." ER 50.

Berry's contention that the evidence of his knowing participation was insufficient rests on his erroneous claim that, to prove this element,

the government must demonstrate not only that Berry intended to rig bids but also that he understood the competitive significance of that act. A conspiracy to rig bids is per se illegal under the Sherman Act. When the defendant is charged with a per se illegal conspiracy, the requisite intent is the intent to engage in the per se unlawful conspiracy, that is, the intent to rig bids. Proof of a further intent to harm competition is not required. Accordingly, to prove intent here, the government need only prove that Berry knowingly agreed to rig bids. The trial record amply supports the jury's conclusion that Berry did so.

The trial record also fully supports the jury's conclusion that the conspiracy was in the flow of interstate commerce. The evidence demonstrated many instances in which a rigged foreclosure auction sale was initiated by a lender located outside of California who later received some or all of the funds used to purchase the property for a suppressed price at the public auction. The jury could readily find, for example, that the funds used to purchase rigged properties were actually mailed from California to a recipient in another state based on a Federal Express tracking slip, a copy of the mailed check, and the attendant cover letter. Notwithstanding this evidence, defendants

argue that the funds may have been transferred electronically rather than actually mailed, but these transactions were no less interstate transactions if the money was initially deposited in California before being electronically transferred out of state to the intended recipient.

2. The indictment was not constructively amended as to the interstate commerce element. The jury instruction on, and the government's evidence establishing, this element are fully consistent with the indictment's allegations that the public auctions and business activities of the conspirators that are the subject of the charge were within the flow of interstate commerce. The rigged auctions were interstate transactions. The funds from the rigged auctions were transmitted from one state to trustees, lenders, or loan service companies in another state.

3. At sentencing, the district court correctly increased Diaz's offense level by two levels based on the court's finding that Diaz was involved in the purchase of more than $1,000,000 in property rigged at auctions. Contrary to Diaz's assertions, the volume of affected commerce is not measured by the damages or harm from the offense, gain to the conspirator, or the loss to the victims. Rather, under the

guidelines, it consists of the volume of commerce for all the transactions rigged by the defendant or his principal. Here the payouts on these properties show those transactions were affected, and thus the district court's undisputed findings mandate the two level increase.

4. The conditions of Rasheed's supervised release were lawful and reasonably related to his rehabilitation, prevention of recidivism, and protection of the public from future crimes. First, the district court's requirement that Rasheed notify others of risks that may be occasioned by his criminal record or personal history or characteristics is essentially the same lawful standard condition that the sentencing guidelines recommend for all terms of supervised release. The condition is not unconstitutionally vague because it adequately informs the defendant of the conduct required of him while on supervised release. The notification requirement is also not an impermissible delegation to a probation officer because it is the court that required Rasheed to give notice to at-risk third parties, while the probation officer merely directs where, when, and to whom such notice must be given. Lastly, the notification requirement is not an occupational restriction. As a result, the court did not need to make the factual determinations required by

the guidelines for occupational restrictions before imposing this condition.

Second, the district court correctly applied the sentencing guidelines when it imposed 1260 hours of community service on Rasheed in lieu of a fine, and that requirement is substantively reasonable. The commentary to the more general provision, USSG 5F1.3, does not apply here in light of the antitrust specific guideline and, in any event, does not cap community service at 400 hours (or at all). The record makes clear that the court considered the rehabilitative priority that Rasheed find full-time work to support himself, and determined that the requirement is compatible with that priority. That is no less true because the court required, to the greatest extent practicable, that the service be done by giving presentations to real estate groups.

Third, the district court appropriately imposed financial monitoring conditions to ensure that Rasheed's income is from legitimate sources. The basis for, and purpose of, the financial monitoring requirements was apparent in the record. After considering the presentence report and the Section 3553(a) factors, the court

concluded that financial monitoring was necessary because Rasheed committed a complex financial crime that was motivated by his desire for easy money. The sentencing guidelines and this Court's precedent make clear that financial monitoring can be imposed in circumstances like those here regardless of whether a district court also imposes a fine or restitution.

## STANDARDS OF REVIEW

Defendants' sufficiency of the evidence challenges, *infra* Section I, are subject to de novo review. *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017). "There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Ubaldo*, 859 F.3d 690, 699 (9th Cir. 2017). Before evaluating the sufficiency of the evidence, this Court construes the evidence in the light most favorable to the prosecution. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). This means that "the government does not need to rebut all reasonable interpretations of the evidence that would establish the defendant's innocence, or 'rule out every hypothesis except that of

guilt beyond a reasonable doubt'" to defeat a challenge to the sufficiency of the evidence because the Court "presume[s] . . . that the trier of fact resolved any [inferential] conflicts in favor of the prosecution." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). The Court "may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." *Id.*

Diaz's constructive amendment challenge, *infra* Section II, should be reviewed for "plain error only" because Diaz neither objected to the relevant jury instructions at trial nor raised this claim in his post-trial motions. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002); *see* Rule 52(b). "An error is plain when there is an (1) error, (2) that was clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Johnson*, 626 F.3d 1085, 1088 (9th Cir. 2010). In the district court, Diaz raised a constructive amendment claim related to multiple conspiracies, but in his counsel-prepared opening brief, he asserts a different claim related to interstate commerce.

Diaz's challenge to the two offense level adjustment under USSG 2R1.1(b)(2)(A), *infra* Section III, is subject to de novo review as to "the district court's interpretation of the sentencing guidelines" and clear error review as to its factual findings. *United States v. Pinto*, 48 F.3d 384, 388 (9th Cir. 1995).

Rasheed's challenges to the conditions of supervised release, *infra* Section IV, are subject to plain error review because Rasheed did not object to the conditions below. Fed. R. Crim. P. 52(b); *United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012). Under the law of this Circuit, to the extent Rasheed's facial challenge to the constitutionality of the notice of risks condition presents a pure question of law and the failure to raise the issue below does not prejudice the government, his challenge is subject to de novo review. *See United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009).[7] The Court should

[7] Although this Court has said it is "not limited to [the plain error] standard of review when [it is] presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court," *Saavedra-Velazquez*, 578 F.3d at 1106, the Supreme Court has held that courts have no authority to make such exceptions to the plain error rule, *see Johnson v. United States*, 520 U.S. 461, 466 (1997) (rejecting suggestion that plain error review should not apply to structural errors, noting that "the creation out of whole cloth of an exception to" the plain error

nonetheless apply the plain error standard here because Rasheed's failure to present this challenge to the district court caused prejudice to the government: if Rasheed had raised this issue below, then the district court would have been able explicate or clarify the condition as necessary. In addition, this Court has applied plain error review to similar vagueness challenges to conditions of supervised release that were raised for the first time on appeal. *See, e.g.*, *United States v. Phillips*, 704 F.3d 754, 767 (9th Cir. 2012); *United States v. Rearden*, 349 F.3d 608, 614 (9th Cir. 2003).

## ARGUMENT

### I. The Evidence Amply Proved Berry's Knowing Participation in the Conspiracy and the Conspiracy's Connection to Interstate Commerce

Ample evidence supports the jury's conclusion that Berry knowingly joined the conspiracy and that the conspiracy was in the flow of interstate commerce. As the district court explained, the trial featured "substantial evidence from cooperating witnesses who had

---

rule would be "an exception which we have no authority to make"); *United States v. Young*, 470 U.S. 1, 15 & n.12 (1985) (cautioning that "[a]ny unwarranted extension" of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice).

personally participated in the bid rigging scheme, an undercover FBI agent who had infiltrated the conspiracy and worked with the defendants at the auctions, audio and video evidence that captured the defendants' own speech and conduct, and documents prepared by the defendants as business records for the conspiracy." ER 50. Defendants, including Berry, were "central actors in the scheme," and there was "substantial evidence that the funds defendants tendered for the affected properties entered the flow of interstate commerce." ER 51, 53. Defendants' sufficiency claims are without merit.

### A. Witness Testimony and Contemporaneous Documents Demonstrated that Berry Knowingly Joined the Conspiracy

Berry erroneously asserts that the evidence was insufficient because it failed to establish that he understood "the purpose of the agreements at issue was to reduce or eliminate competition." Berry Br.

13. No such evidence is required. The government need only establish that Berry knowingly joined a conspiracy to rig bids.

This Court and others have held that, when a defendant is charged with a per se violation of the Sherman Act,[8] the government need not prove "that the defendants acted with the purpose of achieving anticompetitive effects or with the knowledge that such effects likely would result." *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991). "Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient." *Id.* (quoting *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981)); *see also United States v. Alston*, 974 F.2d 1206, 1213 (9th Cir. 1992) ("In a criminal antitrust prosecution, the government need not prove specific intent to produce anticompetitive effects where a per se violation is alleged.").

[8] The Supreme Court "has enunciated two distinct substantive rules of law" for determining whether a restraint challenged under Section 1 of the Sherman Act is unreasonable: the rule of reason and the per se rule. *United States v. Manufacturers' Ass'n of Relocatable Bldg. Indus.*, 462 F.2d 49, 52 (9th Cir. 1972). The per se rule "*defines* certain classes [] of conduct as unreasonable," while the rule of reason holds that "restraints upon trade or commerce which do not fit into any of [the per se] classes are prohibited only when unreasonable." *Id.* (emphasis in original).

Bid rigging is a per se violation of the Sherman Act. *United States v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010). Thus, the intent to rig bids is "equivalent to the intent to unreasonably restrain trade." *United States v. Giordano*, 261 F.3d 1134, 1143 (11th Cir. 2001); *see also United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 450 (10th Cir. 1984) (holding that "the proof of the requisite intent in the instant case was satisfied by showing that the appellants knowingly joined and participated in a conspiracy to rig bids"). Berry's contention that the government must go further and prove that a defendant understood that bid rigging would "reduce or eliminate competition," Berry Br. 18, has been rejected by every court to hear it, including this one. *Alston*, 974 F.2d at 1213; *see also Giordano*, 261 F.3d at 1143-44; *Metropolitan Enterprises*, 728 F.2d at 449-50; *Koppers*, 652 F.2d at 295; *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981); *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979).

There can be no doubt that Berry intended to rig bids. Four separate witnesses testified to rigging bids with Berry (or "JB" as he was known). ER 568, 737, 839, 1034, 1060. Douglas Ditmer, one of

Berry's co-conspirators, recounted rigging bids with Berry for properties located on Sextus Road in Oakland and B Street in Hayward—for which Berry received a $3257 payoff. ER 736-37, 754. Danli Liu, another co-conspirator, also recounted rigging bids with Berry (whom she knew as JB and identified at trial), including bids for a property on 2196 Herrington for which Berry bid $20,400 in the private auction before dropping out to receive a payoff rather than the property. ER 1060. And Bradley Roemer, a third co-conspirator, recounted paying $2000 to Realty Info Systems, which he explained consisted of Florida and Berry, for agreeing not bid on the 3821 Opal property. ER 584-85. This testimony was corroborated by an FBI agent whose review of seized "round sheets"—the records kept by the conspirators to monitor payoffs—revealed that Berry participated in 61 rigged auctions. ER 1112.

Berry's own admissions to a then-undercover agent further demonstrate his intent to engage in a bid-rigging conspiracy. Berry explained how to communicate to others in the conspiracy to stop bidding at the public auction in a conversation that was recorded by the agent (and played for the jury). ER 382-85. Berry explained that a

conspirator could "just tap Mr. Florida on the shoulder and that would . . . signal that the deal was on." ER 383. Berry also "personally" approached conspirators to tell them when he was "going to take" a property at auction. ER 854. Berry likewise took actions to enforce the conspiracy: When Berry believed that one of his co-conspirators wrongly failed to hold a round, he "followed" the co-conspirator "shouting and yelling" at him "all the way back to [his] car." ER 570-75.

Based on this evidence, a rational juror would have no difficulty finding, beyond a reasonable doubt, that Berry "accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade" by participating in an agreement to rig bids at Alameda County foreclosure auctions. *United States v. MMR Corp. (LA)*, 907 F.2d 489, 495 (5th Cir. 1990). That is sufficient to prove his knowing participation in the conspiracy.

### B. Witness Testimony and Contemporaneous Documents Demonstrated that the Conspiracy Occurred in the Flow of Interstate Commerce

Defendants are also wrong when they argue that the evidence was insufficient to prove the conspiracy occurred in the flow of interstate commerce, Rasheed Br. 12-17; Berry Br. 14-16; Diaz Br. 1. The

evidence showed that defendants rigged bids at a real estate foreclosure auction and that the funds from those rigged auctions moved in interstate commerce. That is sufficient to satisfy the interstate commerce element of the Sherman Act.

In enacting the Sherman Act's prohibition on agreements "in restraint of trade or commerce among the several States," 15 U.S.C. § 1, Congress exercised the full extent of its constitutional power to regulate interstate commerce. *See Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 328-29 & n.10 (1991) ("It is firmly settled that when Congress passed the Sherman Act, it 'left no area of its constitutional power [over commerce] unoccupied.'" (quoting *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945)). Thus, the Act reaches conduct in the flow of interstate commerce, as well as wholly local conduct that nevertheless substantially affects interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980). Where a defendant's conduct is "as a matter of law or practical necessity" an "integral part of an interstate transaction," the interstate commerce element is satisfied. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785 (1975).

In *United States v. Guthrie*, for example, the court concluded that the evidence was sufficient to show that the conspiracy was in the flow of interstate commerce where, as here, the rigged real estate foreclosure auctions involved out of state lenders who received funds from such auctions. 814 F. Supp. 942, 943-44 (E.D. Wash. 1993), *aff'd*, 17 F.3d 397 (9th Cir. 1994) (unpublished table op.). Specifically, a defendant was charged with rigging bids at two public real estate foreclosure auctions in Washington. *Id.* Banks in South Carolina and Maryland initiated the sales of real estate after borrowers defaulted on their loans and hired agents and trustees in Washington to conduct the sales and obtain the highest possible return. *Id.* at 944. Money from those sales were forwarded to the out-of-state banks in interstate commerce. *Id.* The court held that this evidence was "undeniabl[y]" sufficient to support the jury's conclusion that "the foreclosure transactions constituted interstate commerce" because the "funds Guthrie tendered to the trustees at the foreclosure sales eventually made their way across state lines to the out of state banks" who initiated the sales. *Id.* at 946.

Here, as in *Guthrie*, the evidence was sufficient to prove that defendants' conspiracy occurred in interstate commerce. Testimony

revealed multiple instances in which lender located outside of California initiated a foreclosure auction and later received some or all of the funds resulting from that sale. ER 265-73. For example, Washington Mutual/JP Morgan Chase repeatedly hired trustee California Reconveyance Company ("CRC") to initiate foreclosure sales in Alameda County. ER 265-66. CRC sold a property for JP Morgan Chase—located in Columbus, Ohio—for $158,000, and forwarded that money to JP Morgan Chase. ER 266-67. CRC also sold a property for Washington Mutual Home Loans—located in Jacksonville, Florida—for $551,650.01 and forwarded that money to Washington Mutual. ER 271. All told, CRC's vice president identified seven properties sold at auctions rigged by defendants and their conspirators for which CRC initiated the foreclosure and sent resultant funds to an out-of-state lender. ER 273. Documentary evidence—cover letters and copies of checks mailed therewith—corroborated the vice president's testimony. SER 116-17, 118-19, 121-22, 123-24, 125-26, 127-28, 129-30, 131-32, 133-34, 135-36.

FBI Agent Jones provided further evidence of interstate commerce by identifying 22 rigged properties accounting for $4,358,475.87 of

suppressed auction proceeds that were sent out of state. ER 1122, 1128; SER 109-12. For example, a "Fedex slip," the relevant "check," and a "letter" accompanying the conveyance of funds from the rigged sale of 3300 North Central Avenue showed $309,500 being sent first from Alameda County, California, to a trustee in Phoenix, Arizona, and then to a loan servicing company in Orlando, Florida. ER 1122-25; SER 113-15. Similar documents revealed a transfer of $248,487.34 in suppressed auction proceeds to Home Loan Services in Pittsburgh, Pennsylvania. ER 1125-27; SER 120, 137.

Conspirator Liu confirmed that such funds entered the flow of interstate commerce based on her personal experience. She testified that her checks to purchase a rigged property were sent to Aztec Foreclosure in Phoenix, Arizona. ER 1038-45.

From this evidence, a rational trier of fact readily could have concluded that "the funds . . . tendered to the trustees at the foreclosure sales eventually made their way across state lines to the out of state banks" or that the transactions at issue in this case involved "the transaction of business across a state line." *Guthrie*, 814 F. Supp. at 946; *see Goldfarb*, 421 U.S. at 783-84 (explaining that local "purchasing

of homes" was "frequently [an] interstate transaction" because of out-of-state stakeholders to real estate transactions); *McLain*, 444 U.S. at 244 (explaining conspiracy of attorneys to fix fees for title examination services for real estate transactions in *Goldfarb* was "within stream of interstate commerce"). This evidence was more than sufficient to establish the Sherman Act's interstate commerce element.

Defendants' contention, Rasheed Br. 16, that transfers of funds by CRC to JP Morgan or Washington Mutual do not count as interstate commerce because "JP Morgan owned both CRC and WaMu" for a portion of time during the conspiracy does not undermine the verdict. Defendants cite nothing to support their mistaken claim that intracompany transfers cannot constitute interstate commerce. And, in any event, the evidence at trial was not limited to transfers by CRC. Rather, it included evidence of an auctioneer sending a conspirator's funds to trustee Aztec Foreclosure in Arizona, ER 1045, and a trustee forwarding funds from a rigged Alameda County foreclosure auction to servicing company Ocwen Loan Servicing in Florida, ER 1122-23; SER 113-15. As such, the corporate relationship of CRC, JP Morgan, and Washington Mutual is beside the point.

Defendants attempt to call "into question whether the checks at issue were actually mailed, or were electronically transferred interstate instead," Rasheed Br. 16, *see* also Berry Br. 15, but their argument is belied by the record and contrary to the law. Evidence that funds were electronically transferred out of state would be sufficient to demonstrate a continuous interstate transaction. For the purposes of an interstate commerce analysis, funds do not come to rest simply because the physical tender was initially deposited in one state before it was electronically transferred to another. "[M]ere change in the form of the commodity or even complete change in essential quality . . . does not defeat application of the [Sherman Act] to practices occurring either during those processes or before they begin." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 238 (1948). Commerce remains commerce even if it involves "the flow of" nothing "more tangible than electrons and information." *United States v. S.-E. Underwriters Ass'n,* 322 U.S. 533, 550 (1944), *abrogated on other grounds by* 15 U.S.C. § 1012(b); *cf. Swift & Co. v. United States*, 196 U.S. 375, 398 (1905) ("[C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of

business."); *United States v. Mussari*, 95 F.3d 787, 790 (9th Cir. 1996) (an "electronic transfer of funds" is sufficient to implicate Congress's power to regulate interstate commerce). Thus, the conversion of tender from a physical to electronic form to facilitate the travel of funds to their final destination would not stop the flow interstate commerce (had such a transformation happened here).

In any event, the evidence amply demonstrates that the relevant funds were actually mailed out of state. *See, e.g.*, ER 273 (testifying to mailing funds out of state); ER 1045-47 (same); ER 1122-27 (identifying Federal Express tracking slips and letters for interstate mailing of funds); SER 113-15, 120, 137. A reasonable jury could rest its verdict on that evidence alone.

## II. The Proof at Trial Did Not Constructively Amend the Indictment as to Interstate Commerce

Diaz's constructive amendment argument rests on a fundamental mischaracterization of the indictment and the elements of the offense. He wrongly contends, for the first time on appeal, that even though the government proved the interstate commerce element by showing the conspiracy was in the flow of interstate commerce the "'in the flow' standard is much lower than the true standard and burden reflected in

the indictment: 'in unreasonable restraint of interstate trade and commerce.'" Diaz Br. 14. Contrary to Diaz's contention, the indictment unmistakably alleged the offense's interstate commerce element by alleging that the conspiracy was in the flow of interstate commerce, and the jury instructions and proof were fully consistent with that allegation. Thus, the district court committed no error, plain or otherwise, by not finding a constructive amendment.

A constructive amendment occurs if the indictment's charges are "broadened" through some action other than amendment "by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 216 (1960). To prevail on a constructive amendment claim, a defendant must show that a "difference between the indictment and the jury instructions allowed the defendant to be convicted on the basis of different behavior than that alleged in the original indictment." *United States v. Garcia-Paz*, 282 F.3d 1212, 1216 (9th Cir. 2002); *see also United States v. Ward*, 747 F.3d 1184, 1190-91 (9th Cir. 2014).

The indictment alleged that the "the business activities of the defendants and co-conspirators that are the subject of this Count were within the continuous and uninterrupted flow of . . . interstate trade

and commerce,"[9] and further that funds "from the sale of properties purchased by the conspirators pursuant to the bid-rigging conspiracy were transmitted from locations in one state to certain beneficiaries located in other states." ER 20. The jury was instructed that the "Government must prove beyond a reasonable doubt that the conspiracy charged in the indictment occurred in the flow of interstate commerce" by "decid[ing] whether the activities of the charged conspiracy were an essential part of a real estate transaction across state lines." ER 1189. The government's evidence establishing this element, *see supra* I.B, was fully consistent with indictment's allegations.

Diaz does not contend that "the government has . . . offered proof of facts different from those set forth in the indictment," as required to establish a constructive amendment. *United States v. Wilbur*, 674 F.3d

[9] The indictment also alleged that the bid rigging scheme "substantially affected" interstate commerce. ER 20. At trial, the government did not rely on a substantial effects theory. Diaz does not claim constructive amendment for failure to prove a substantial effect and, in any event, the doctrine of constructive amendment is not implicated when the government proves only one of two alternative allegations in an indictment as to an element of the crime. *United States v. Miller*, 471 U.S. 130, 136 (1985).

1160, 1178 (9th Cir. 2012).[10] Instead, Diaz wrongly asserts that the indictment alleges the government's "true standard and burden" was to show conduct "in unreasonable restraint of interstate trade and commerce," and that his conviction was based on a lesser standard of conduct "in the flow of interstate commerce." Diaz Br. 14.

As explained above, a showing that defendants' conduct was "in the flow" of interstate commerce is sufficient to satisfy the interstate commerce element. *See supra* Part I. Diaz's contention that "only unreasonable restraints are outlawed, not all conspiracies in the flow of commerce," Diaz Br. 14, misleadingly conflates the first and third elements of the offense. Under Section 1 of the Sherman Act, the government must charge and prove three elements: "[f]irst, that the conspiracy [in unreasonable restraint of trade] existed at or about the time stated in the indictment; second, that the defendant knowingly—a that is, voluntarily and intentionally—became a member of the

---

[10] Diaz does not raise the related doctrine of variance in his brief. But because Diaz is not contending that there was a difference between the facts alleged and proven at trial, or that the facts proven at trial permitted him to be convicted for an offense other than that which is charged in the indictment, the doctrine of variance also does not apply. *Wilbur*, 674 F.3d at 1179.

conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; third, that interstate commerce was involved." *Alston*, 974 F.2d at 1210. Proof of a restraint's reasonableness is not tied to the conspiracy's connection to interstate commerce; and, conversely, proof of interstate commerce is not tied to the reasonableness of the restraint. *Cf. id.* (laying out these two as separate elements).

Even if the indictment did allege a higher burden than that provided for under the law (which it does not), Diaz's argument would not be grounds for reversal. "Congress defines the elements of an offense, not the charging document." *United States v. Deverso*, 518 F.3d 1250, 1258 n.2 (11th Cir. 2008); *see also Liparota v. United States*, 471 U.S. 419, 424 (1985). The government cannot alter the elements of a Sherman Act offense through pleading.

Lastly, Diaz's constructive amendment argument also fails because the district court correctly instructed the jury that it may only convict if it finds the interstate commerce element consistent with the conduct charged in the indictment. The court instructed the jury that in order to convict on "the offense of conspiracy to rig bids as charged in

the indictment" the jury must find "beyond a reasonable doubt . . . [t]hat the conspiracy described in the indictment occurred within the flow of interstate commerce." ER 1185-86.[11] Where the court's jury instructions make clear to the jury that it must "find the conduct charged in the indictment before it may convict," no constructive amendment occurs. *Ward*, 747 F.3d at 1191.

## III. The District Court Correctly Increased Diaz's Sentencing Guidelines Offense Level Based on His Involvement in the Purchase of Over $1,000,000 of Rigged Properties

The district court did not err in increasing Diaz's offense level under USSG 2R1.1(b)(2) by two levels when calculating his advisory guidelines range. That subsection directs the addition of two offense levels "[i]f the volume of commerce attributable to the defendant was more than $1,000,000" and less than $10,000,000, *id.*, and the court found that the relevant volume of commerce was $1,158,563, SER 6-7. The two-level increase yielded an advisory guidelines range of 18 to 24

---

[11] *See also* ER 1189 (further instructing the jury that the "Government must prove beyond a reasonable doubt that the conspiracy charged in the indictment occurred in the flow of interstate commerce" and that, consistent with the indictment, the jury must determine whether "the activities of the charged conspiracy were an essential part of a real estate transaction across state lines").

months imprisonment, although the court ultimately sentenced Diaz to 8 months imprisonment. SER 5, 9.

The "volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." USSG 2R1.1(b)(2). Here, the record demonstrated that Diaz's volume of commerce was $1,158,563, which is the sum of the winning bids ($1,050,463) and total payouts ($108,100) for eight properties that Diaz was involved in purchasing and that were rigged at the auction.[12] *See* Diaz PSR 11, 19; *see also* SER 70-77.

Diaz does not dispute these facts, but rather wrongly asserts that the total volume of commerce affected is limited to the "negative effect on the volume of commerce." Diaz Br. 16-17. But as the commentary to Section 2R1.1 explains: "The offense levels are not based directly on the

[12] The government's sentencing submission and the PSR on which the district court based its calculation contain the same arithmetic error in totaling the payout amounts. Diaz PSR 11, 19; SER 70-77. The payouts for the eight properties actually total $105,500, not $108,100. This difference, however, does not affect the two-level adjustment challenged by Diaz on appeal because the volume of commerce, after correcting for this error, $1,155,963, still exceeds $1,000,000.

damage caused or profit made by the defendant." USSG 2R1.1, comment. (backg'd.) Sentencing guidelines commentary is "generally authoritative," *United States v. Lambert*, 498 F.3d 963, 966 (9th Cir. 2007) (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)), and the commentary here forecloses Diaz's request to equate the volume of commerce affected to the damage caused by the crime. Thus, "[i]n calculating the 'volume of commerce,' the district court is to consider not just 'the damage caused or profit made by the defendant,' but the overall amount of sales during the conspiracy." *United States v. Peake*, 804 F.3d 81, 100 (1st Cir. 2015), *cert. denied*, 137 S. Ct. 36 (2016); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1274 (6th Cir. 1995).

To the extent Diaz argues that the sales of the eight properties on which the volume of commerce calculation is based were unaffected by the bid rigging, *see* Diaz Br. 19, he failed to object to his presentence report on this basis or raise it to the district court below. And Diaz cannot show either plain or clear error in the court's finding that the sale of such properties constituted affected commerce. Indeed, it is uncontested that substantial payouts were made in connection with each of these properties, and that the trial testimony established that

the existence of payouts affected the outcome of the auctions: the auction price would have been higher but for the payouts. ER 564-65, 598. Such evidence is more than enough to show that the transactions for which Diaz participated in rounds constitute affected commerce. *Hayter Oil,* 51 F.3d at 1272; *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000).

## IV. The District Court Imposed Lawful and Reasonable Conditions of Supervised Release

The district court did not plainly err when it exercised its discretion in requiring, as conditions of supervised release, that Rasheed: 1) notify others of risks that may be occasioned by his criminal record or personal history or characteristics, 2) perform 1260 hours of community service, and 3) obtain the probation officer's permission before opening new lines of credit or incurring new debts and provide the probation officer access to his financial information. Rasheed ER 3-4. Rasheed's contentions, made for the first time on appeal, that these conditions are substantively unreasonable, a due process violation, or contrary to the sentencing guidelines, are without merit.[13] The

[13] Diaz joins the other briefs as applicable to him. Diaz Br. 1. Only Rasheed's challenge to the notice of risks condition, *infra* Part IV.A, is

conditions are lawful and "reasonably related to [defendant's] rehabilitation, prevention of recidivism, and protection of the public from future crimes." *United States v. Vega*, 545 F.3d 743, 748 (9th Cir. 2008).

### A. The Notice of Risks Condition Is Lawful

As Standard Condition 13 of supervised release, the district court imposed substantially the same condition that the Sentencing Commission recommends:

> As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Rasheed ER 3; *see* USSG 5D1.3(c)(12).[14] This Court and others have held that such a condition is neither vague nor an impermissible

---

applicable to Diaz. Diaz's incorporated challenge to the notice of risks condition fails for the same reasons as Rasheed's.

[14] Section 5D1.3(c)(12) provides that "the following 'standard' conditions are recommended for supervised release . . . . If the probation office determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact

delegation. Moreover, the condition is not an occupational restriction under USSG 5F1.5(a), and thus the specific determinations required by that provision were not necessary.

### 1. The Notice of Risks Condition Is Not Unconstitutionally Vague or an Impermissible Delegation of Judicial Decision Making to the Probation Officer

The notice of risks condition is not unconstitutionally vague.[15] As an initial matter, the nature of Rasheed's challenge is not clear. *See* Rasheed Br. 19-24. Rasheed's claim that the "condition is facially vague" and presents a pure question of law suggests he is making a facial challenge, Rasheed Br. 21, but Rasheed does not cite the applicable standard, which readily disposes of the challenge. "Facial vagueness challenges may go forward only if the challenged regulation 'reaches a substantial amount of constitutionally protected conduct.'" *Farrell v. Burke*, 449 F.3d 470, 496 (2d Cir. 2006) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)). Rasheed never identifies any

---

the person and confirm that the defendant has notified the person about the risk."

[15] This condition is also being challenged as impermissibly vague in *United States v. Evans,* No. 16-10310 & 16-10311 (9th Cir. filed July 11, 2016).

constitutionally protected conduct this provision threatens to chill. *Id.* at 497. A provision requiring mere notice to at-risk third parties does not present any obvious limitations on constitutional rights. Indeed, many potential applications of this provision would be "reasonably and necessarily related to the Government's legitimate interests in the parolee's activities" and protecting the public. *Id.*

Nor is the condition unconstitutionally vague as-applied to Rasheed.[16] A condition of supervised release is unconstitutionally vague if it "requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Hugs*, 384 F.3d 762, 768 (9th Cir. 2004). A defendant has a "due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will

[16] Rasheed's claim that the provision on its face is vague as it applies to him, *see* Rasheed Br. 21-22, does not raise a pure question of law because it requires application of certain facts (like Rasheed's particular conviction and criminal history) to the provision. Because Rasheed did not raise this issue below and it is not a pure question of law, it should be reviewed for plain error. *See United States v. Rearden*, 349 F.3d 608, 614 (9th Cir. 2003); Fed. R. Crim. P. 52(b); *supra* Standard of Review.

result in his being returned to prison." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (per curiam).

The notice condition makes clear to Rasheed what could result in his return to prison because it requires a knowing violation. "Conditions of supervised release . . . must be interpreted consistently with the well-established jurisprudence under which we presume prohibited criminal acts require an element of mens rea." *United States v. Napulou*, 593 F.3d 1041, 1045 (9th Cir. 2010); *see Vega*, 545 F.3d at 750. Accordingly, the condition "regulates only *knowing*" failures to disclose risks to third parties. *See id.* Because Rasheed will not be returned to jail for unintentionally failing to recognize and disclose a risk, the condition is not vague. *See, e.g.*, *Vega*, 545 F.3d at 750; *Napulou*, 593 F.3d at 1045.

In addition, this Court and others have upheld notice of risks conditions like the one here against vagueness challenges because the "'condition is reasonably related to the goals of deterrence, protection of the public, or rehabilitation . . . taking into account [defendant's] history and personal characteristics' and involves 'no greater deprivation of liberty than is reasonably necessary for the purposes of supervised

release.'" *United States v. Begay*, 556 F. App'x 581, 583 (9th Cir. 2014) (unpublished) (quoting *United States v. Watson*, 582 F.3d 974, 982 (9th Cir.2009)). The Eleventh Circuit reached the same conclusion in *United States v. Nash*, 438 F.3d 1302, 1306-07 (11th Cir. 2006). In *Nash*, the court held that a notice of risks condition imposed upon a defendant convicted of "financial fraud" was not vague because of its "undeniable relationship" to "the need to protect the public from [defendant's] financial fraud" among other things. *Id.*[17]

Finally, the "related problem" raised by Rasheed—impermissible delegation of decisions to a probation officer—also lacks merit. *See Nash*, 438 F.3d at 1306 (upholding same condition against delegation challenge). The probation officer may engage in "a ministerial act or support service" with respect to a sentence, but may not be delegated the "ultimate responsibility of imposing the sentence." *Id.* at 1304-05.

---

[17] Rasheed's reliance on Seventh Circuit decisions, Rasheed Br. 22, is unavailing. Those decisions are wrong for the reasons given above. And, in any event, those decisions cannot establish plain error because an error "cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results." *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011).

Thus, "'where the court makes the determination of *whether* a defendant must abide by a condition . . . it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied.'" *Id.* (quoting *United States v. Stephens*, 424 F.3d 876, 880 (9th Cir. 2005)). The notice of risks condition does not improperly delegate a judicial function to a probation officer. It merely permits the "probation officer [to] 'direct' when, where, and to whom notice must be given"; the probation officer "may not unilaterally decide whether [the defendant] 'shall' do so at all." *Id.*

Rasheed's reliance on *United States v. Stephens*, 424 F.3d 876 (9th Cir. 2005), is misplaced. *Stephens* is fully consistent with—and was in fact relied upon by the court in—*Nash*. In *Stephens*, the district court allowed the probation officer to determine "the *maximum* number of non-treatment drug tests" after determining itself "the *minimum* number of tests." *Id.* at 883 (emphasis in original). This Court held that such delegation was impermissible because the district court permitted the probation officer to determine the "extent of the punishment imposed upon a probationer," just as if the district court permitted a probation officer to determine "whether drug testing would

occur" or how a "defendant will pay his restitution." *Id.* at 881. But this Court emphasized that the district court was not required to "micro-manage drug treatment" and that it was permissible to delegate the choice of program to a probation officer and the details of the program to the drug treatment professionals. *Id.* at 883. Consistent with *Nash*, the inquiry in *Stephens* focused on whether the probation officer had the ability to impose more or new punishment on the defendant, not whether the probation officer was exercising discretion in administering punishment already meted out by the district court.[18] Here, the notice of risks condition only authorizes the probation officer to administer the punishment and thus it is not an impermissible delegation.

**2. The Notice of Risks Condition Is Not an Occupational Restriction Subject to USSG 5F1.5's Requirements**

The notice of risks condition is neither an occupational restriction on its face, nor is it likely to be applied to Rasheed in a manner that

[18] Rasheed's reliance on *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001), is similarly unavailing. *Peterson* held a delegation impermissible only to the extent that certain conditions of release contemplated employer notification. As explained below, *see infra* Part VI.A.2, this provision does not contemplate employer notification.

impacts his future employment. There is no basis for Rasheed's complaint that the district court did not make the specific determinations required by USSG 5F1.5 for occupational restrictions.[19]

The condition never mentions employers, clients, or customers. It merely requires notification to "third parties" to whom the defendant poses "risks." Many supervised release terms include this condition (or a version of it) in order to permit probation officers to fulfill their "duty to warn when . . . the person under supervision presents a reasonable foreseeable risk of harm to a third party."[20]

---

[19] Section 5F1.5(a) provides:

> The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:
>
> (1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and
>
> (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

[20] United States Courts, Probation and Pretrial Services, *Overview of Probation and Supervised Release Conditions*, *Chapter 2: Notification of Risk Posed by Defendant (Probation and Supervised Release Conditions)*, Ch. 2 § D.1, *available at* http://www.uscourts.gov/services-

The notice of risks condition is not likely to be enforced in any way that relates to Rasheed's employment absent future guidance to that effect by the district court or Rasheed's consent. The guidelines provided "to assist probation officer in complying with obligations to warn third parties" make clear that these obligations are distinct from an occupational restriction or employer-notice requirement because requirements to "refrain from engaging in a particular type of employment or inform his or her employer . . . about the defendant's criminal conviction generally should be imposed . . . as a formal condition of probation."[21] The government has consulted with the United States Probation Office for the Northern District of California, and that office does not expect this condition to result in employment-based notification under these circumstances. In addition, if the notice of risks condition were interpreted to require employment-based notification, that office would first seek Rasheed's consent and, if such consent is not given, the probation office would raise the issue with the

---

forms/notification-risk-posed-defendant-probation-supervised-release-conditions.

[21] *Id.* at Ch. 2 § D.2.c (citing *Peterson*, 248 F.3d at 87; *United States v. Doe*, 79 F.3d 1309 (2d Cir. 1996)).

district court. The government is not aware of a case—and Rasheed identifies none—holding that this condition, without any accompanying special condition that imposes an occupation restriction, constitutes an occupational restriction requiring the specific determinations identified in Section 5F.1.5.[22]

There is no reason to disturb the notice of risks condition based on the unfounded speculation that the probation officer will apply the condition to Rasheed as an occupational restriction contrary to probation office guidance. If the probation office attempts to apply this condition to Rasheed's employment in future, however, Rasheed can make "a motion to modify the conditions of supervised release under 18

---

[22] The cases cited by Rasheed are inapposite because they involved express conditions or local probation office policies requiring employer notice. *See United States v. Britt*, 332 F.3d 1229, 1231 (9th Cir. 2003) (condition requiring defendant to "notify the clients/customers of third party risks" "[i]f the defendant's employment involves the collection of personal financial information form (sic) clients/customers"); *United States v. Souser*, 405 F.3d 1162, 1164 (10th Cir. 2005) (local policy to enforce this condition by requiring defendants to "inform their employers of their criminal record unless they can show hardship"); *Peterson*, 248 F.3d at 85-86 (addressing standard condition paired with special condition requiring that "defendant must notify his employer of his conviction"); *Doe*, 79 F.3d at 1312 (judicial decision made at request of probation office that, under standard condition, defendant must "notify all clients of your federal tax conviction").

U.S.C. § 3583(e)(2)" at that time. *United States v. Rivera*, 163 F. App'x 554, 555 (9th Cir. 2006) (unpublished); *see also United States v. Stergios*, 659 F.3d 127, 133-34 (1st Cir. 2011) ("Should Stergios find Special Condition 7 unduly restrictive upon his release, he need only speak with his supervising officer and, if that does not succeed, raise the issue with the district court."); 18 U.S.C. § 3583(e)(2).

### B. Requiring Rasheed to Perform 1260 Hours of Community Service Is Substantively Reasonable

The district court imposed on Rasheed as a special condition of supervised release:

> The defendant shall perform 1260 hours of community service, as directed by the probation officer. The Court orders that, for as much of the community service hours as possible, the defendant shall make a 30-minute presentation to individuals engaged, or training to be engaged, in the real estate business, on the nature of his conviction, including his offense conduct, and how serving time in prison has affected his life. The defendant shall provide proposed written materials for the presentation, as well as a well-scheduled calendar of proposed presentation dates, to the Court for approval. The remainder of community service hours shall be completed in a manner deemed appropriate by the probation officer.

Rasheed ER 4. The court fully explained the rationale for this special condition, and Rasheed offers no proper ground for vacating it. The court found under the applicable guideline, USSG 2R1.1, a "base fine

of . . . $126,000" for Rasheed, but that Rasheed was unable to pay this fine. SER 36-37. Following the guidance in Comment 2 to Section 2R1.1,[23] the court imposed "community service that is . . . equally as burdensome as the fine." SER 36. To do so, the court credited Rasheed as "working off that fine at the rate of $100 per hour," which yields 1260 community service hours. SER 37.

Rasheed contends for the first time on appeal that this community service requirement is substantively unreasonable, but that contention is meritless. Courts consider the "totality of the circumstances" when assessing the substantive reasonableness of a sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007). "The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Rudd*, 662 F.3d 1257, 1261 (9th Cir. 2011). A sentence is substantively reasonable if it is "sufficient, but not greater than necessary to accomplish § 3553(a)(2)'s sentencing goals." *United States*

[23] In relevant part, Comment 2 provides that "[i]f the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine" and "[t]he community service should be equally as burdensome as a fine."

*v. Crowe*, 563 F.3d 969, 977 n.16 (9th Cir. 2009). "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51; *see also United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008).

In determining the sentence, the district court "carefully considered both the guidelines and the Section 3553(a) factors" and imposed a sentence that is "sufficient but not greater than necessary to comply with the purposes of sentencing." SER 32. *Compare* 18 U.S.C. § 3553(a) *with* SER 32 (explaining that the court has considered the "seriousness of the crime, promot[ing] respect for the law, and provid[ing] just punishment for the offense"; the need to "deter criminal conduct, prevent the public from future crime by the defendant, and promote rehabilitation"; and "the nature and circumstances of Mr. Rasheed's offense and the conviction leading to the sentencing proceedings today").

Rasheed erroneously faults the district court for following Comment 2 to Section 2R1.1, instead of Comment 1 to Section 5F1.3, Br. 29, but the latter comment does not render the court's approach

incorrect or its outcome unreasonable. Comment 1 to Section 5F1.3 suggests "generally" limiting community service to "400 hours," but the court correctly imposed community service pursuant to the "Special Instruction for Fines" under the antitrust offense-specific sentencing guideline, USSG 2R1.1(c)(1); USSG 2R1.1, comment. (n.2). *See* SER 36-37. The decision to sentence under the offense-specific guideline (as opposed to the generic one) was not unreasonable, much less plain error. *See United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) (applying rules of statutory construction to sentencing guidelines); *United States v. Torres-Echavarria*, 129 F.3d 692, 699-700 n.3 (2d Cir. 1997) (explaining "principle of statutory construction" "that a specific provision takes precedence over a more general provision"); *cf.* USSG 5E1.2(b) (noting that if guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedent over subsection (c) of this section).

In any event, nothing in 5F1.3 or its comments "prohibits the imposition of more than 400 hours." *Vega*, 545 F.3d at 748 n.4. The district court therefore committed no error—plain or otherwise—by relieving Rasheed of a substantial fine that he could not pay and

instead ordering "a substantial amount of community service." *See Whitehead*, 532 F.3d at 993 (upholding sentence of 1000 hours of community service).

Rasheed's argument that the district court's community service requirement reflects a failure to consider, or an incompatibility with, the "rehabilitative priority that Rasheed find steady full-time work to support himself," Rasheed Br. 26, is belied by the record. The district court explicitly "[took] into consideration" that "there must be some accounting for how that rehabilitation and second chance . . . is going to be carried out" including the need to ensure a "realistic probability of [Rasheed] . . . finding a way to make money." SER 34-36. And there is no incompatibility. Rasheed fears that spending one "full" 8-hour day each week will impair his ability to find work, Rasheed Br. 26, but that leaves six days per week for remunerative employment. Because Rasheed's fear "is based on speculation" at best, this condition should remain undisturbed. *Vega*, 545 F.3d at 749. Should Rasheed's fears materialize, he retains the option to file "a motion to modify the conditions of supervised release under 18 U.S.C. § 3583(e)(2)." *Rivera*,

163 F. App'x at 555; *see also Stergios*, 659 F.3d at 133-34; 18 U.S.C. § 3583(e)(2).

Lastly, the district court's direction that Rasheed perform his community service requirement to the "maximum extent possible" through presentations to real estate groups does not render the requirement itself unreasonable. Although scheduling those presentations may prove difficult, Rasheed Br. 27-28, the court did not require Rasheed to complete any particular amount of his community service in this method. To the contrary, the court recognized that "realistically that's going to be hard to work off 1260 hours in that method" and so Rasheed can work off the hours using "any . . . [a]nd by 'any,' I mean any" type of community service that the "Probation Office thinks is appropriate." SER 37-38. The court provided the flexibility necessary to prevent the community service requirement from unduly interfering with Rasheed's ability to make a living. Thus, Rasheed's complaints about the *mode* of service are also based on unfounded speculation. *Vega*, 545 F.3d at 749.

### C. The Record Supports the Need for Financial Monitoring

The district court also imposed on Rasheed as special conditions of release:

> The defendant shall not open any new lines of credit and/or incur new debt without the prior permission of the probation officer.
>
> The defendant shall provide the probation officer with access to any financial information, including tax returns, and shall authorize the probation officer to conduct credit checks and obtain copies of income tax returns.

Rasheed ER 4 (enumeration omitted). Rasheed argues for the first time on appeal that that the "court did not articulate any basis for applying" these conditions and that these conditions "do not apply under the Guideline recommendations," Rasheed Br. 30, but both arguments are meritless.

First, contrary to Rasheed's argument, the "reasoning" for applying this condition "is apparent from the record." Rasheed Br. 32. The district court recognized, at sentencing, that Rasheed's crime "was motivated purely by greed and the desire for easy money." SER 34. That finding underscored the probation officer's recommendation that Rasheed's supervised release be subject to certain financial monitoring conditions "in view of the offense, to ensure [Rasheed's] income is from

legitimate sources" and based on "consider[ation] of the factors set forth in 18 U.S.C. § 3553(a)." Rasheed PSR 47. Indeed, as the probation officer explained in detail, Rasheed's offense was a complex financial crime through which he and others repeatedly stole from the intended beneficiaries of the Alameda County foreclosure auctions for their personal gain. Rasheed PSR 4-9.

The district court made clear that it had "carefully considered the presentence report that was prepared by the Probation Office for Mr. Rasheed" along with the 18 U.S.C. § 3553(a) factors. SER 26, 32. Accordingly, the district court's reasoning is adequately presented in the record because "[t]he presentence report contained sufficient information to support the district court's determination, and it is apparent from the record that the district court read and considered that report." *United States v. Defterios*, 5 F. App'x 715, 716 (9th Cir. 2001) (unpublished); *see also United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) (adequate explanation may be inferred from the presentence report or the record as a whole). Moreover, the district court's finding at the hearing that greed motivated this crime reinforced the applicable findings in the presentence report.

Such reasoning satisfies the requirements for financial monitoring as a condition of supervised release. A court may impose conditions on supervised release if three criteria are met. *United States v. Garcia*, 522 F.3d 855, 861-62 (9th Cir. 2008). First, the condition must be "reasonably related to the factors set forth in 18 U.S.C. §3553(a)"; second, the condition "must involve no greater deprivation of liberty than is reasonably necessary"; and third, "the condition must be consistent with pertinent policy statements of the Sentencing Commission." *Id.* at 862. All three criteria are met for a financial monitoring condition when, as here, the record reflects that "money and greed were at the heart" of the offense. *Id.* (quoting *United States v. Behler*, 187 F.3d 772, 780 (8th Cir. 1999)). In such circumstances, a financial monitoring condition "deters the offender from returning to a life of crime by forcing him to account for his income," *United States v. Brown*, 402 F.3d 133, 137 (2d Cir. 2005), "reflects appreciation of the nature and circumstances of the offense and [Rasheed's] history and characteristics, and serves to protect the public from further crimes," while imposing a deprivation of liberty that is "no greater than necessary to achieve" such ends, *Garcia*, 522 F.3d at 862.

Second, this Court has already rejected Rasheed's other argument—that financial monitoring conditions do not apply under the guidelines unless the court orders a "fine or restitution," Rasheed Br. 31—in *Garcia*, 522 F.3d at 861-62. While Section 5D1.3(d) recommends financial monitoring when "the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine," USSG 5D1.3(d)(3), it also permits the imposition of such condition as "may otherwise be appropriate in particular cases," USSG 5D1.3(d). Accordingly, courts have upheld financial monitoring conditions as appropriate even if no restitution, forfeiture, fine, or notice to victims has been ordered. *See, e.g.*, *Garcia*, 522 F.3d at 861-62; *Brown*, 402 F.3d at 137.

## CONCLUSION

The Court should affirm the judgments below.

Respectfully submitted.

s/ Jonathan Lasken

MAKAN DELRAHIM
*Assistant Attorney General*

ANDREW C. FINCH
*Principal Deputy Assistant Attorney General*

MARVIN N. PRICE, JR.
*Acting Deputy Assistant Attorney General*

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
JONATHAN LASKEN
*Attorneys*

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-353-6638

E. KATE PATCHEN
MANISH KUMAR
MICAH LANIELLE RUBBO
ALBERT BILOG SAMBAT
*Attorneys*

U.S. Department of Justice
Antitrust Division
450 Golden Gate Ave.
Room 10-0101, Box 36046
San Francisco, CA 94102
415-934-5300

December 29, 2017

## STATEMENT OF RELATED CASES

This government agrees with appellees that these consolidated appeals are related to case number 17-10330, *United States v. Alvin Florida* (9th Cir. filed Aug. 8, 2017), which arose out of the same case before the district court but which was not consolidated with these cases due to a later briefing schedule. *See* Rasheed Br. 39; Berry Br. 23; Diaz Br. 23.

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number** 17-10188, 17-10197, 17-10198

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [13,017] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☒ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Jonathan Lasken

Date: 12/29/2017

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

*(Rev. 12/1/16)*

## CERTIFICATE OF SERVICE

I, Jonathan Lasken, hereby certify that on December 29, 2017, I electronically filed the foregoing Opening Brief for the United States of America, the accompanying Supplemental Excerpts of Record, and the Presentence Report (under seal) for Refugio Diaz with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the 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.

December 29, 2017

s/ Jonathan Lasken
*Attorney for the*
*United States of America*