No. 17-10407

IN THE
United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GLENN GUILLORY,
Defendant-Appellant.

On Appeal from the
United States District Court for the Northern District of California
No. 4:14-cr-607 (Hon. Phyllis J. Hamilton)

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

Glenn Guillory appeals from his conviction for bid rigging in violation of 15 U.S.C. § 1. With two exceptions, the United States agrees with Guillory's jurisdictional statement. First, the district court entered judgment in 2017, not 2014. Second, this Court's jurisdiction rests on 28 U.S.C. § 1291 alone. Section 3742 of Title 18 does not apply because Guillory has not challenged "the validity of the sentencing decision." *United States v. Salemo*, 81 F.3d 1453, 1455 (9th Cir. 1996), *as amended* (May 28, 1996).

STATEMENT OF THE ISSUES

1. Whether Guillory's challenges to the jury instructions, a statement in the prosecutor's rebuttal argument, and the sufficiency of the evidence supporting his guilty verdict—for which he failed to make contemporaneous objections or motions at trial—demonstrate plain error affecting his substantial rights and seriously affecting the fairness, integrity, or public reputation of the judicial proceedings.

2. Whether this is the rare case in which the Court should consider an ineffective-assistance-of-counsel claim on direct appeal and, if so, whether Guillory has shown that his counsel's actions were

outside the wide range of professionally competent assistance, and that the deficient performance prejudiced the defense.

3. Whether Guillory's challenge to the claimed overbreadth of the district court's exclusion of evidence concerning the alleged reasonableness of the charged bid-rigging conspiracy is waived and therefore not reviewable on appeal and, if not, whether Guillory has demonstrated the district court plainly erred.

STATEMENT OF THE CASE

The U.S. District Court for the Northern District of California entered a judgment of conviction against Glenn Guillory for conspiring to rig bids in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. ER19-26 (Judgment).[1] Guillory appeals from his conviction.

A. Legal Background

In relevant part, Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Courts have long interpreted the Act to prohibit only "unreasonable" restraints of trade. *E.g.*, *Arizona v.*

[1] "ER" refers to Guillory's Excerpts of Record, "SER" to the government's Supplemental Excerpts of Record, and "Dkt. No." to the docket number of filings before the district court below.

Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343 (1982); *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The reasonableness of most restraints is assessed under the "rule of reason." *Maricopa Cty. Med. Soc'y,* 457 U.S. at 343. "As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Id.*

But the rule of reason does not govern all restraints. *N. Pac. Ry.*, 356 U.S. at 5. Some categories of restraints are subject to the per se rule, under which they are condemned as "*per se* unreasonable[]" and therefore "deemed to be unlawful in and of themselves." *Id.* By "treating categories of restraints as necessarily illegal," the per se rule "eliminates the need to study the reasonableness of an individual restraint." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 551 U.S. 877, 886 (2007); *see United States v. Mfrs.' Ass'n of Relocatable Bldg. Indus.*, 462 F.2d 49, 51-52 (9th Cir. 1972) (discussing per se rule).

Bid rigging is a per se unlawful restraint. *United States v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010) (collecting cases). It is "[a]ny agreement between competitors pursuant to which contract offers are to

be submitted to or withheld from a third party." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982); *accord United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). Bid rigging "is a form of price-fixing." *Ramsay v. Vogel*, 970 F.2d 471, 474 (8th Cir. 1992); *accord, e.g.*, *United States v. Guthrie*, 814 F. Supp. 942, 950 (E.D. Wash. 1993), *aff'd*, 17 F.3d 397, 1994 WL 41106 (9th Cir. 1994) (unpublished table decision); 12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2005a, at 73 (3d ed. 2012).

Because bid rigging, like price fixing, is subject to the per se rule, "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). Likewise, "the law does not permit an inquiry into the[] reasonableness" of, or "economic justification" for, these restraints. *Id.* at 224 n.59; *accord Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-50 (1980); *N. Pac. Ry.*, 356 U.S. at 5. Rather, "the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir.

1981) (quoting *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979)).

B. Indictment and Disposition of Case

In December 2014, a grand jury returned an indictment charging Guillory and four co-defendants with one count of conspiring to rig bids at public real-estate foreclosure auctions in Contra Costa County, California, in violation of 15 U.S.C. § 1. ER38-41 (Indictment ¶¶ 1-14).[2] The indictment alleged that the conspirators were competitors for the purchase of foreclosure properties at the Contra Costa County public auctions. *See* ER38-39 (*Id.* ¶¶ 1-6). Rather than submitting competing bids for the same property, however, they would designate one winner among them to "purchas[e] selected properties at public auctions at artificially suppressed prices." ER40 (*Id.* ¶ 11(d)). The indictment further alleged that, after the conclusion of the public auction for a particular property, the conspirators would hold a separate, private auction called a "round," wherein they would bid for the property by the

[2] The indictment also included eight counts charging mail fraud in violation of 18 U.S.C. § 1341, ER42-44 (Indictment ¶¶ 15-21), which the district court dismissed before trial, SER421 (Aug. 15, 2016 Order 25); Sept. 29, 2016 Order (Dkt. No. 146).

amount they were willing to pay over the public auction winning price. ER41 (*Id.* ¶ 11(f)). And it charged that the winner of the round would pay the amount of his private bid to the round participants and take title to the property. *Id.*

Three of Guillory's co-defendants (Nicholas Diaz, John Michael Galloway, and Charles Rock) pleaded guilty to bid rigging. Diaz Judgment (Dkt. No. 284); Galloway Judgment (Dkt. No. 291); Rock Judgment (Dkt. No. 379). Guillory and co-defendant Thomas Joyce proceeded to separate jury trials. Both were found guilty of bid rigging. ER19-26 (Guillory Judgment); Joyce Judgment (Dkt. No. 324).[3]

C. Pertinent Pretrial Motions and Rulings

1. Prior to trial, Guillory and defendants Diaz, Galloway, and Joyce moved the court to adjudicate the case under the rule of reason instead of the per se rule that applies to bid-rigging, price-fixing, and market- or customer-allocation agreements among competitors. SER422-24 (Defs.' Mot.); *see also* U.S. Opp. (Dkt. No. 115). They did not make a substantive argument in support of the motion, but rather

[3] Joyce has also appealed from his conviction. *See United States v. Joyce*, No. 17-10269 (9th Cir.).

asked the court to take judicial notice of briefs submitted in two other criminal cases before the same court involving the same or similar bid-rigging conspiracies. *See* Exs. to Defs.' Mot. (Dkt. Nos. 106-1, 106-5) (Defs.' Mot. to Adjudicate, *United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.); Defs.' Am. Mot. to Adjudicate, *United States v. Florida*, No. 4:14-cr-582 (N.D. Cal.)).

Following a hearing, July 27, 2016 Hr'g Tr. (Dkt. No. 135), the district court denied the motion, SER408-11 (Aug. 15, 2016 Order 12-15). Consistent with its rulings in the *Marr* and *Florida* cases, the district court concluded that the type of conduct charged in the indictment "falls squarely within the per se category of bid-rigging, which is widely recognized as a form of price-fixing, which is 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [such restraints] have caused or the business excuse for their use.'" SER408 (*Id.* at 12) (quoting *N. Pac. Ry.*, 356 U.S. at 5). Accordingly, "[t]he court decline[d] defendants' invitation to carve out an exception from the per se rule that applies to bid-rigging simply because it took place during a recession or in the wake of a housing bubble, given the weight of authority recognizing bid-

rigging as a category of anticompetitive conduct subject to per se treatment." SER409 (*Id.* at 13); *see* SER408-11 (*Id.* at 12-15).

2. The government moved to preclude Guillory and Joyce (the two defendants going to trial) "from introducing any evidence or argument that [] their bid-rigging agreements were reasonable." U.S. Mots. in Limine 1 (Dkt. No. 179). It argued that such evidence was irrelevant to the existence of the charged per se illegal agreement, whether the defendants knowingly joined that agreement, or whether the agreement was in the flow of or affected interstate commerce. *Id.* at 2. Guillory and Joyce did not offer a substantive response but instead "object[ed] for the record." Defs.' Opp. 2 (Dkt. No. 205).

In January 2017, before the district court ruled on the government's motion, Guillory's retained trial counsel became temporarily unable to participate in Guillory's representation due to health problems. *See* ER242-43 (Jan. 11, 2017 Hr'g Tr. 2-3). The court asked Guillory whether he wanted a new lawyer, but Guillory said no. SER392 (Jan. 13, 2017 Hr'g Tr. 5). Accordingly, the court severed Guillory's trial from Joyce's and delayed it to give Guillory's counsel time to recover. SER393-95 (*Id.* at 6-8).

Guillory's trial counsel returned to court a few weeks later and stated that he was "well enough where [he could] do a trial," "more than prepared," and ready to try the case on "whatever date the court assigns."[4] SER376 (Feb. 15, 2017 Hr'g Tr. 7). In addition, trial counsel asked the court to rule on the pending pretrial motions based on the arguments presented in the briefs, stating that "we have already said all we have to say, and nothing has changed." SER380 (*Id.* at 11).

The district court granted the government's motion "to prohibit defendant from introducing evidence or argument that the bid-rigging agreements were reasonable." ER47 (Mar. 17, 2017 Order 1). The court explained that its decision followed from its "earlier ruling . . . denying defendants' motion to adjudicate the Sherman Act count pursuant to the rule of reason." *Id.*

D. Trial

The case was tried over a pefriod of four days in April 2017, two and a half months after the original trial date. *See* Dkt. Nos. 310 (Trial Tr. Vol. 2, pp. 165-350), 311 (Trial Tr. Vol. 3, pp. 351-560), 312 (Trial Tr.

[4] For readability, this brief quotes the transcripts in regular font style instead of the all-capitals used in most of the transcripts.

Vol. 4, pp. 561-686), 313 (Trial Tr. Vol. 5, pp. 687-920). The government presented 9 witnesses, and Guillory testified on his own behalf. *See* Master Index (Dkt. No. 302-1); Exhibit & Witness List (Dkt. No. 309). A summary of the evidence follows.

1. The Foreclosure Process

In Contra Costa County, like elsewhere, when a homeowner stops making payments on a secured home loan, the lender bank may foreclose on the property. SER287-88, 290-91 (Bounlet Louvan, foreclosure-trustee company employee, 207-08, 210-11). The bank offers the home for sale at public auction as required by law, typically on the steps of the county courthouse. SER291, 295 (Louvan 211, 215). Bidders must first qualify to participate in the auction by producing cashier's checks in an amount at least equal to the minimum opening bid set by the lender bank for the property. SER299 (Louvan 219). The auctioneer (also referred to in the record as the "crier") then accepts bids from qualified bidders, and the home is sold to the highest bidder. SER299-300 (Louvan 219-20).

Following the auction, the auctioneer collects a cashier's check from the winning bidder and sends it to the foreclosure trustee, along

with a copy of the "receipt of funds" setting forth the buyer's information and the amount of the winning bid. SER300-04 (Louvan 220-24). The trustee forwards the funds from the auction sale to the lender bank—often located out of state—to satisfy the debt on the property, and it also issues a deed to transfer title to the buyer. SER304-07 (Louvan 224-27). *See* SER355-58 (U.S. Trial Ex. 8) (summarizing proceeds, from sales affected by the bid-rigging conspiracy, sent out of state); Trial Tr. 229-56 (Louvan); Trial Tr. 484-96 (Sullivan). Any amount left over is distributed to junior lienholders, and then to the former homeowner. SER291-92 (Louvan 211-12).

2. Contra Costa County Bid-Rigging Conspiracy

Four of Guillory's co-conspirators (Thomas Bishop, Wesley Barta, Timothy Powers, and Charles Rock) testified, explaining their and Guillory's participation in the bid-rigging conspiracy at the Contra Costa County public foreclosure auctions. Between 2008 and 2011, the conspirators selected foreclosed properties for bid rigging "right when the sales were starting and people kind of saw who was interested in bidding and who qualified to bid," or even "during the auction" itself. SER313, 339-40 (Bishop 277, 308-09); *accord* SER178, 243, 250, 274,

313, 327 (Barta 382; Powers 503, 510; Rock 546; Bishop 277, 291). "[I]t can be any one person that's kind of in that group can start to signal to other people, would you like to try to, you know, basically bid rig on this property, then you knew that that was a goal for this property." SER314 (Bishop 278); *accord* SER178-79 (Barta 382-83).

The conspirators gave each other signals or used certain phrases to indicate they had "agreed that [they] would not then bid against the other people in the group" at the public auction; instead, one conspirator among them would place the winning public bid. SER315 (Bishop 279); *accord* SER178-79, 251, 273-75, 314-16 (Barta 382-83; Powers 511; Rock 545-47; Bishop 278-80). The purpose of the agreement "to not bid against each other" was "to buy the property lower than [the conspirators] would have otherwise purchased it for" at the public auction "if [they] had bid against each other." SER310 (Bishop 274); *accord* SER166, 243-44 (Barta 370; Powers 503-04). The effect of the agreement was that "[t]he trustee or the bank would ultimately get less money." SER244 (Powers 504).

If one of the conspirators won the public auction, the members of the group would shortly thereafter hold a private auction amongst

themselves called a "round." SER180, 243-44, 317 (Barta 384; Powers 503-04; Bishop 281). The people who participated in the round were "the people that were a part of the bid-rigging group at the public auction for that property." SER318 (Bishop 282). Not just anyone could join a round. "It was a set group from the beginning. . . . Once the property was sold at the public auction, the group that had formed there is the same group that would go to the round." SER327 (Bishop 291); *accord* SER136, 181, 239-40, 253-54 (Rock 603; Barta 385, 475-76; Powers 513-14).

During a round, the bidding would occur in a set order, with each bid reflecting the amount the bidder was willing to pay extra for the house over the public auction sale price. SER180, 184, 252, 271, 318 (Barta 384, 388; Powers 512; Rock 543; Bishop 282). The bid amount would go up in intervals, and each participant would either bid at that interval or drop out. SER184-85, 271, 276, 318 (Barta 388-89; Rock 543, 548; Bishop 282). "Bidding would go around until . . . there was one last bidder. And that's the person that would then be the winner of the property . . . ." SER318 (Bishop 282); *accord* SER180-81, 185, 271 (Barta 384-85, 389; Rock 543). The winning bid was the amount that

the round winner would pay to the losing round participants, in addition to paying the auctioneer the public auction sales price. SER180-81, 184-85, 271, 318-19, 321-22 (Barta 384-85, 388-89; Rock 543; Bishop 282-83, 285-86). Payments from that extra money were "basically payouts for being a part of the group that didn't, you know, didn't bid each other higher during the public auction." SER319 (Bishop 283); *accord* SER180, 245, 276 (Barta 384; Powers 505; Rock 548). The later a participant stayed in the round (and thus the higher he bid), the more money he would get from the winner as a payout. SER185, 245, 272 (Barta 389; Powers 505; Rock 544); *see* SER13 (Guillory 747) (agreeing that "[t]he higher you bid in the round, the bigger the cut you would get from the round"). If multiple participants dropped out at the same bidding level, they each would receive the same payoff amount. SER128-29 (Rock 581-82).

After the round, the public auction winner and the round winner would go back to the auctioneer, who would accept a check in the amount of the winning public auction bid for the property and add the round winner's name to the receipt of funds so that he would receive the

deed to the property. SER186, 278-80, 321-22 (Barta 390; Rock 550-52; Bishop 285-86).

Bishop, Barta, Powers, and Rock all testified that Guillory participated in bid rigging with them at the Contra Costa County public foreclosure auctions during the relevant time period. SER123, 128-29, 170, 172, 248, 331 (Rock 576, 581-82; Barta 374, 376; Powers 508; Bishop 300). Among them, these witnesses described 14 specific instances of Guillory's participation in the conspiracy. *See* Section I.C.3, *infra*, pp. 47-55 (discussing details of testimony). All four conspirators testified to participating in the rounds with Guillory and giving money to Guillory, or receiving money from Guillory, in payment for agreeing to stop bidding at the public auctions. *See, e.g.*, *id.*; SER 123, 128-29, 237, 269, 345 (Rock 576, 581-82; Barta 446; Powers 529; Bishop 314).[5]

[5] Near the end of the government's case in chief, the wife of Guillory's trial counsel fell ill. *See* SER138-45 (Trial Tr. 664-71). Counsel consented to finishing the government's final witness, an FBI agent whose testimony was offered to identify documents, but asked the district court to move Guillory's testimony to Monday. SER143-44 (*Id.* at 669-70). Counsel expressed concern that he would "not perform as well as I need to" if he had to call Guillory that afternoon. SER144 (*Id.* at 670). The court granted counsel's request and, shortly thereafter, trial was adjourned from Friday to Monday. SER145, 160 (*Id.* at 671,

3. Guillory's Testimony

Guillory testified on his own behalf. *See* Trial Tr. 691-814. He told the jury that he was not engaged in bid rigging, but instead was involved in a productive research-sharing partnership with other investors. ER215-18, 223-25, 226-27 (Guillory 694-97, 702-04, 714-15). He also testified that, while he "did not sell properties at a secondary auction" (that is, a round), he did buy properties at the public auction and then resell them to other buyers shortly thereafter. ER227-29 (Guillory 715-17). Guillory nonetheless admitted that he knew that a group of investors agreed not to bid against each other at the public auctions. SER27-29 (Guillory 769-71). He also admitted that he participated in rounds for properties purchased at the public auctions, round participants were bidding for the right to purchase the subject property, and the round winner would pay the other participants. SER4-6, 12-13 (Guillory 738-40, 746-47). Guillory never quite settled on a single explanation for the relationship between round participants' bids and the payments they received from the winner. At one time, he

686). On Monday, counsel did not request any additional continuance and proceeded to call Guillory. *See* ER211 (*Id.* at 690).

testified that round payments would always be in different amounts, reflecting the fact that each successive bidder at the round had to escalate the bid. ER222 (Guillory 701). Later, however, when confronted with contradictory round documentation, Guillory said he did not know how payments for the rounds were calculated after all. SER19-20 (Guillory 753-54).

Guillory admitted to receiving payments and making payments to others for the rounds. SER25, 29-30 (Guillory 767, 771-72). And he claimed to have kept records of these payments to report as expenses (for payments made) or income (for payments received) on his taxes. SER39 (Guillory 781). But when the government asked Guillory about the business files he provided in response to the government's subpoena, he could identify no such records in the relevant property files. SER30-58 (Guillory 772-800).

Finally, Guillory testified about his January 11, 2011 interview with the FBI. He was unable, however, to recall any specifics from the interview. SER14-16, 21-22, 28-29 (Guillory 748-50, 755-56, 770-71).

4. Rebuttal Witness

Michael Roldan, the FBI special agent who interviewed Guillory in January 2011, testified as the government's rebuttal witness. SER66 (Roldan 817). Agent Roldan explained how, during that interview, Guillory denied that he knew anyone who was involved in bid rigging. SER72 (Roldan 823). Guillory also told Agent Roldan that he had never participated in a round, and he denied knowing if or when rounds ever occurred. SER72-73, 75 (Roldan 823-24, 826).

E. Verdict, Sentencing, and Judgment

The jury found Guillory guilty. Jury Verdict (Dkt. No. 308). The district court held a sentencing hearing, Sept. 6, 2017 Hr'g Tr. (Dkt. No. 350), and entered judgment against Guillory on the jury's verdict, ER19-26 (Judgment). The court sentenced Guillory to 18 months of imprisonment, plus 3 years of supervised release. ER20-21 (*Id.* at 2-3). The court also imposed a fine of $20,000. ER24 (*Id.* at 6).

Guillory now brings this appeal.

STANDARDS OF REVIEW

Guillory makes three types of arguments on appeal, each governed by a different standard of review: (i) claims concerning the jury

instructions, the prosecutor's rebuttal argument, and the sufficiency of the evidence that were not preserved by a proper objection before the district court, *see* Guillory Br. 15-23, 25-28, (ii) challenges to his trial counsel's performance, *see id.* at 23-25, 28-29, and (iii) arguments concerning the court's exclusion of evidence that are based on grounds identified, but not argued, below and thus knowingly relinquished, *see id.* at 29-37.

1. When a defendant "d[oes] not preserve [an] issue by a proper objection at trial," this Court "review[s] the issue under the plain error doctrine." *United States v. Traylor*, 656 F.2d 1326, 1333 (9th Cir. 1981). The doctrine has four prongs: (i) "there must be . . . some sort of deviation from a legal rule[] that has not been intentionally relinquished or abandoned"; (ii) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (iii) "the error must have affected the appellant's substantial rights"; and (iv) if the first three prongs are met, "the court of appeals has the *discretion* to remedy the error . . . if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (emphasis in original; alterations, citations, and

quotation marks omitted). "Meeting all four prongs is difficult, as it should be." *Id.* (quotation marks omitted). This Court grants relief "for plain error only in exceptional circumstances." *United States v. Brown*, 936 F.2d 1042, 1048 (9th Cir. 1991).

2. This Court's "'general rule'" is that it does "'not review challenges to the effectiveness of defense counsel on direct appeal.'" *United States v. McGowan*, 668 F.3d 601, 605 (9th Cir. 2012) (quoting *United States v. Moreland*, 622 F.3d 1147, 1157 (9th Cir. 2010)). The exceptions to this rule are for "'extraordinary'" cases "'(1) where the record on appeal is sufficiently developed to permit determination of the issue, or (2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel.'" *Id.* (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1156 (9th Cir. 2005), *overruled on other grounds by United States v. Jacobo Castillo*, 496 F.3d 947, 949-50 (9th Cir. 2007) (en banc)).

3. Normally, this Court "review[s] the district court's ruling on a motion *in limine* . . . for an abuse of discretion," except to the extent that "the order precludes presentation of a defense," in which case it is reviewed de novo. *United States v. Ross*, 206 F.3d 896, 898-99 (9th Cir.

2000). If, however, the record reflects the defense's "'intentional relinquishment or abandonment of a known right'" with respect to the evidence admitted or excluded, any error is "extinguish[ed]," and the defense waives the right to challenge it on appeal. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

SUMMARY OF ARGUMENT

1. Guillory raises three claims of error that he did not preserve by proper objection below; therefore, they are reviewed under the plain-error standard. The first two are offered in support of Guillory's meritless argument that the jury convicted him based on the presumption that his participation in the rounds, standing alone, was illegal: (i) he contends that the court should have sua sponte instructed the jury that rounds in and of themselves were not illegal; and (ii) he misleadingly plucks two sentences from the prosecutor's rebuttal argument as evidence that the government's case rested on this so-called presumption. Guillory is wrong on both counts. The jury instructions accurately explained the elements of a criminal bid-rigging conspiracy and made clear that Guillory could be convicted only if he

knowingly joined, and participated in, the bid-rigging conspiracy. In addition, the prosecutor argued in rebuttal that the rounds were illegal because they were in furtherance of the agreement not to bid competitively at the public auctions—and this statement is entirely correct.

Guillory's third forfeited argument is that, despite the ample, corroborated evidence of Guillory's agreement to rig the bidding at the public auctions, the evidence was insufficient to sustain the verdict against him. He ignores the bulk of the adverse evidence offered at trial and asks the Court to second guess the jury's assessment of the credibility of the testimony of two witnesses. That the Court may not do; Guillory's arguments fall well short of the required showing that no reasonable juror could have convicted based on the evidence at trial.

2. Guillory also asks this Court to consider an ineffective-assistance-of-counsel claim on direct appeal. This is not the rare case for which direct review of an ineffective-assistance claim is appropriate. There is no record of the reasons for counsel's strategic decisions at trial, and Guillory's arguments concerning those reasons are purely speculative. Nor is it obvious from the face of the record that counsel's

performance was so deficient that the Court may summarily conclude that it constituted ineffective assistance. To the contrary, the objections and motions that Guillory contends his trial counsel should have made are meritless and therefore, had they been made at trial, would not have changed the result.

3. Guillory's last argument is that the district court's exclusion of evidence concerning the reasonableness of, or business justification for, the bid-rigging conspiracy was overbroad because it prevented him from showing he lacked intent to enter the bid-rigging agreement and it barred him presenting a joint-venture defense. Guillory cannot establish any error on this ground for three reasons.

First, the district court's motion in limine ruling did not do what Guillory claims it did. The government did not seek to exclude, and the district court's order did nothing to preclude, Guillory from presenting any evidence regarding his lack of criminal intent. Nor did the district court order that Guillory was barred from offering evidence that his conduct was in furtherance of a joint venture. Indeed, Guillory testified that he lacked the intent to enter a bid-rigging agreement and instead participated in the rounds as part of a productive research-sharing

partnership. The jury simply rejected this evidence, as it was entitled to do.

Second, Guillory waived this argument. The defense motion to adjudicate the case under the rule of reason expressly reserved the right to present evidence related to motive or a joint-venture defense even if the court decided to try the case under the per se rule. The district court made no ruling excluding such evidence, and Guillory testified on these matters. To the extent he had more to offer, having expressly reserved the right to do so and then chosen not to exercise it, Guillory intentionally relinquished a known right and therefore waived this claim of error. It is not reviewable on appeal.

Third, if this Court concludes that the argument is not waived, it is subject to only plain-error review because Guillory never identified the substance of the supposedly excluded evidence below. To this day, Guillory has not identified a single piece of evidence concerning his intent that he was barred from offering. And his newly minted theory that the ancillary-restraints doctrine applies fails on its face because he does not describe a legitimate joint venture, and he does not explain how bid rigging was ancillary to any such venture. Guillory thus has

not shown the supposed exclusion of evidence was error, let alone plain error.

ARGUMENT

I. GUILLORY HAS NOT IDENTIFIED PLAIN ERROR WITH RESPECT TO THE JURY INSTRUCTIONS, REBUTTAL ARGUMENT, OR SUFFICIENCY OF THE EVIDENCE

A. The District Court Correctly Instructed The Jury

Guillory recognizes that, at trial, he did not make the challenges to the jury instructions that he now raises on appeal. Guillory Br. 23. He also acknowledges that "[j]ury instructions are reviewed for plain error if," as here, "no objection is lodged." *Id.* at 16. So far, so good. But then Guillory cites *United States v. Brown*, 936 F.2d 1042, 1047 (9th Cir. 1991), for the proposition that "[q]uestions as to whether jury instructions properly state the elements of an offense are reviewed *de novo*." Guillory Br. 16. That standard is not relevant. As *Brown* states, de novo review applies only when the "[a]ppellant[] timely objected to the instruction." 936 F.2d at 1047. Because it is undisputed that "a proper objection to the[] instructions was not made below," this Court "review[s] for plain error." *Id.* at 1048.

1. The Jury Instructions Were Not Confusing

a. Guillory's first flawed argument is that the jury instructions' "attempt[] to explain what conduct constitutes a conspiracy to rig bids" was "confusing[]." Guillory Br. 20. Guillory's proof consists of two sentences from a single jury instruction explaining what it means to "willfully" join in a conspiracy. *Id.* (quoting ER143 (Final Jury Instrs., No. 31, at 18)). Therein lies the disconnect. His criticism about the instructions' explanation of the *conduct* of a bid-rigging conspiracy does not match the object of his criticism: the instruction that described the *intent* required to join the conspiracy. *See id.*

In any event, when correctly viewed "'as a whole,'" *id.* at 18 (quoting *United States v. Liu*, 538 F.3d 1078, 1088 (9th Cir. 2008)), the jury instructions accurately and completely described both the requisite conduct of a bid-rigging conspiracy and the intent necessary to join it. As for the requisite conduct, Instruction 31 defined a "conspiracy to rig bids" as "an agreement between two or more persons to eliminate, reduce, or interfere with competition for something that is to be awarded on the basis of bids." ER142 (Final Jury Instrs., No. 31, at 17). It emphasized that "[t]he agreement is the crime." *Id.* It provided

examples of the types of agreements that constituted unlawful bid-rigging conspiracies: "an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding; or any other agreement with respect to bidding that affects, limits, or avoids competition among them." *Id.* And it offered guidance concerning the underlying principle that makes bid rigging unlawful: "The aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition." *Id.*

This text accurately describes bid rigging and correctly states the law. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."); *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992) ("Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1." (brackets omitted; quoting *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989))); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) (same).

Indeed, the parties agreed to this portion of the jury instruction before the district court. *See* Stipulated & Disputed Proposed Jury Instrs., No. 18, at 23 (Dkt. No. 191) (citing, at 24, ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Case*s 54-56, 61-63 (2009)).

The jury instructions also accurately described the "subjective intent" required for criminal bid rigging. Guillory Br. 17. Guillory is correct that, "in a bid-rigging case, the government must prove the defendant's intentional agreement to rig bids." *Id.* (citing *United States v. Andreas*, 216 F.3d 645, 669 (7th Cir. 2000)); *see Brown*, 936 F.2d at 1046 (quoting *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981), for same principle). Instruction 30 stated just that: "In order to establish the offense of conspiracy to rig bids as charged in the indictment, the government must prove . . . beyond a reasonable doubt . . . that the defendant knowingly became a member of the conspiracy." ER141 (Final Jury Instrs., No. 30, at 16). This is the recognized standard of criminal intent required for a conspiracy, like a bid-rigging conspiracy, that is per se unlawful under the Sherman Act. *See, e.g.*, *Brown*, 936 F.2d at 1046 n.2 (citing *United States v. Metro. Enters., Inc.*,

728 F.2d 444, 449-50 (10th Cir. 1984), with approval, as "finding intent requirement satisfied where defendants 'knowingly joined and participated in' bid-rigging conspiracy"); *see also supra*, Statement § A, at pp. 2-5 (describing the per se rule).

Instruction 31 provided additional guidance about the intent required to join a conspiracy: "One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy." ER143 (Final Jury Instrs., No. 31, at 18). The district court drew this language directly from this Circuit's Model Criminal Jury Instructions on criminal conspiracy. *See* 9th Cir. Crim. Jury Instr. § 8.20 (2010 ed.) (seventh paragraph). This Court has approved the use of that model instruction to describe the elements of a criminal conspiracy. *See United States v. Castellanos*, 524 F. App'x 360, 361-62 (9th Cir. 2013); *United States v. Reed*, 575 F.3d 900, 926-27 (9th Cir. 2009).

Additionally, in *Brown*, this Court approved the use of analogous language instructing the jurors to determine whether acts were part of

the charged Sherman Act conspiracy for purposes of the statute of limitations: to convict, the jurors had to find "'one or more members of the conspiracy performed some act after December 12, 1983 in furtherance of the purposes or objectives of the conspiracy.'" 936 F.2d at 1048. The court rejected the defense argument that the instruction's description of acts "in furtherance of the purposes and objectives of the conspiracy" gave "the impression that a conviction could be based on an innocent act which inadvertently furthered the conspiracy." *Id.* The Court held that the instruction did not give that impression, but rather required that the act be done by one who intentionally joined the conspiracy and performed the act in furtherance of the conspiracy's purposes or objectives. *Id.* Just so here: the jury instructions do not give the impression that the jury could convict based on Guillory's innocent conduct that furthered the conspiracy only inadvertently. Guillory therefore cannot demonstrate that the jury instructions misstated the law in any way.

b. Guillory nevertheless incorrectly claims that "a juror would surely find that Mr. Guillory's participation in rounds was sufficient for conviction" under Instruction 31. Guillory Br. 20. And Guillory argues

that innocent "participation in rounds"—without the accompanying agreement to rig bids at the public auction—is "consistent with lawful competition." *Id.* at 21. Guillory's description of the jury instructions is selective and incorrect. The very language that Guillory quotes shows the jury could not have convicted based on his inadvertent advancement of the conspiracy, and the jury instructions as a whole made this point repeatedly.

Specifically, Instruction 31 stated that the government had to prove Guillory's "willful[] participati[on] in the unlawful plan." ER143 (Final Jury Instrs., No. 31, at 18). By its express terms, the instruction required Guillory's participation "in the unlawful plan" to be "willful[]," meaning that he had to enter the plan knowing those aspects of the plan that made it unlawful. *See id.* The very next sentence of the instruction, which Guillory does not reference, drives this point home, negating the inference he suggests a juror might draw, by explicitly instructing that "one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator." *Id.*

The jury instructions also emphasized that Guillory had to possess "the intent to advance or further some object or purpose of the conspiracy." *Id.* And the instructions made clear when defining a bid-rigging conspiracy that the object or purpose of the agreement must be "to eliminate, reduce, or interfere with competition for something that is to be awarded on the basis of bids." ER142 (*Id.* at 17). Because "[t]he agreement is the crime," the instructions clarified, the key question for the jury on this issue was whether "the defendant entered into an agreement to rig bids." *Id.*; *accord id.* (explaining the jury must decide "whether [the conspirators] actually entered into an agreement to rig bids"); ER143 (*Id.* at 18) (similar).

In short, the jury instructions completely and accurately informed the jury that, in order to convict, it had to find that Guillory agreed to rig bids at the Contra Costa County public foreclosure auctions. Thus, contrary to Guillory's argument, the district court left no room for confusion about "what constitutes the offense" charged and proved in this case. Guillory Br. 19.

2. No Additional Instruction Was Necessary

a. Guillory's second erroneous argument is that the district court plainly erred when the court failed to sua sponte instruct the jury specifically and expressly that it could consider Guillory's participation in the rounds as evidence of his participation in the bid-rigging conspiracy only if it found that the rounds were in furtherance of the bid-rigging conspiracy. *Id.* at 20-21. For the reasons just discussed, this argument is without merit because the jury instructions already informed the jury that it could convict only if it found Guillory agreed to rig bids at the public auctions. No additional clarification was necessary.

b. Guillory nonetheless contends that *United States v. Alston*, 974 F.2d 1206 (9th Cir. 1992), supports his argument, but his reliance on that case is misplaced. In *Alston*, Guillory claims, the Court found that the jury instructions "may not have adequately guided the jury regarding th[e] required [intent] element." Guillory Br. 19; *see id.* at 18-19. Guillory's description is not accurate; this Court's decision stands for the opposite proposition.

In *Alston*, three defendants were convicted of price fixing. 974 F.2d at 1208. The district court granted judgments of acquittal notwithstanding the verdict to two defendants and granted a new trial to the third defendant. *Id.* Guillory states that this Court "affirmed" the district court's judgment, Guillory Br. 19, but that is not entirely correct. The Court affirmed only the district court's order of a new trial for one defendant; it vacated the district court's judgment of acquittal for the two other defendants. *Alston*, 974 F.2d at 1215.

This distinction matters because the Court's vacatur of the judgment of acquittal was based in part on the district court's erroneous determination that its jury instructions were legally deficient. *Id.* at 1209-10. This Court held that the "jury instructions accurately stated the law of conspiracy and price fixing" and therefore "cannot serve as the basis for acquittal." *Id.* at 1210. The district judge's assessment that he had erred because "he could have made clearer" to the jury that the per se rule did not require the jury to convict was thus *rejected* by this Court. *Id.*

The Court's affirmance in *Alston* of the district court's order of a new trial for the other defendant, by contrast, was based on different

grounds: the district court's determination "that the evidence weighed heavily against the verdict." *Id.* at 1213. And "[a] district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal." *Id.* at 1211.

To be sure, when discussing the potential retrial of all three defendants, the Court "underscore[d] the importance of giving the jury sufficient useful guidance in sorting the evidence before it," *id.* at 1213, and it opined that courts should be clear about what conduct "would escape the per se rule and might be perfectly legal under the rule of reason," *id.* at 1214. But the Court did not identify any legal error on the district court's part that would justify relief from a verdict. *See id.* at 1213-15. To the contrary, it reiterated that "[t]he indictment charges, and the district court correctly instructed the jury to find, that the defendants *knowingly conspired* to fix and raise co-payment fees." *Id.* at 1213 (emphasis in original).

In this case, of course, the district court did not order a new trial. The more generous appellate review for a new-trial order thus does not apply. Rather, like in *Alston*, the district court correctly instructed the jury that it had to find that the defendant knowingly entered the

charged conspiracy. *See id.*; ER141 (Final Jury Instrs., No. 30, at 16). Because the challenged jury instructions were "'technically and legally correct,'" 974 F.2d at 1210, *Alston* provides no basis to reverse the judgment in this case.

c. Guillory attempts to bolster his jury-instruction argument by overstating the district court's decision to grant him bail pending appeal. *See* Guillory Br. 4, 13, 20. He quotes only part of the court's reasoning and claims that the court ruled out of concern that the jury in fact was confused about the legal significance of the rounds. *Id.* at 20 (quoting ER274 (Oct. 18, 2017 Hr'g Tr. 22)). The end of the court's statement, which Guillory omitted, essentially disclaimed any such concern. The court began, as Guillory quotes, "I have some concern with about the fact that there might be some basis for an argument that the jury was confused about the legal significance of the rounds," but then the court continued, "although I wasn't and I don't really think our jury was." ER274 (Oct. 18, 2017 Hr'g Tr. 22).

Regardless, the district court was not ruling on the merits of the issue, but found only that Guillory had satisfied the very low "fairly debatable" standard for bail pending appeal. ER277-78 (*Id.* at 25-26).

And to the extent the court opined on the merits of Guillory's claim, it expressed deep skepticism. The court stated that the jury "clearly . . . understood everything," and "I don't think that [Guillory is] going to be able to meet the plain error standard" on appeal. *Id.* The court was correct.

d. Lastly, Guillory's reliance on filings from the separate prosecution of Victor Marr (Victor), for which he asks the Court to take judicial notice, is misplaced. Guillory's Mot. for Judicial Notice 1-3. Victor was indicted for a bid-rigging conspiracy at public real-estate foreclosure auctions in a different county (Alameda). *See Marr* Indictment ¶¶ 5-13, *United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.) (*Marr* Dkt. No. 1). Guillory asks the Court to take into consideration that, in that separately tried case, (i) Victor admitted he participated in rounds for properties purchased at public auction, (ii) the district court gave the clarifying instruction about rounds that Guillory argues the court should have given sua sponte in this case, and (iii) the jury found Victor not guilty of bid rigging. *See* Guillory's Mot. for Judicial Notice 1-3. Guillory then speculates that, had the court given the same

instruction in his case, he "almost certainly" would have been found not guilty. Guillory Br. 25.

This Court "'generally will not consider facts outside the record developed before the district court,'" but it "'may take notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue.'" *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (quoting *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)); *see Santa Monica Nativity Scenes Comm. v. Santa Monica*, 784 F.3d 1286, 1298 n.6 (9th Cir. 2015) ("deny[ing] . . . requests for judicial notice on the grounds that the documents to be noticed are irrelevant"). Guillory's request does not meet this standard.

Guillory does not establish that the Victor proceedings have a "'direct relation'" to the issues in this case. *Black*, 482 F.3d at 1041. Guillory cites only one supposedly overlapping fact between the two cases: Victor, like Guillory, admitted to participating in rounds. But, unlike Guillory, Victor presented evidence and argument that he "never acted in any way, shape, or form that proves that he was in or even knew about any conspiracy"; "[t]here was never a check written out to

Victor independently" as any kind of payoff; and he "never made any of his own decisions or acted independently" from his employer (and father), Michael Marr, but instead "was essentially a note-taker." *Marr* Trial Tr. 879, 884, 887, 890 (Def. Closing), *United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.) (*Marr* Dkt. No. 331). The isolated, allegedly common fact that Guillory and Victor both participated in rounds thus is not enough to show that Victor's conduct was comparable to Guillory's—a logical prerequisite to any finding that the result of Victor's trial informs what could have been the result of Guillory's trial had the district court given the additional clarifying instruction on rounds.

Moreover, even if this Court were to grant the requested judicial notice, the Victor proceedings do not help Guillory. As discussed above, the jury instructions in this case made clear that Guillory could be convicted only if he knowingly agreed to rig bids at the public auctions, and Guillory's unknowing participation in the rounds was insufficient to sustain the conviction. *See* Section I.A.1, *supra*, pp. 26-32. "There is a strong presumption that jurors follow a court's instructions." *United States v. Johnson*, 767 F.3d 815, 824 (9th Cir. 2014). The different

result—based on different evidence of a different conspiracy—does not demonstrate that the jury in this case ignored the court's instructions. The presumption thus stands undisturbed by Guillory's speculation that he would have been acquitted if the court had given the rounds instruction it gave in the Victor trial.

B. The Prosecutor Did Not Engage In Misconduct In Her Rebuttal Argument

Guillory's next argument also lacks merit and, like the first argument, he did not preserve it by objection below. Guillory claims that "the government misled the jury on the applicable standard necessary for a finding of guilt." Guillory Br. 22. He does not, however, identify a purportedly "misleading" legal standard or any legal standard at all that the prosecutor described; instead, he points to a snippet from the rebuttal argument wherein the prosecutor said: "Mr. Guillory admitted he participated in rounds. And rounds, rounds are illegal." *Id.* (quoting ER236 (Trial Tr. 880)). But Guillory omits the important qualifier about the rounds that the prosecutor offered immediately following the challenged language: "Rounds exist because there was an agreement to stop bidding at the public auction. . . . That's why you have a round, because you had an agreement to stop bidding." ER236

(Trial Tr. 880). The prosecutor thus argued, correctly, that the rounds were illegal *because* they were part of the agreement to rig the public-auction bids. *See id.*; *cf. Hyde v. United States*, 225 U.S. 347, 360 (1912) ("acts innocent, indeed, of themselves" take on their "criminal taint from the purpose for which they were done"). The district court stated as much during its hearing on Guillory's bail motion when it said to Guillory's counsel: "I don't think that the snippets you've pointed out are sufficient to persuade me that the government argued that the rounds in and of themselves were illegal . . . ." ER274 (Oct. 18, 2017 Hr'g Tr. 22). "Consequently, the single, brief statement highlighted by [Guillory] is neither improper nor did it affect his substantial rights." *United States v. Moreland*, 622 F.3d 1147, 1163 (9th Cir. 2010).

Guillory's prosecutorial-misconduct argument is additionally flawed because he "ignores the fact that the prosecutor spent a substantial amount of time reviewing the legal elements of the charges and discussing which facts the jury needed to find in order to convict" him. *Id.* The prosecutor described in her closing argument "the three things the government needs to prove": "first, that a bid-rigging conspiracy existed"; "second, the defendant knowingly joined the

conspiracy;" and "third, that the conspiracy occurred in the flow of interstate commerce." SER83 (Trial Tr. 843). The prosecutor then walked through the evidence that supported each of these elements. SER83-98 (*Id.* at 843-58). She emphasized that "the agreement is the crime. That means that when they [the conspirators] agreed not to bid against each other, that was the conspiracy." SER84 (*Id.* at 844); *accord* SER78-91, 97-98 (*Id.* at 838-51, 857-58). And in her rebuttal, the prosecutor reiterated that "the agreement to stop bidding at the public auction, that's the crime," "[a]nd the[] rounds . . . are how people got paid for that agreement." SER107 (*Id.* at 886); *accord* SER100-02, 104-09, 111-13, 116 (*Id.* at 879-81, 883-88, 890-92, 895). "In doing so, the prosecutor accurately explained exactly what the government had to prove to find [Guillory] guilty." *Moreland*, 622 F.3d at 1163. There was no prosecutorial misconduct.

C. The Evidence Overwhelmingly Supports The Verdict

The third forfeited challenge that Guillory raises on appeal is that the evidence is insufficient to support the verdict. *See* Guillory Br. 25-28. Guillory's argument fails on the law and on the facts.

1. The Law Does Not Distinguish Between Direct And Circumstantial Evidence

Guillory grounds his sufficiency argument in a nonexistent rule that circumstantial evidence is only "sometimes sufficient to sustain a conviction," and "circumstantial evidence that merely shows the *modus operandi* but provides no direct evidence for an essential element of the crime is insufficient." *Id.* at 27. That contention is incorrect. It is well established that "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quotation marks omitted); *accord United States v. Stauffer*, 922 F.2d 508, 514 (9th Cir. 1990). Thus, "[t]he government may rely on circumstantial evidence and inferences drawn from that evidence in order to prove the defendant's knowing connection to the conspiracy." *United States v. Grasso*, 724 F.3d 1077, 1086 (9th Cir. 2013); *accord United States v. Grovo*, 826 F.3d 1207, 1216 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1112 (2017); ER130 (Final Jury Instrs., No. 21, at 7). Indeed, "[a] conviction resting solely upon circumstantial evidence is not an innovation. It is, we think, well established that the proof and evidence in an anti-trust conspiracy case

is, in most cases, circumstantial." *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 494 (9th Cir. 1952).

Guillory incorrectly argues that *United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015), shows that this Court views circumstantial evidence with greater skepticism than direct evidence. *See* Guillory Br. 27. *Katakis* affirmed the district court's judgment of acquittal on an obstruction-of-justice charge on the ground that "there was no evidence, direct or circumstantial," that the defendant had in fact "double deleted" (that is, permanently deleted) incriminating emails as charged. 800 F.3d at 1028. In so holding, this Court made no distinction between direct and circumstantial evidence. *See id.* The Court instead concluded the government had impermissibly invited the jury to "engage in mere speculation on critical elements of proof" when it "presented *no theory at all* to explain to the jury how the emails were destroyed, a fact that was critical to the chain of inferences required to find beyond a reasonable doubt that [the defendant] double deleted the emails." *Id.* (emphasis in original).

This case is not analogous to *Katakis*. Guillory recognizes that there was some evidence against him; he simply dismisses it as either

"speculation" or "circumstantial." Guillory Br. 26, 27-28. So unlike in *Katakis*, where the Court concluded that the government asked the jury to speculate in the absence of any evidence whatsoever, 800 F.3d at 1024-28, here Guillory argues that the government's evidence is unreliable, *see* Guillory Br. 26-28. Indeed, *Katakis* disproves his claim that evidence "from two witnesses who testified in the hopes of reduced sentences in their own cases" is insufficient, Guillory Br. 26, by describing as "'well established'" the principle that "'the uncorroborated testimony of a single witness may be sufficient to sustain a conviction.'" 800 F.3d at 1028 (quoting *United States v. Dodge*, 538 F.2d 770, 783 (8th Cir. 1976)); *see United States v. Escalante*, 637 F.2d 1197, 1200 (9th Cir. 1980) ("even the uncorroborated testimony of a single accomplice is sufficient by itself to sustain a conviction, if the testimony is not incredible or unsubstantial on its face" (quotation marks omitted)).

2. This Court Gives Great Deference To A Jury's Credibility Assessments And Verdict

Guillory's sufficiency argument presses two additional points that are contrary to this Court's precedents. He argues that "there was no reliable direct evidence that Mr. Guillory agreed to rig bids." Guillory Br. 28. But to accept this argument, the Court would have to engage in

an impermissible "usurp[ation of] 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." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). The Court "cannot second-guess the jury's credibility assessments," however; "'the assessment of the credibility of witnesses is generally beyond the scope of review.'" *Id.* at 1170 (quoting *Schlup v. Delo*, 513 U.S. 298, 330 (1995)).

Guillory's second legally erroneous argument is that the Court should reverse because the government supposedly "failed to rule out the possibility of lawful conduct and thus did not prove Mr. Guillory's subjective intent to join a bid-rigging conspiracy." Guillory Br. 28; *see id.* at 33 (claiming the government's "evidence must exclude the possibility of lawful alternative explanations"). But this Court rejected that very standard for reviewing sufficiency challenges in its 2010 en banc decision, *Nevils*, 598 F.3d 1158.

Nevils "overrule[d]" the Circuit's sufficiency-of-the-evidence decisions that had "construed evidence in a manner favoring innocence rather than in a manner favoring the prosecution, and required reversal

when such a construction was not 'any less likely than the incriminating explanation advanced by the government.'" *Id.* at 1167 (quoting, and overruling, *United States v. Vasquez-Chan*, 978 F.2d 546, 551 (9th Cir. 1992)). Under Supreme Court precedent, courts of appeals must "'view[] the evidence in the light most favorable to the prosecution.'" *Id.* at 1163-64 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This means that, contrary to Guillory's contention, "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.'" *Id.* at 1164 (quoting *Jackson*, 443 U.S. at 326). *Contra* Guillory Br. 28, 33.

3. The Evidence Established Guillory's Guilt

a. Emptied of his erroneous discussion of *Katakis* and the governing legal standards, Guillory's sufficiency-of-the-evidence challenge is left hollow. Without any explanation or citation to the record or applicable law, Guillory declares that the testimony from Thomas Bishop and Charles Rock was mere "speculation." Guillory Br. 26. Such a "cursory assertion" does not meet this Court's standard for presenting issues on appeal. *United States v. Hernandez*, 357 F.

App'x 52, 53 (9th Cir. 2009). The Court "'review[s] only issues which are argued specifically and distinctly in a party's opening brief.'" *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). "Issues raised in a brief that are not supported by argument are deemed abandoned," including those that are "referred to in the appellant's statement of the case but not discussed in the body of the opening brief." *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996).

In any event, Guillory does not claim that the district court erred in admitting the Bishop and Rock testimony. (Guillory abandons the admissibility arguments that he raised in his motion for bail pending appeal, which the government's opposition showed were completely meritless. *See* Guillory Mot. 7-9 (Dkt. No. 347); U.S. Opp. 6-7 (Dkt. No. 351).) The assessment of the credibility of those witnesses and the weighing of their testimony thus fell to the jury—and this Court will not second guess those assessments. *See Nevils*, 598 F.3d at 1170.

b. Next, relying heavily on citations to his own testimony, Guillory conclusorily asserts that "the circumstantial evidence . . . that relates to Mr. Guillory contradicts the alleged conspiracy the

government presents." Guillory Br. 28. But Guillory does not explain the contradiction; his citations are accompanied only by parentheticals that do not establish any factual contradictions. *See id.* And the jury had every reason to disbelieve Guillory's innocent explanation for his conduct after hearing the rebuttal testimony from Agent Roldan that, when he interviewed Guillory in January 2011, Guillory lied about knowing anyone involved in bid rigging and told the agent that he had never participated in a round. SER72-73 (Roldan 823-24). These "false exculpatory statements" show Guillory's "consciousness of guilt." *United States v. Newman*, 6 F.3d 623, 628 (9th Cir. 1993). Once again, Guillory neither provides the specific argument necessary to present the claim on appeal nor identifies an issue, outside the exclusive province of the jury, which this Court may resolve.

c. Finally, the record demonstrates that Guillory's assessment of the evidence is wrong. The evidence of his guilt was overwhelming. Among other things, four of Guillory's co-conspirators testified against him and detailed 14 specific instances of Guillory's bid-rigging activity. They also identified records, many created at the time of the bid rigging by the co-conspirators, corroborating their testimony.

Thomas Bishop, for example, described the November 25, 2009 public auction for 90 Pleasant Valley, during which he "participated in bid rigging" with Guillory and "specifically paid him money from a property that I purchased and we had a round on." SER331 (Bishop 300). Bishop bid for the property because he "did all the research on [his] own and wanted to buy it to move into it." SER334 (Bishop 303). The opening bid was $229,900. SER335 (Bishop 304). Others were also publicly bidding for the property, including Guillory, who submitted a high bid of $280,000. *Id.*

As the public bidding got higher, another member of the conspiracy, John "Mike" Galloway, approached Bishop and told him: "Glenn [Guillory] and I we'll basically stop bidding" so they would "not bid each other up" and instead could "do a round" for the property. SER337 (Bishop 306); *see* SER348 (Bishop 323). Bishop acquiesced, and "[a]fter our agreement had been made, they [Guillory and Galloway] stopped bidding." SER338 (Bishop 307); *see* SER339, 351 (Bishop 308, 310). Bishop then submitted the winning $281,700 bid at the public auction. SER338, 341, 343 (Bishop 307, 310, 312); *see* SER367-68 (U.S. Trial Ex. 566) (auctioneer's "bid log" for this public auction).

Bishop, Guillory, and Galloway conducted a round for the Pleasant Valley property immediately after the public auction. SER342 (Bishop 311). The bidding went up in the usual $200 increments, and Bishop eventually won the round with a high bid of $6,000. *Id.* He paid Guillory "a little bit over 3,000" dollars in cash. SER344 (Bishop 313). Bishop explained why he gave money to Guillory: "That was part of our agreement was that as he [Guillory] stopped bidding there at the public auction, and then we did our round, so to follow through, I owed him money from the round." SER345 (Bishop 314).

Wesley Barta also offered testimony against Guillory—a fact Guillory's brief nowhere acknowledges. During the relevant time, Barta was employed by Community Fund, the company owned by Michael Marr—who was separately indicted, charged, and convicted for the same bid-rigging conspiracy and a similar one in Alameda County. SER162 (Barta 366); *see United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.). Barta testified that he too witnessed Guillory (or his son, Antonio Guillory, acting on Guillory's behalf) participate in rigging the bids for at least nine properties publicly auctioned in Contra Costa County (848 Ladera Corte, 21 West Lake Drive, 1350 Traynor Road, 2118 Ramona

Drive, 2104 St. Andrews Court, 4007 Carla Court, 1814 Holland Drive, 1113 Meadow Lane #53, and 2304 Cambridge Drive). SER170, 194-224, 351-53 (Barta 374, 398-428; U.S. Trial Ex. 4 (summary of round records)); *see* SER359 (U.S. Trial Ex. 70 (summary of round payments owed between Guillory and Marr)).

For instance, Barta purchased the 21 West Lake Drive property on behalf of his employer (Marr) on September 16, 2009. SER201, 366 (Barta 405; U.S. Trial Ex. 471 (receipt of funds)). Guillory was one of the people bidding against Barta at the public auction until Barta and Marr "reached an agreement with Glenn that he would be part of the round if he stopped bidding at the public auction." SER204 (Barta 408); *see* SER202, 364-65 (Barta 406; U.S. Trial Ex. 470 (bid log)). During the round, Marr separately agreed to pay Guillory more than he would otherwise be owed for his participation—$2,000—"[b]ecause [Marr] just wanted [Guillory] to stop bidding against him in this case on the round so he could just take the house. So they reached an agreement." SER200, 362 (Barta 404; U.S. Trial Ex. 160 (Barta's notes, or "round sheet," on the round). Barta won the round with a high bid of $1,000. SER198, 200 (Barta 402, 404).

On October 3, 2009, Community Fund paid Guillory's company, Integrity Investment Group, $3,038 by check for Guillory's participation in rigging the bids for 21 West Lake Drive and another property, 4007 Carla Court. SER212-13, 231-35, 360-61 (Barta 416-17, 440-44; U.S. Trial Ex. 79 (copy of check)); *see* SER350 (Trial Tr. 335) (stipulation identifying the companies for which Guillory acting as an agent); SER20-21 (Guillory 754-55) (Guillory identifies check). Barta confirmed that Guillory received the check "[b]ecause he agreed not to bid against Michael Marr at the public auction." SER237 (Barta 446).

Timothy Powers testified that he reached agreement with Guillory to stop bidding at the public auctions for three properties that Powers ultimately purchased (2543 Hamilton Avenue, 732 Krisview Court, 1576 Pinewood Place). SER257-69, 354 (Powers 517-29; U.S. Trial Ex. 5 (summary of round notes)). In addition, Powers recalled at least one time when Guillory paid him not to bid by giving him "cash that was in a paper bag." SER269 (Powers 529). Guillory ignores Powers's testimony entirely in his brief.

Finally, Charles Rock described Guillory's participation in the bid rigging for 5346 Summerfield. Rock, Guillory, Galloway, and Douglas

Ditmer were at the public auction for that property on November 2, 2009. SER119-121, 122 (Rock 572-74, 591). Rock observed Guillory start the bid-qualification process with the auctioneer. SER121 (Rock 574). But Guillory withdrew his registration after Galloway went over to speak with him, and Guillory's name is crossed off the bid log for the property. SER121, 134, 369 (Rock 574, 601; U.S. Trial Ex. 722 (bid log)). Galloway approached Rock also and told him the others were interested in doing a round for the property. SER120-21 (Rock 573-74). Rock agreed, and he placed the sole bid of $209,900.01 at the public auction, without competition from any other bidders. *Id.*

After the auction was over, Rock, Galloway, Guillory, and Ditmer held a round for the property. SER121-22 (Rock 574-75). Rock won the property with a winning bid of $12,000. *Id.* He paid $4,000 each to Galloway, Guillory, and Ditmer, for agreeing not to bid against him at the public auction. SER123-30 (Rock 576-83). They were all paid the same amount because they all dropped out of the round at the same bidding level. SER128-29 (Rock 581-82). Rock prepared a $4,000 check for Guillory, who initially refused it, telling Rock he did not want any paper trail. SER130 (Rock 583). Eventually, however, Guillory

accepted the check. SER128-30, 363 (Rock 581-83; U.S. Trial Ex. 240 (copy of check)).

The four conspirators' testimony was consistent and corroborated by documentary evidence. It described Guillory's bid-rigging activity on multiple occasions. And it was more than sufficient to sustain the verdict against Guillory.

D. Guillory's Forfeited Arguments Satisfy None Of The Plain-Error Standard's Four Prongs

The foregoing shows that Guillory fails the plain-error standard at the first prong. He has not identified any "error" whatsoever in the proceedings below. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Necessarily, then, Guillory has not met the second prong either because he cannot identify an error that is "clear or obvious, rather than subject to reasonable dispute." *Id.*

Guillory fails the final two prongs as well. To meet the third prong, "the burden is on the defendant to demonstrate that the error affected his substantial rights." *United States v. Jimenez-Dominguez*, 296 F.3d 863, 866 (9th Cir. 2002). In other words, Guillory must show that the purported error was "prejudicial, i.e., the error 'must have affected the outcome of the district court proceedings.'" *Id.* at 867

(quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). He cannot rely on conclusory assertions; he must "make a 'specific showing of prejudice.'" *Id.* (quoting *Olano*, 507 U.S. at 735).

Guillory does not satisfy "this 'heavy burden.'" *Id.* at 866-67 (quoting *United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000)). As for his first two forfeited claims of error (jury instructions and prosecutorial misconduct), he simply declares that "[i]t is likely that the jury misapplied the [court's] instructions," and he would have "almost certainly" been acquitted if the court had given the specific rounds instruction it gave in the Victor Marr trial. Guillory Br. 22, 25. His unsupported say-so does not amount to "a 'specific showing of prejudice.'" *Jimenez-Dominguez*, 296 F.3d at 867 (quoting *Olano*, 507 U.S. at 735). With respect to his third forfeited claim (sufficiency of the evidence), Guillory argues that "no rational trier of fact could have found that Mr. Guillory was guilty of bid rigging beyond a reasonable doubt." Guillory Br. 28. But as explained above, Guillory's argument is belied by the record, which more than sufficiently supports the verdict against him. *See* Section I.C.3, *supra*, pp. 47-55. His substantial rights were not affected by any error.

Lastly, Guillory does not satisfy the fourth prong of the plain-error standard because none of his claimed errors "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Jimenez-Dominguez*, 296 F.3d at 867 (quoting *Sager*, 227 F.3d at 1145). Guillory makes only one fairness-related argument: that the government's purported misconduct in its rebuttal "misled the jury" and "materially affected the fairness of the trial." Guillory Br. 22. As this brief has already explained, however, nothing the prosecutor said in her rebuttal was incorrect or misleading. Moreover, even if the rebuttal had been less than clear, the district court's instructions correctly informed the jury of the applicable law and told the jury that "arguments by the lawyers are not evidence." ER129 (Final Jury Instrs., No. 20, at 6). Guillory has not overcome the "strong presumption" that the jurors followed the court's instructions. *Johnson*, 767 F.3d at 824. In short, there was no plain error.

II. GUILLORY'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM IS BOTH PREMATURE AND MERITLESS

The Court should deny Guillory's request that it consider, on direct appeal, whether his trial counsel was ineffective in failing to preserve his forfeited claims before the district court. *See* Guillory

Br. 17, 23-25, 26, 28-29. "As a 'general rule,'" this Court "'do[es] not review challenges to the effectiveness of defense counsel on direct appeal.'" *United States v. McGowan*, 668 F.3d 601, 605 (9th Cir. 2012) (quoting *Moreland*, 622 F.3d at 1157). Neither of the "'extraordinary exceptions'" to the general rule applies here. *Id.* (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1156 (9th Cir. 2005), *overruled on other grounds by United States v. Jacobo Castillo*, 496 F.3d 947, 949-50 (9th Cir. 2007) (en banc)).

1. The first exception does not apply because the record on appeal is not "'sufficiently developed to permit determination of the issue.'" *Id.* (quoting *Jeronimo*, 398 F.3d at 1156). Guillory declares that his trial counsel's failure to object to the government's rebuttal and to request a clarifying jury instruction on the rounds constitutes deficient performance. Guillory Br. 24. Guillory simply asserts that trial counsel's failure was "based upon legal error rather than a trial strategy." *Id.* The same is true for Guillory's attack on his trial counsel's failure to move for judgment of acquittal. *See id.* at 28.

Without citing any record or authority, Guillory insists that "any competent defense attorney would have moved for acquittal." *Id.*[6]

These arguments are "little more than generalized assertions of incompetency." *United States v. Laughlin*, 933 F.2d 786, 789 (9th Cir. 1991). Guillory's "[f]ormer defense counsel has had no opportunity to explain his actions." *Id.* at 789; *accord McGowan*, 668 F.3d at 606; *Moreland*, 622 F.3d at 1157. And Guillory has not yet "established any foundation for demonstrating that the alleged errors actually prejudiced the outcome" of his trial. *Laughlin*, 933 F.2d at 789. There is, in short, no developed "record as to what counsel did, why it was done, and what, if any, prejudice resulted." *McGowan*, 668 F.3d at 605 (quoting *Laughlin*, 933 F.2d at 788-89). Adjudication at this time would be premature.

2. The second exception does not apply because the existing record does not show that "'the defendant's legal representation was so

[6] Guillory exaggerates his trial counsel's stated concerns about representing Guillory "through the close of the government's case." Guillory Br. 28; *see id.* at 29. Following the illness of his wife, counsel asked only that Guillory's testimony be postponed from Friday to Monday, and that request was granted. *See* Statement § D.2, at pp. 15-16 n.5, *supra*.

inadequate as obviously to deny him his sixth amendment right to counsel,'" such that "'the trial court's failure to take notice sua sponte of the problem' amounted to plain error." *Laughlin*, 933 F.2d at 789 n.1 (quoting *United States v. Wagner*, 834 F.2d 1474, 1482 (9th Cir. 1987)). In fact, the record shows the contrary.

Courts evaluate ineffective-assistance claims using the two-step inquiry set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first question evaluates whether counsel's performance is deficient; that is, "whether counsel's conduct, seen objectively, was out of 'the wide range of professionally competent assistance.'" *Wilson v. Henry*, 185 F.3d 986, 988 (9th Cir. 1999) (quoting *Strickland*, 466 U.S. at 690). The second question evaluates the existence of any prejudice to the defense by asking "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). When a defendant's claim of prejudice is based on trial counsel's failure to make a motion or objection, the defendant must show that "(1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable

that there would have been an outcome more favorable to him." *Id.* at 990. Courts "must strongly presume that counsel's conduct falls within a wide range of reasonable professional assistance," but courts "need not decide whether counsel's performance was deficient before determining whether any prejudice was suffered by the defendant because of the alleged errors." *Id.* at 988.

Guillory's claims do not meet the *Strickland* standard. As explained above, the jury instructions were complete, accurate, and clear; the prosecutor did not misstate the law or mislead the jury in her rebuttal argument; and the evidence amply supported the verdict. *See* Section I.A-C, *supra*, pp. 25-55. Any motion or objection on these grounds would have lacked merit, and "[f]ailure to raise a meritless argument does not constitute ineffective assistance." *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985). In addition, because any such motion or objection "almost certainly would have been denied, no prejudice accrued to [Guillory] from his counsel's failure to make a motion [or objection] on these grounds." *Wilson*, 185 F.3d at 992.

Likewise, trial counsel's failure to request a jury instruction specifically explaining the relationship between the rounds and the

overall bid-rigging conspiracy was not ineffective assistance of counsel. Again, as explained above, the jury instructions already offered that guidance, so there was no additional clarification needed. *See* Section I.A, *supra*, pp. 25-40. And because the jury is presumed to have followed these correct and complete instructions, there is no "'reasonable probability that, but for counsel's [failure to request the additional instruction], the result of the proceeding would have been different.'" *Wilson*, 185 F.3d at 988 (quoting *Strickland*, 466 U.S. at 694). The record thus fails to establish that Guillory received ineffective assistance of counsel.

III. THE CHALLENGED RULING CORRECTLY EXCLUDED ONLY IRRELEVANT REASONABLENESS EVIDENCE

A. The District Court's Order Did Not Preclude Guillory From Offering Any Relevant Defense

Guillory's final claim of error is that the district court prevented him from mounting a complete defense, *see* Guillory Br. 29-37, but the court did no such thing. The district court's order simply granted the government's motion "to prohibit defendant from introducing evidence or argument that the bid-rigging agreements were reasonable." ER47 (Mar. 17, 2017 Order 1).

The scope of Guillory's argument is important. Guillory does not contend that he should have been allowed to present evidence or argue that bid rigging is reasonable; his claim of error is instead premised on his contention that the order "did more than exclude Mr. Guillory from arguing that bid rigging is reasonable." Guillory Br. 30. Guillory is unable, however, to cite a single line from the order precluding him from offering evidence "on the issue of his intent to enter into a bid-rigging agreement," *id.* at 31, or "the procompetitive benefits and business justifications for a broader joint venture," *id.* at 32. Rather, as the district court explained during the hearing on Guillory's motion for bail pending appeal, its "ruling went to bid-rigging" and "simply precluded [Guillory] from putting on evidence that the bid-rigging agreements were reasonable." ER259 (Oct. 18, 2017 Hr'g Tr. 7). Guillory "was not precluded from putting on evidence that he didn't participate in the rounds or that the rounds had some other purpose other than being a way in which the bid-rigging was demonstrated." ER259-60 (*Id.* at 7-8).

In *United States v. Ross*, the defendant made an argument almost identical to the one Guillory makes: that a district court's ruling on a

motion in limine was "'over-broad'" and "precluded her from presenting evidence" relevant to her defense. 206 F.3d 896, 899 (9th Cir. 2000). The Court disagreed because "[t]he order, by its terms, does not specifically exclude such evidence." *Id.* The same is true here; the challenged district court order on its face does not do what Guillory claims it did. Accordingly, this Court should reach the same conclusion that it reached in *Ross*: "there was no error . . . in the scope of the district court's order granting the government's motion *in limine*." *Id.*

Guillory's trial presentation reflects that he understood the limited scope of the district court's order. Guillory offered testimony that he did not intend to join the bid-rigging conspiracy, SER25, 61-63 (Guillory 767, 812-14), but was instead engaged in productive research-sharing investment partnerships, ER215-18, 223-25, 226-27 (Guillory 694-97, 702-04, 714-15); SER16-17, 39 (Guillory 750-51, 781). The district court confirmed this, stating that Guillory's trial counsel "did argue and [Guillory] did testify that he did not participate in the agreements to rig bids and that there were other justifications for the rounds." ER271 (Oct. 18, 2017 Hr'g Tr. 19). "That evidence wasn't

precluded. In fact, it was presented . . . ." *Id.* Guillory's argument is thus contradicted by his evidence and argument at trial.

B. Guillory Has Waived Any Argument Concerning The Purportedly Missing Evidence

To the extent Guillory had additional evidence, his failure to offer it was not the district court's error, but a waiver of his supposed right to do so. His waiver is demonstrated by "evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right." *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). Namely, the defense motion to adjudicate the case under the rule of reason expressly stated that it was "submitted without prejudice to defendant[s'] right to argue that evidence relating to motive, the pro-competitive nature of the conduct at issue, or other facts that may be excluded under a strict per se analysis" could instead be offered to support "some other defense, such as whether the parties entered into a joint venture." SER423 (Defs.' Mot. 2 n.1 (Dkt. No. 106)).

This express reservation of rights reflects Guillory's understanding that evidence concerning "motive" or "joint venture" could be admissible even if the case was adjudicated under the per se rule (as it was). *See id.* It shows that "the defendant considered the

controlling law, . . . and, in spite of being aware of the applicable law," elected not to offer the evidence Guillory now claims was precluded. *Perez*, 116 F.3d at 845. This is waiver; Guillory's argument is not reviewable on appeal.

C. There Was No Plainly Erroneous Exclusion Of Evidence

If this Court disagrees and concludes that Guillory's argument is not waived, the plain-error standard of review applies. Because "the substance of the evidence" supposedly excluded was neither "made known to the court by offer" nor "apparent from the context within which questions were asked," as required by Federal Rule of Evidence 103(a)(2), "'reversal will lie only where there is plain error." *United States v. Bishop*, 291 F.3d 1100, 1108 (9th Cir. 2002) (quoting *United States v. Kupau*, 781 F.2d 740, 745 (9th Cir. 1986)).

Guillory refers to supposed "direct and relevant evidence on the issue of his intent." Guillory Br. 31; *see id.* at 30-32. To the extent Guillory is referencing something other than his claimed evidence on the ancillary-restraints doctrine, *see id.* at 35-36, he never informs the Court of the nature of that evidence. He thus does not give the Court any basis to conclude that the evidence (if it exists) would have been

relevant, admissible, and likely to have changed the outcome of the case.

As for the alleged evidence on the ancillary-restraints doctrine, Guillory mainly points to the existing trial evidence. *See id.* at 32, 34-36. He testified that he did not participate in bid rigging at all, but instead was part of a secondary resale market for properties purchased at public auction. *See id.* at 36. Guillory does not explain how he was "constrained by the district court's order." *Id*. The jury heard and rejected his defense.

The ancillary-restraints doctrine has no application here. Guillory has offered no coherent theory of how the doctrine applies in this case, and nothing he offers would support such a theory. The ancillary-restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (*Dagher*). *See generally* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701 (1998). It applies the rule of reason to restraints on competition that would otherwise be deemed per se illegal when they are (i) imposed by a legitimate joint

venture, and (ii) reasonably necessary to the productive activities of that venture. *E.g.*, *Dagher*, 547 U.S. at 7; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

The hallmarks of a legitimate joint venture are "fusions or integrations of economic activity," *Rothery*, 792 F.2d at 224; *see Dagher*, 547 U.S. at 3 (describing the "lawful . . . joint venture" as "economically integrated"), wherein "multiple sources of economic power cooperating to produce a product," *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 199, 203 (2010). A legitimate joint venture's restraint on non-venture activity is "ancillary" if it is "subordinate and collateral to a separate, legitimate transaction," "in the sense that it serves to make the main transaction more effective in accomplishing its purpose" and is reasonably necessary. *Rothery*, 792 F.2d at 224; *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984).

Guillory has not identified evidence establishing a separate legitimate joint venture. Nor would his unsupported allegations even

establish a legitimate joint venture. Guillory alleges that he and other real-estate investors sometimes shared research on auctioned properties that were the subjects of the rounds. *See* Guillory Br. 35-36. But he alleges no economic integration; the participants apparently did not even coordinate their research efforts. *See id.* Mere information sharing is not economic integration. There were, accordingly, no "fusions or integrations of economic activity," *Rothery*, 792 F.2d at 224, as required for a legitimate joint venture.

In any event, Guillory also does not establish that bid rigging was reasonably necessary to any information sharing among the conspiracy's members. Guillory's theory is that investors used the rounds to share information about the auctioned properties after the public auctions, but before the rounds. *See* Guillory Br. 35-36. But he fails entirely to explain why the investors' agreement not to bid against each other at the public auction facilitated this information exchange or how the round payments correlated with the information conveyed. *See id.* Indeed, he fails to explain why they did not share information before the public auctions and dispense with the rounds.

The holes in Guillory's ancillary-restraints argument cannot be filled by his declaration that supposedly missing evidence would have proved that the round participants "solve[d] the market problems associated with foreclosure auctions," and that "many of the properties" were "sold for higher" at the public auctions because of the rounds. *Id.* He never explains how that could be true, why the bid rigging would then be ancillary to a legitimate joint venture, or what missing evidence would be. Because Guillory has not offered a viable theory, let alone a credible demonstration, that his bid rigging was ancillary to a legitimate joint venture, he cannot claim that the supposed exclusion of that evidence was plainly erroneous.

* * *

Guillory was correctly convicted of conspiring to rig bids at the Contra Costa County public real-estate foreclosure auctions in violation of Section 1 of the Sherman Act. The evidence against him was overwhelming, the prosecutor accurately summarized that evidence and argued for conviction under the law in her closing and rebuttal arguments, and the jury rightly found Guillory guilty after being correctly instructed by the district court. Guillory was not prevented

from offering any relevant defense, nor was he deprived of effective assistance of counsel. He simply lost at trial because he committed the crime as charged and proved. His appeal presents no valid basis to disturb the judgment.

CONCLUSION

The Court should affirm.

Respectfully submitted.

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March 19, 2018

STATEMENT OF RELATED CASES

The government agrees with Guillory's statement of the related cases currently pending before this Court and offers the following additional explanation of the relatedness of the cited cases:

The appeal of Thomas Joyce, who was charged in the same indictment as Guillory, but separately tried, is pending before this Court as *United States v. Thomas Joyce*, No. 17-10269. The other six appeals cited by Guillory concern two separately indicted cases arising out of the same Contra Costa County bid-rigging conspiracy or the related Alameda County bid-rigging conspiracy. *See United States v. Marr*, No. 4:14-cr-580 (N.D. Cal.); *United States v. Florida*, No. 4:14-cr-582 (N.D. Cal.). Currently pending appeals arising out of the *Marr* case are *United States v. Javier Sanchez*, No. 17-10519; and *United States v. Gregory Casorso*, No. 17-10528. Currently pending appeals arising out of the *Florida* case are *United States v. Alvin Florida, Jr.*, No. 17-10330; *United States v. Robert Rasheed*, No. 17-10188; *United States v. John Lee Berry, III*, No. 17-10197; and *United States v. Refugio Diaz*, No. 17-10198.

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Signature of Attorney or Unrepresented Litigant: /s/ Mary Helen Wimberly

Date: 03/19/2018

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

CERTIFICATE OF SERVICE

I certify that on March 19, 2018, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for Appellant.

/s/ Mary Helen Wimberly
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