

**NOT FOR PUBLICATION****FILED**

UNITED STATES COURT OF APPEALS

AUG 16 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 15-50375

Plaintiff-Appellee,

D.C. No.

v.

2:11-cr-00930-TJH-2

DAVID KALAI,

MEMORANDUM\*

Defendant-Appellant.

UNITED STATES OF AMERICA,

No. 15-50381

Plaintiff-Appellee,

D.C. No.

v.

2:11-cr-00930-TJH-3

NADAV KALAI,

Defendant-Appellant.

Appeal from the United States District Court  
for the Central District of California  
Terry J. Hatter, District Judge, PresidingSubmitted August 10, 2017\*\*  
Pasadena, California

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: CALLAHAN and OWENS, Circuit Judges, and GILLIAM,<sup>\*\*\*</sup> District Judge.

David Kalai (David) appeals from his jury convictions for one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and two counts of willful failure to file reports of foreign bank and financial accounts (FBARs), in violation of 31 U.S.C. §§ 5314, 5322(a). David contends that the district court clearly erred by finding him competent to stand trial. David's son, Nadav Kalai (Nadav), was convicted of the same charges, but appeals only from his jury convictions for the two FBAR counts. Nadav argues that the district court's jury instructions for those counts were erroneous and that there was insufficient evidence to convict him. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. The district court's finding that David was competent to stand trial was supported by ample evidence in the record. The only disagreement among the four experts for the government and defense was whether David could reasonably assist counsel in his defense, in light of a cognitive impairment that caused memory issues. In assessing these expert opinions, the district court was "free to assign

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<sup>\*\*\*</sup> The Honorable Haywood S. Gilliam, Jr., United States District Judge for the Northern District of California, sitting by designation.

greater weight to the findings of experts produced by the Government than to the opposing opinions of the medical witnesses produced by the defendant.” *United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991). Therefore, David’s focus on conflicts in the record and on discrediting the government’s experts does not establish clear error. *Id.*

Moreover, the record as a whole supports the district court’s competency finding. David was able to engage in logical, detailed discussions regarding his case, and was easily redirected back to the topic at hand when he digressed or repeated himself. Furthermore, he demonstrated the ability to thoughtfully consider his legal options and to weigh advice from his lawyer and others. Although the record indicates David could be difficult to work with, was in poor health, and struggled with memory lapses and focus, it also reflects his ability to think logically and coherently and thereby assist in his defense. Therefore, the district court did not clearly err by finding David competent to stand trial.

2. Regarding Nadav’s appeal, the jury instructions given by the district court for the FBAR counts were not “misleading or inadequate.” *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010) (citation omitted). A conviction for willful failure to file a FBAR requires proof that “the defendant acted with knowledge that his conduct was unlawful,” meaning he intentionally violated “a known legal duty.” *Ratzlaf v. United States*, 510 U.S. 135, 137, 141-42 (1994).

The district court appropriately instructed the jury that (1) the government had to prove Nadav “willfully failed to file a [FBAR]” and (2) “willfully” meant Nadav “knew federal law imposed a duty on him to file a [FBAR] . . . [and] intentionally and voluntarily violated that duty.” Nadav’s proposed additions to those instructions were superfluous, because the jury could not find that Nadav intentionally violated a known duty without also finding that he knew the foreign account at issue contained over \$10,000—the amount that triggered the requirement to file a FBAR.

The district court’s additional instruction to review the blank FBAR form in evidence in response to a jury question further demonstrates the adequacy of the instructions, because that form stated that “[n]o report is required if the aggregate value of the [foreign] accounts did not exceed \$10,000.” *See Beardslee v. Woodford*, 358 F.3d 560, 590 (9th Cir. 2004) (“Written instructions in response to juror notes may be treated as jury instructions for purposes of review.”). Moreover, the jury heard testimony on FBAR filing requirements, and Nadav’s counsel argued in closing that Nadav could only be convicted if he knew the account contained over \$10,000. *Cf. United States v. Johnson*, 680 F.3d 1140, 1148 (9th Cir. 2012) (separate perjury instruction not required in part because the defense “pointed out [the witness’s] alleged perjury to the jury”). Accordingly, viewed “as a whole in the context of the entire trial,” *id.* at 1147 (citation omitted),

the jury instructions were both correct and adequate, and there are no grounds for reversal on this basis.

3. Sufficient evidence supported Nadav's convictions on the FBAR counts. Although the government did not introduce direct evidence of Nadav's knowledge of the amount in the foreign account at issue, it provided sufficient circumstantial evidence from which the jury could reasonably infer that Nadav knew the account contained more than \$10,000, and therefore knew of his duty to file FBARs. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979)

In particular, the evidence of Nadav's established methods for helping wealthy clients evade tax liability, and evidence that Nadav used those methods in opening the foreign account, would reasonably allow the jury to infer that Nadav knew the foreign account contained more than \$10,000 and sought to hide that income from the Internal Revenue Service. *Cf. Karne v. Comm'r of Internal Revenue*, 673 F.2d 1062, 1064 (9th Cir. 1982) (in tax case, testimony unrelated to particular transaction was admissible because it "tend[ed] to establish a pattern or practice of tax planning of which [the] transaction was a part"). Such inferences were especially reasonable in light of Nadav's statements that his strategy was only useful for wealthy clients, as well as evidence that the money involved in his clients' accounts far exceeded \$10,000. The jury could reasonably rely on that evidence, as well as its experience and common sense, and find that Nadav knew

the foreign account contained more than \$10,000.

Evidence that Nadav had signatory authority over the account and was informed of at least one transfer of funds further supported the jury's conclusion that Nadav's failure to file was willful. Furthermore, the steps Nadav took to conceal the foreign account could allow the jury to infer knowledge of the account balance and therefore find willfulness. *Cf. Hawkins v. Franchise Tax Bd. of Cal.*, 769 F.3d 662, 668 (9th Cir. 2014) (holding that willfulness in the context of felony tax evasion may be shown through "any kind of conduct, the likely effect of which would be to mislead or conceal" (quoting *Spies v. United States*, 317 U.S. 492, 499 (1943))). Accordingly, sufficient evidence supported Nadav's convictions on the FBAR counts.

**AFFIRMED.**

## **United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**  
95 Seventh Street  
San Francisco, CA 94103

### **Information Regarding Judgment and Post-Judgment Proceedings**

#### **Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### **Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### **Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

#### **Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

##### **(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

##### **B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.



- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

# United States Court of Appeals for the Ninth Circuit

## BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
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Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

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Name of Counsel:

Attorney for:

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Date

Costs are taxed in the amount of \$

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