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. 14-cr-00607-PJH-3
The Honorable Phyllis J. Hamilton

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The government's bid-rigging case against Appellant Glenn Guillory relied on an assumption: that Mr. Guillory's participation in secondary auctions (called "rounds") was *ipso facto* evidence of an agreement to rig bids in the primary auctions: "Today Mr. Guillory admitted he participated in rounds. And rounds, rounds are illegal." (ER 236:12–14).

But the Sherman Act does not forbid secondary markets, and Mr. Guillory's participation in rounds was as consistent with lawful conduct as an illegal agreement. Even in civil cases—with significantly lower thresholds of proof—conduct that is as consistent with permissible competition as an illegal conspiracy does not, without more, support ***even an inference*** of conspiracy. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763–64 (1984); *see also T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987) ("[A]ntitrust law limits the range of permissible inferences from ambiguous evidence. In particular, evidence of conduct that is as consistent with permissible competition as with illegal conspiracy does not, ***standing alone***, support an inference of antitrust conspiracy." (citations and internal quotation

marks omitted)); *see also Hartford Accident & Indem. Co. v. Sullivan*, 846 F.2d 377, 383 (7th Cir. 1988) (requirements to establish a criminal or civil conspiracy are the same apart from the higher standard of proof in criminal cases). In criminal antitrust cases, intent is an essential element that the prosecution must prove—it cannot be presumed from conduct that is consistent with permissible competition. *Cf. United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978) ("[A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.").

Yet a verdict built upon presumption is exactly what the government led the jury to decide: because Mr. Guillory participated in rounds, he is guilty of bid rigging under Section 1 of the Sherman Act. The government's evidence certainly showed that Mr. Guillory participated in rounds; indeed, he admitted to it. But participation in a secondary market is not *ipso facto* evidence of a conspiracy not to bid in the first place. Evidence of that agreement was conspicuously absent from the government's case—aside from the speculative third-hand

testimony of two witnesses who cut deals with the government. Mr. Guillory's presentation, on the other hand, was crippled by a preemptive exclusion: he was not allowed to argue or present evidence showing that his conduct was consistent with permissible competition. He thus could not negate the government's circumstantial evidence and its necessary premise that participating in rounds was an agreement to rig bids.

The government was required to prove that Mr. Guillory agreed to a conspiracy to not bid in primary auctions, and Mr. Guillory was entitled to rebut the government's case. This Court should reverse Mr. Guillory's conviction because (1) the jury instructions did not adequately instruct the jury, (2) the government misled the jury, (3) the evidence was insufficient for conviction, and (4) Mr. Guillory was improperly constrained from presenting his defense.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The district court entered judgment September 6, 2014. (ER 19–26). Mr. Guillory timely filed his notice of appeal September 18, 2017. (ER 1–18); *see* Fed. R. App. P. 4(a).

BAIL STATUS

The district court stayed Mr. Guillory's prison sentence pending the outcome of the appeal after finding that his appeal raised a substantial question that, if successful, is likely to result in reversal of the conviction by an order dated October 18, 2017. (ER 253–278). Specifically, the district court expressed concern that it was possible "the jury was confused about the legal significance of the rounds" in light of the circumstantial focus of the government's case, its closing argument, and inadequate jury instructions. (ER 274:3–4).

STATUTORY AUTHORITY

The revelant statutory authority is 15 U.S.C. Section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

ISSUES PRESENTED

1. Is a criminal antitrust defendant entitled to a new trial where the jury instructions failed to adequately guide the jury on the government's burden to show the defendant's subjective intent to enter a bid-rigging conspiracy?

2. Is a criminal antitrust defendant entitled to a new trial where the government misleads the jury to believe that proof of conduct consistent with permissible competition is sufficient to prove the defendant's subjective intent to enter a bid-rigging conspiracy?

3. Is a criminal antitrust defendant entitled to acquittal where the government's only reliable evidence relates to conduct that is consistent with lawful competition?

4. Is a criminal defendant entitled to a new trial on direct appeal where his counsel provides ineffective assistance by failing to move for acquittal, object to prosecutorial misconduct, or request a curative instruction?

5. Is a criminal antitrust defendant entitled to a new trial where the trial court precludes the defense from presenting evidence and

argument that negates the government's proof of his subjective intent to join a bid-rigging conspiracy?

STATEMENT OF THE CASE AND FACTS

Appellant Glenn Guillory appeals his conviction for one count of conspiracy to restrain trade in violation of the Sherman Act, 15 U.S.C. Section 1.

Mr. Guillory is a real-estate broker and investor who participated in the real-estate foreclosure market in Contra Costa County. (ER 213–214). Homeowners who default on their mortgage in California are subject to nonjudicial foreclosure, in which a trustee sells the property at a public auction on behalf of the lender. (ER 157:23–158:9). At the height of the subprime mortgage crisis, chaos ensued when hundreds of properties in Contra Costa County were sold every week, often at different auctions occurring simultaneously. (ER 215:10–216:1).

Any member of the public can bid on properties at the foreclosure auctions so long as they qualify by providing identification and verification of sufficient funds to cover the amount of the opening bid. (ER 159:6–18). An auction begins with the crier announcing the lender's opening bid, and the highest bid takes ownership of the property. (ER

159:19–160:11). About 85% of the time, no one else bids, so the lender takes ownership of the property.

Mr. Guillory, a real-estate broker, had made his business around foreclosure auctions since the early 2000s, bidding on behalf of multiple clients. (ER 214:6–21). Foreclosure auctions are buyer beware and come with extreme risk. (ER 216:6–218:14). Lenders provide little to no relevant information about the properties (and do not warrant what information they do provide), concealing the hidden horrors of properties:

- Without clear title
- Based on a junior mortgage
- With unpaid property taxes exceeding the value of the property
- With IRS liens
- That have been stripped, damaged, destroyed, razed, or are uninhabitable
- That are inhabited by squatters

(ER 217–218).

Mr. Guillory spent much of his time researching the properties he was interested in bidding for himself or his clients. (ER 216–218). He

would obtain and review title reports, physically visit the property, and run comparative market value analyses. (ER 216:11–217:25). In the early 2000s, a given week might see 30 foreclosures in the entire Bay area. (ER 215:17–22). But the subprime mortgage crisis brought with it a foreclosure epidemic: hundreds of properties were listed each week in Contra Costa County alone. (ER 215:23–25). And the massive real-state foreclosure system became unmanageable for investors like Mr. Guillory. (ER 215:25–216:1).

Between 2009 and 2010, Mr. Guillory participated in secondary auctions with other real-estate investors for a primary reason: it allowed him to manage the risk of bidding on a property with one of the hidden horrors. (ER 215–218). The secondary auctions allowed an investor to research a property, bid on it at the public auction, and then offer it in a secondary auction among investors (commonly called "rounds"), often complete with the research that suggests the property doesn't have a hidden horror. And that makes sense: the investor can add value in the secondary auction by offering information—unavailable in the public auction—that certain risk factors are not present for that property. Indeed, many investors may not want to purchase properties without this

additional information, which creates a lower risk profile. (ER 228:22–229:4, ER 230:1–23, ER 232:14–21). That was the case for Mr. Guillory.

On December 3, 2014, Mr. Guillory was indicted for one count of conspiracy to rig bids under Section 1 of the Sherman Act for his participation in the rounds. (ER 39, ¶ 7.C.). Unlike other related cases, the government's case against Mr. Guillory sought to rely on an assumption: his participation in the rounds was evidence that he participated in a bid-rigging conspiracy.

Before trial, the government preemptively sought to exclude Mr. Guillory and his co-defendants from offering "any evidence or argument that that [sic] their bid-rigging agreements were reasonable" under the auspice of preventing the jury from hearing irrelevant, prejudicial evidence in a *per se* case. (ER 104). The trial court agreed, and Mr. Guillory was effectively precluded from negating the essential premise of the government's case (ER 64:4–12): that "[r]ounds exist because there was an agreement to stop bidding at the public auction." (ER 236:14–15).

Indeed, the government's case was circumstantial and revolved around Mr. Guillory's participation in the rounds. It called the rounds participation fees "pay-offs," even though the evidence showed some of

those payments didn't even fit the government's theory of how the "pay-offs" worked. (ER 184:5–18) (payment not consistent with round); (ER 222:14–20) (equal payments not consistent with government's bid payoff theory). Only the speculative testimony of two witnesses who reached plea deals with government—Tom Bishop and Charles Rock—even suggest Mr. Guillory agreed to rig bids. Their testimony was speculative and third-hand:

Bishop testified that he, Mr. Guillory, John Galloway, and Wesley Barta were bidding on a property at 90 Pleasant Valley Drive in Walnut Creek when Galloway approached him with an offer to "buy [the property] together" with Galloway and Mr. Guillory. (ER 164:22–165:11, 166:15–17). Mr. Bishop construed this offer to buy the property as partners instead as a bid-rigging agreement, and speculates that Mr. Guillory agreed to bid-rig. (ER 165:13–18). This speculation is based on a discussion between Galloway and Mr. Guillory that he assumes occurred and which he did not see or hear. (ER 171:24–172:5).

Similarly, Rock testified that Galloway, Doug Ditmer, and he were planning to bid on a property at 5346 Summerfield in Antioch when Galloway approached Rock and asked that he offer up the property in a

secondary auction. (ER 187:16–24). Rock construed Galloway's statement as an offer to rig bids. (ER 187:16–188:1). Rock testified that he then saw Galloway approach and whisper to Mr. Guillory. (ER 193:2–7). Thereafter, Galloway returned and told Rock that Mr. Guillory was "in the round." (ER 194:5–8). Mr. Rock won at the auction, and participated in a post-auction round with Mr. Guillory and others. (ER 188:19–189:1). Like Bishop, Rock speculates on what was said in a conversation between Galloway and Mr. Guillory that Rock did not hear and assumes that Mr. Galloway's subsequent statement was equivalent to an agreement to rig the bid. (ER 193:1–15).

The government did not call Galloway to testify.

Before trial was to occur, Mr. Guillory's counsel suffered a serious medical issue that resulted in a separate trial for Mr. Guillory and may have affected his ability to adequately represent Mr. Guillory. (ER 241–250). To make matters worse, trial counsel's wife was rushed from the courtroom by ambulance to the hospital on the last day of the government's case. Counsel was "quite upset" and expressed his concern that he could not "proceed coherently" and that it would "deny [his] client a fair trial." (ER 199:24, ER 200:2–4, ER 201:11–13). In fact, he said he

didn't "remember the issues that [he] even had lined up" (ER 202:6–7), and the court begrudgingly adjourned for the weekend at the close of the government's case—but not before entering discussions concerning the final jury instructions and reminding counsel that his own health problems had delayed trial once before. (ER 202:15–16, ER 205:5–206).

Mr. Guillory's counsel's performance was clearly compromised: he failed to request a more specific instruction that counsel for other defendants did seek; he failed to object to speculative, inadmissible testimony; he failed to object to the government's misleading closing arguments; and he failed to move for acquittal or a new trial despite the government's wholly circumstantial case revolving around Mr. Guillory's participation in rounds—conduct that is permissible with lawful competition. His opening and closing arguments were not particularly clear, and may have contributed to the jury's confusion about the standard that it was to apply.

On the fourth day of trial, following closing arguments and instructions, the district court released the jury for deliberations just before 3:35 p.m. (ER 238–239). Less than an hour later, at 4:32 p.m., court was called back into session after it was notified the jury had

reached a unanimous verdict. Given that almost all of the evidence presented at trial concerned Mr. Guillory's participation in rounds—aside from speculative third-hand statements of witnesses whose plea deals depended on it—the jury must have believed the government's misleading argument that Mr. Guillory's participation in rounds was all that was necessary to convict him of bid rigging. Mr. Guillory was subsequently sentenced to 18 months of federal prison with three years of subsequent supervised release and a $20,000 fine. (ER 251).

Mr. Guillory subsequently filed a timely notice of appeal and moved the district court to stay his prison sentence pending a decision by this Court. The district court granted the stay after finding that Mr. Guillory raised a substantial question that, if successful, is likely to result in reversal of the conviction. (ER 253–278). The district court agreed with Mr. Guillory that the jury may have been confused "about the legal significance of the rounds" in light of the evidence and the government's arguments, and further noted that it did not provide a very specific instruction that had been provided in other cases. (ER 274:3–4). In one such subsequent case, Victor Marr was acquitted by a jury who received a more specific instruction after Marr admitted to participating in

rounds. Exhibits A–C to Appellant's Motion for Judicial Notice ("MJN"), filed concurrently with this brief.

SUMMARY OF THE ARGUMENT

This Court should reverse Mr. Guillory's conviction for the following reasons:

I. Mr. Guillory's conviction was based upon confusing jury instructions and the government's improper arguments about the elements of a bid-rigging offense. The instructions failed to clearly explain what specific conduct constituted a conspiracy to rig bids and the subjective intent the government was required to prove. The government misled the jury by incorrectly stating the law and leading it to believe the government only needed to prove Mr. Guillory's participation in rounds for a conviction.

II. The only evidence of Mr. Guillory's agreement not to rig bids was the speculative testimony of two witnesses who relied on the hearsay statements of another rounds participant. Without the speculation, the testimony only supported Mr. Guillory's participation in rounds, not an agreement to rig bids.

III. Mr. Guillory was excluded from presenting a defense that negated the government's central theory. The district court improperly excluded Mr. Guillory from presenting evidence of business justifications for his participations in rounds under the guise of applying the *per se* label to his actions. Mr. Guillory was entitled to present evidence and argument that negated the government's case, which was based almost exclusively on evidence of his participation in rounds.

ARGUMENT

I. THE JURY APPLIED THE WRONG STANDARD

Mr. Guillory's conviction was based on a presumption: that because he participated in rounds, he was guilty of conspiring to rig bids. But rounds are not illegal, and conduct that is as consistent with permissible competition as an illegal conspiracy cannot, without more, support even an inference of a conspiracy, let alone a criminal conviction. Intent is an essential element that the prosecution must prove—it cannot be inferred from lawful conduct.

Yet the government led the jury to believe that it need no such proof of Mr. Guillory's subjective intent to join a bid-rigging conspiracy: "Today Mr. Guillory admitted he participated in rounds. And rounds, rounds are

illegal." (ER 236:12–14). The government made that argument because it was the only way to secure a conviction: unlike other cases involving the same alleged conspiracy, the government's case against Mr. Guillory relied almost exclusively on circumstantial evidence of conduct consistent with lawful competition: his participation in rounds.

The jury decided that Mr. Guillory participated in rounds—indeed, he admitted to it—and thus found him guilty. The government argued that's all that was necessary and the jury instructions did not provide sufficient useful guidance to understand what was required of it: to determine whether the government presented evidence that Mr. Guillory subjectively intended to and did agree to join a naked bid-rigging conspiracy.

A. Standard Of Review

Questions as to whether jury instructions properly state the elements of an offense are reviewed *de novo*. *United States v. Brown*, 936 F.2d 1042, 1047 (9th Cir. 1991). Jury instructions are reviewed for plain error if no objection is lodged. *See United States v. Conti*, 804 F.3d 977, 981 (9th Cir. 2015). Plain error review also applies where a defendant fails to object to prosecutorial misconduct. *United States v. Geston*, 299

F.3d 1130, 1134 (9th Cir. 2002); *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017).

Counsel's failure to object can also be grounds for a finding of ineffective assistance of counsel where the Court finds that counsel's deficient performance prejudiced the defense such that there is a reasonable probability that the result would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Daire v. Lattimore*, 812 F.3d 766, 767–68 (9th Cir. 2016).

B. The Jury Instructions Were Confusing And Failed To Adequately Guide The Jury

The instructions to the jury about the central question it was to decide—whether the evidence proved beyond a reasonable doubt that Mr. Guillory agreed to a conspiracy to rig bids—failed to provide useful guidance on exactly that.

A defendant's subjective intent is a required element of a criminal antitrust violation, *United States v. Andreas*, 216 F.3d 645, 669 (7th Cir. 2000), and in a bid-rigging case, the government must prove the defendant's intentional agreement to rig bids. *Id.* Thus, jury instructions must give "sufficient useful guidance" to allow the jury to decide what constitutes an agreement to rig bids, because like price fixing, bid rigging

is a term that is "hardly self-defining." *United States v. Alston*, 974 F.2d 1206, 1213–14 (9th Cir. 1992).

The court evaluates the instructions "as a whole" in determining whether jury instructions are misleading or inadequate to guide the jury's deliberations. *United States v. Liu*, 538 F.3d 1078, 1088 (9th Cir. 2008). If there is a reasonable likelihood that the jury misapplied the instructions, then the defendant is entitled to a new trial. *Jones v. United States*, 527 U.S. 373, 390 (1999).

In *Alston*, three dentists were charged with price fixing after they met, along with 50 other competing dentists, to discuss a plan to seek higher co-payment fees they received from participants of prepaid dental plans. 974 F.2d 1206. After the meeting, the dentists sent form letters to the plans, and the plans ultimately agreed to a higher fee schedule. *Id.* at 1213. But the evidence supported two conclusions: one was that they conspired to fix prices; the other that they merely agreed to a fee schedule proposed or approved by the plans. *Id.* Though the jury returned convictions, the trial court entered judgment of acquittal as to two defendants and granted a new trial to the third. *Id.* at 1209.

This Court affirmed, agreeing with the trial judge that the innocent explanation would not satisfy the intent requirement, and the jury instructions may not have adequately guided the jury regarding that required element. *Id.* at 1213–14. Although the instructions were standard and had been approved by this Court before, they were inadequate to "explain clearly . . . 'to the jury that its function is to decide whether certain conduct, ***described with precision in the instruction***, did or did not occur." *Id.* at 1214 (quoting *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 219 (7th Cir. 1983)).

Like the dentists in *Alston*, Mr. Guillory faced a *per se* illegal antitrust offense based on conduct that could be entirely innocent: his participation in rounds. And just as "mere acquiescence in a fee schedule . . . does not [a price-fixing] ***conspiracy*** make," *id.* at 1213, participation in rounds does not a bid-rigging conspiracy make.

The instructions given to the jury at Mr. Guillory's trial do not adequately explain to the jury what constitutes the offense. Instruction 30 explains that the jury may only convict if it finds the government established the following relevant elements beyond a reasonable doubt:

> *One*, that the conspiracy described in the indictment existed at or about the time alleged;

> *Two*, that the defendant knowingly became a member of the conspiracy; and [a third element not relevant here].

(ER 141:7–9).

While Instruction 31 attempts to explain what conduct constitutes a conspiracy to rig bids, it confusingly states that

> 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. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators.

(ER 142:18–21).

Under this standard, a juror would surely find that Mr. Guillory's participation in rounds was sufficient for conviction. After all, Mr. Guillory willfully participated in rounds, those rounds advanced the alleged conspiracy, and he didn't need to know other details about what the alleged conspirators were doing—or why—to participate in rounds.

At Mr. Guillory's post-conviction bail hearing, the district judge intimated her "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." (ER 273:2–4). Indeed, at other trials, the district judge gave a more specific instruction:

> If you find that rounds were in furtherance of the bid-rigging conspiracy alleged in the indictment, then you may consider the defendant's participation in rounds as evidence of his participation in that bid-rigging conspiracy. If, on the other hand, you do not find that rounds were in furtherance of the bid-rigging conspiracy alleged in the indictment, then the defendant's participation in the rounds alone does not violate the Sherman Act.

(*See, e.g.*, MJN, Ex. 2 at 940:19–941:2).

This instruction makes a distinction between rounds and bid-rigging that the instructions given at Mr. Guillory's trial did not. That distinction was necessary to ensure that the jury clearly understood what conduct constituted the offense it was deciding.

Even though the government sought to convict Mr. Guillory of a *per se* illegal bid-rigging offense, its case against him focused almost exclusively on his participation in rounds—conduct that is consistent with lawful competition. The jury instructions did not discuss rounds and were not clear on what the government was required to prove to find that Mr. Guillory had the requisite subjective intent to enter into a naked conspiracy to rig bids. The "crushing consequences" of a bid-rigging conviction made it "all the more important that the district judge spell out with specificity what the jury must find in order to convict." *Alston*, 974 F.2d at 1214–15. The instructions were not adequate and did not

sufficiently guide the jury in its verdict. It is likely that the jury misapplied the instructions—having deliberated for less than an hour—and thus this Court should reverse Mr. Guillory's conviction and remand for a new trial.

C. The Government's Misleading Statements Were Prosecutorial Misconduct

The government told the jury that "Mr. Guillory admitted to participating in rounds. And rounds, rounds are illegal." Rounds are decidedly not illegal, as the government effectively conceded at a pretrial hearing. (ER 78–79:4–7) ("I don't think there's any—that there's going to be any dispute about the participation in the rounds. I think the dispute is going to be about what the significance of that participation is."). But having failed to introduce sufficient evidence of Mr. Guillory's agreement to rig bids, the government misled the jury on the applicable standard necessary for a finding of guilt.

The government's conduct, particularly in the context of the other issues described in this brief, necessarily "affected the jury's ability to judge the evidence fairly" and materially affected the fairness of the trial. *United States v. McKoy*, 771 F.2d 1207, 1212 (9th Cir. 1985). They were among the last words that the jury heard from an attorney before

beginning its deliberations, and thus, given the timing, "the impact was likely to be significant." *United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir. 2011).

D. Counsel's Failure To Object Or Seek Curative Instructions Prejudiced Mr. Guillory's Defense

Mr. Guillory's counsel's failure to object to the jury instructions and to the government's conduct are an independent basis on which this Court should reverse Mr. Guillory's conviction.

This Court does not usually hear ineffective assistance arguments on direct appeal, with two important exceptions: "(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." *United States v. McGowan*, 668 F.3d 601, 605 (9th Cir. 2012). Both exceptions apply here: the reasons for trial counsel's deficient performance are well-documented. (ER 242:8–3:10, ER 196–203). The Court can assess these failures based on the record at trial and the trial court's subsequent discussion of these issues at the bail hearing. (ER 272:23–276:11). Moreover, Mr. Guillory's 18-month sentence makes *habeas* review a practical nullity.

To succeed on an argument for ineffective assistance of counsel, Mr. Guillory must show that (1) his counsel's performance was deficient; and (2) counsel's deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687; *Daire*, 812 F.3d at 767–68. Prejudice is shown where "there is a reasonable probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. While courts ***usually*** presume that the trial counsel's conduct falls within the range of reasonable assistance, this Court is not obliged to make such a presumption where an attorney's failure to object or request a jury instruction is based upon legal error rather than a trial strategy to forego a material instruction. *See Crace v. Herzog*, 798 F.3d 840, 852 (9th Cir. 2015).

Mr. Guillory's counsel did not object to the government's misconduct in arguing that "rounds are illegal" and he did not request a clarifying instruction to prevent jury confusion from resulting. Even the district court noted that trial counsel's failure to request an instruction concerning the legal significance of rounds was inconsistent with the

actions of attorneys representing defendants in subsequent related cases. (ER 273:13–274:21).

The lack of clarity in the instructions was exacerbated by the government's improper arguments about the elements that it must prove to convict Mr. Guillory of bid rigging. And counsel's failure to object to that improper argument and seek curative instructions almost certainly would have led to a different result—another defendant, Victor Marr, received the more specific instruction and was acquitted. *See* MJN, Exs. A–C. The fact that the jury deliberated for less than an hour on evidence focused on Mr. Guillory's participation in rounds (a fact he admitted) before returning a guilty verdict shows that it believed the task before it was quite simple: Mr. Guillory participated in rounds, and rounds are illegal.

II. MR. GUILLORY'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE

A. Standard Of Review

Claims of sufficiency of evidence are reviewed *de novo* when preserved by a motion for acquittal at the close of the evidence. *See United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015).

Where the defendant fails to move for acquittal, this Court reviews for plain error or manifest injustice. *See United States v. Pelisamen*, 641 F.3d 399, 408–09 & n.6 (9th Cir. 2011).

Counsel's ineffective failure to move for acquittal is reversible error on direct appeal where (1) an exception to the general rule against deciding ineffective assistance issues on direct appeal applies, *McGowan*, 668 F.3d at 605, and (2) counsel's deficient performance prejudiced the defense such that there is a reasonable probability it undermined the outcome. *Strickland*, 466 U.S. at 687.

B. The Evidence Was Insufficient For A Bid-Rigging Conviction

The only testimony at trial that could be considered close to direct evidence of Mr. Guillory's agreement to engage in a bid-rigging conspiracy was speculation from two witnesses who testified in the hopes of reduced sentences in their own cases: Tom Bishop and Charles Rock.

In reviewing the sufficiency of the evidence, courts should view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the defendant guilty of each element of the crime beyond a reasonable doubt. *United States v. Heller*, 551 F.3d 1108, 1113 (9th Cir. 2009); *United States v. Hinton*, 222

F.3d 664, 669 (9th Cir. 2000). If it determines that it could not, then reversal with an acquittal is appropriate because double jeopardy applies. *Burks v. United States*, 437 U.S. 1, 17–18 (1978).

While it is true that circumstantial evidence is sometimes sufficient to sustain a conviction, circumstantial evidence that merely shows the *modus operandi* but provides no direct evidence for an essential element of the crime is insufficient. *See United States v. Katakis*, 800 F.3d 1017, 1026–27 (9th Cir. 2015) (citing *United States v. Lo*, 231 F.3d 471 (9th Cir. 2000)). In *Katakis*, for example, the Court acknowledged that where there is no direct evidence in the record to support an essential element, evidence of a crime is too attenuated. *Id.* at 1026. This is especially true where the overwhelming circumstantial evidence of the alleged crime—what the government argues is *modus operandi* evidence—relates to conduct consistent with lawful alternative explanations, since it "might lead to a juror to overlook the factual gaps in the government's proof." *Id.*

The evidence showing a scheme or conspiracy occurring during public foreclosure auctions in Contra Costa County is undoubtedly overwhelming. Yet there is only a handful of evidence—round sheets, ledgers, and checks—that even relate to Mr. Guillory, let alone connect

him to the scheme, and all of it is circumstantial; there was no reliable direct evidence that Mr. Guillory agreed to rig bids. In fact, the circumstantial evidence itself that relates to Mr. Guillory contradicts the alleged conspiracy the government presents. (*See* ER 222–225; ER 94–95); (ER 184:5–18) (payment not consistent with round); (ER 222:14–20) (equal payments not consistent with government's bid payoff theory). In light of the admissible evidence against Mr. Guillory, no rational trier of fact could have found that Mr. Guillory was guilty of bid rigging beyond a reasonable doubt. The government 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. The jury decided as it did because the government led it to believe that participating in rounds was, by itself, sufficient to convict for bid rigging. And that is plain error.

C. Counsel's Failure To Move For Acquittal Prejudiced The Defense

In light of the evidence presented at trial, any competent defense attorney would have moved for acquittal on the grounds that the government had not proved Mr. Guillory's agreement to rig bids. And perhaps Mr. Guillory's counsel would have had the court not required him to continue through the close of the government's case despite his

warning that he could not "proceed coherently" and that he didn't "remember the issues that [he] even had lined up." (ER 201–202).

As a result, Mr. Guillory would face plain error rather than *de novo* review. The failure to move for acquittal could not have been the product of trial strategy because such a motion would simply be granted or denied, while failing to do so could only harm Mr. Guillory by failing to preserve it for the more favorable standard on appeal. *See Burdge v. Belleque*, 290 Fed. App'x 73, 79 (9th Cir. 2008) (no trial strategy in failing to object because objection would preserve issue and simply be sustained or overruled) (unpublished).

III. MR. GUILLORY WAS IMPROPERLY EXCLUDED FROM PRESENTING REBUTTAL EVIDENCE AND ARGUMENT

The government preemptively sought to exclude Mr. Guillory from "introducing any evidence or argument that that [sic] their bid-rigging agreements were reasonable" under the auspice of preventing the jury from hearing evidence about business justifications because reasonableness is irrelevant in a *per se* case. (*See* ER 104 (Motion *in Limine* No. 1)). This Court granted the motion over defense opposition. (*See* ER 66–74).

A criminal defendant has a constitutional right to present relevant evidence in his own defense, *Moses v. Payne*, 555 F.3d 742, 756–57 (9th Cir. 2009), such that even the rules of evidence must yield where they would "significantly undermine[] fundamental elements of the [accused]'s defense." *United States v. Scheffer*, 523 U.S. 303, 314 (1998). Here, because of the overbroad exclusion, Mr. Guillory was not permitted to mount his complete defense on the issue of whether he entered the agreement. This is particularly troubling in light of the circumstantial nature of the government's evidence.

A. The Court's Order *In Limine* Improperly Limited Mr. Guillory's Evidence Negating The Government's Case

The exclusion of business-justification evidence and argument did more than exclude Mr. Guillory from arguing that bid rigging is reasonable: it deprived him of his ability to present evidence to negate the government's case—one that rested nearly exclusively on circumstantial evidence: his participation in the rounds. In other words, it prevented him from showing that the government's core theory—that "[r]ounds exist because there was an agreement to stop bidding at the public auction"—is based on a false premise. (ER 236:14–15).

Although Mr. Guillory's business-justification evidence and argument may have been irrelevant to the question of whether bid rigging itself violates the antitrust laws as a *per se* offense, that evidence and argument are directly relevant to the question of whether Mr. Guillory entered an agreement to rig bids. A defendant, of course, has a constitutional right to present relevant evidence in his own defense, *Moses*, 555 F.3d at 756–57, such that even the rules of evidence must yield where they would "significantly undermine[] fundamental elements of the [accused]'s defense." *Scheffer*, 523 U.S. at 314. Here, because of the overbroad exclusion, Mr. Guillory was not permitted to offer direct and relevant evidence on the issue of his intent to enter into a bid-rigging agreement. This is particularly troubling in light of the circumstantial nature of the government's evidence and its failure to present reliable evidence that "exclude[s] the possibility of legitimate activity." *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999).

The district court's exclusion improperly prevented Mr. Guillory from negating the government's case by showing that he did not have the requisite intent to enter into a naked agreement to restrain trade. It also prevented him from affirmatively showing that any such agreement was

nevertheless not a naked agreement but rather a procompetitive joint venture to be judged under the rule of reason.

B. The District Court Erred In Applying *Per Se* Treatment Because The Alleged Agreement Was Ancillary And Necessary To The Procompetitive Rounds Agreement

Even if Mr. Guillory had agreed not to bid in the primary auctions, that agreement would have been necessary and ancillary to a broader procompetitive joint venture. Since the government must establish Mr. Guillory's naked agreement to restrain trade, it was impermissible to preclude him from negating the government's case by showing and arguing the procompetitive benefits and business justifications for a broader joint venture. Mr. Guillory's testimony established that his participation in rounds was, in fact, a procompetitive joint venture. Absent the Court's ruling, Mr. Guillory could have backed up his testimony with expert and other evidence.

In a bid-rigging case, the government must prove the defendant "knowingly entered into agreements with potential competitors ***for the purpose of*** preventing them from bidding on the properties." *United States v. Guthrie*, 17 F.3d 397 (9th Cir. 1994) (unpublished) (emphasis added). That is, the government must show an intent to enter into a

naked agreement that restrained trade—one with one illegitimate purpose: to make bidding noncompetitive. And its evidence must exclude the possibility of lawful alternative explanations. *Citric Acid*, 191 F.3d at 1103.

But "agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984) (quoting *The Rule of Reason and the Per Se Contract: Price Fixing and Market Division*, 74 Yale L.J. 775, 797–98 (1965)). Unlike naked restraints, where there is "nothing to justify or excuse the restraint," ancillary restraints are restraints that are necessary to an otherwise procompetitive transaction or venture. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 737–38 (1988) (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899)).

Under the ancillary restraints doctrine, restraints that would otherwise be considered *per se* illegal are instead judged under the rule of reason. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (price-setting

activities of joint venture by two formerly competing oil companies were subject to rule of reason); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (joint venture's practice of licensing music on blanket basis permissible under ancillary restraints doctrine where it served procompetitive goal of more efficient licensing and monitoring against infringement); *see also Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1395 ("[T]he relevance of ancillarity being it 'increases the probability that the restraint will be found reasonable.' ") (citation omitted). To qualify, the restraint must be necessary—that is, the benefits cannot be achieved by less-restrictive means.

Mr. Guillory participated in rounds because of the nature of the foreclosure auctions at the height of the subprime mortgage crisis:

- Multiple auctions occurred simultaneously.
- Hundreds of properties auctioned weekly, with little advanced notice.
- The lenders that dominated the foreclosure auction process failed to provide relevant information regarding the properties prior to the auctions, and what information they did provide was unreliable.

- Research required title clearance, site visits, and comparative market analysis.

(ER 215:23–218:14, ER 228:11–230:23).

The new mode of foreclosure auctions was overwhelming. Rounds allowed Mr. Guillory to essentially outsource some of his research to other brokers and investors with similar expertise and interests sufficient for him to rely on their due diligence. Thus, by working together with this small group of investors, they engaged in a collaborative relationship to solve the market problems associated with foreclosure auctions.

It also served competition more broadly. Each participant in rounds researched properties that, for one reason or another, might not have ultimately been properties that they would have bid on but for the ability to obtain value from other investors for the time and effort put into researching that property. As a result, more properties were likely to be sold at auction instead of reverting to the bank as real-estate owned like 85% of the properties typically did. Thus, the owners of the foreclosed properties—as well as the lenders—might have received more money than they would have absent the venture. But for the venture, many of

the properties that sold for higher than the lender-owner bid would not have done so. This is a pro-competitive benefit to the joint venture that the district court should have allowed Mr. Guillory to present to the jury.

The evidence showed instances where Mr. Guillory considered bidding on a property, only to instead participate in a round. In each instance, either Mr. Guillory had performed research on the property or another bidder had. In some cases, their research was complementary. Round participants paid for the privilege of that research by participating in the round, and those who performed the research were compensated for it. And although the government did not provide evidence of an agreement not to compete, such an agreement could have proved necessary because "it provides assurance that the resources invested by one venturer will not be undermined or competitively exploited to the sole benefit of [an]other." *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010).

In any case, Mr. Guillory's evidence and arguments were constrained by the district court's order *in limine*, so the jury could not have considered whether these facts negated the government's starkly limited evidence of Mr. Guillory's intent. Instead, it reached a verdict

based upon a presumption, one that absolved the government of proving his intent to enter into a naked bid-rigging agreement. This Court should reverse Mr. Guillory's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed. If this Court finds that the evidence was insufficient to convict Mr. Guillory, it should acquit him. Otherwise, it should remand for a new trial.

Date: January 17, 2018

BONA LAW PC

s/ Aaron R. Gott
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Counsel for Appellant
Glenn Guillory

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Appellant hereby advises the Court that the following related cases pending in this Court arise out of the same district court case as this appeal as follows:

United States v. Joyce, No. 17-10269

The following related cases raise the same or closely related issues:

United States v. Florida, No. 17-10330
United States v. Rasheed, No. 17-10188
United States v. Berry, No. 17-10197
United States v. Diaz, No. 17-10198
United States v. Sanchez, No. 17-10519
United States v. Casorso, No. 17-10528

Date: January 17, 2018

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Counsel for Appellant
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,114 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Century Schoolbook 14-point font.

Date: January 17, 2018

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Counsel for Appellant
Glenn Guillory

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 17, 2018

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