No. 17-50128

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

JEFFREY R. SPANIER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Hon. Roger T. Benitez, Presiding
D. Ct. No. 16cr01545-BEN

APPELLANT'S OPENING BRIEF

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Introduction and Issues Presented

I. Omissions theory of liability.

In *United States v. Shields*, this Court held that "a nondisclosure can support a wire fraud charge only when there exists an independent duty that has been breached by the person so charged" and that it is "error to not instruct the jury" accordingly. 844 F.3d 819, 822-823 (9th Cir. 2016). The government's fraud case relied on a host of alleged non-disclosures, and in a prior trial, correct jury instructions resulted in a hung jury. But then the district court changed the rules, and refused to repeat those instructions in the retrial. Should the resulting convictions be reversed?

II. Statute of limitations.

The indictment was returned after the statute of limitations had run, more than 5 years after the last fraud count and the last overt act charged. It was also more than 60 days after this Court's dismissal of an earlier indictment became final, thus the tolling provisions of 18 U.S.C. § § 3288 and 3289 did not apply. Should the indictment have been dismissed as time-barred? If not, did the district court yet commit reversible error in failing to give proper statute-of-limitations instructions to the jury?

III. Multiple conspiracies instruction.

Spanier was a loan broker. He served as a middleman between corporate executives who wanted to borrow money, and lenders who were willing to loan them cash, using their stock options as collateral. The evidence showed that he worked exclusively with one lender from 2003-2007, then left to work with an unrelated lender from 2007-2010. He then returned to the first lender briefly from 2010-2011, but selling a different kind of loan product. But the indictment alleged that they were all part of one overarching conspiracy. Especially given the fact that a conspiracy ending in 2007 would have been time-barred, was it error to refuse to give a multiple-conspiracies instruction?

IV. Dismissal with prejudice under the Speedy Trial Act.

After a first jury deadlocked, a subsequent conviction was reversed for failure to retry Spanier within 70 days. The government used the intervening delay to secure a key new witness, the district court and the government made findings and arguments that this Court found were "belied by the record" in failing to dismiss, and the prospect of S.E.C. proceedings still serves as a powerful mechanism to obtain justice in this matter. Was it error for the district court to fail to consider these factors in deciding that this Speedy Trial dismissal should only be without prejudice?

V. Forbidding jurors to discuss deliberations after the verdict.

Following the jury's verdict, the district court prohibited jurors from discussing any issue relating to their deliberations with defense counsel. In doing so, the district court made no findings about the need for such a broad prior restraint of speech or whether it was warranted under the circumstances of this case. Did reversible error result?

Statement of Jurisdiction and Bail Status

Jeffrey Spanier appeals his convictions and sentence for conspiracy, 18 U.S.C. § 371; mail and wire fraud, 18 U.S.C. §§ 1341 and 1343; and securities fraud, 15 U.S.C. §§ 78j(b) and 78ff. The district court had jurisdiction under 18 U.S.C. § 3231. It entered judgment on May 24, 2017.[1] Mr. Spanier timely filed his notice of appeal on the day of his sentencing.[2] This Court has jurisdiction under 28 U.S.C. § 1291. Mr. Spanier is presently serving his 8-year sentence. His anticipated release date is in 2024.[3]

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1 Clerk's Record (hereafter "CR") at 131; Excerpts of Record (hereafter "ER") at 110.

2 CR 114, ER 123.

3 See www.bop.gov/inmateloc (searching for inmate by name).

Statement of the Case and the Facts

I. Overview.

Jeffrey Spanier was, essentially, a loan broker. He served as a middle-man between corporate executives who wanted to borrow money against their stock holdings, and lenders who were willing to loan money secured by the stock. The evidence showed that Spanier worked with several different stock lenders over the years,[4] and brokered hundreds of loans—the vast majority of which were consummated and carried to term without incident.[5]

From the loan proceeds, Mr. Spanier received a commission (typically 5%, most of which he would split with sub-brokers who referred him the customers). The loan contracts provided that the lender would take title to the stock, and could sell, hedge, borrow, or hypothecate the stock collateral as they wished until the loan was repaid.[6] Then, by all accounts, the lender was supposed to deliver the stock back to the borrowers.

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[4] *See* ER 1954 (lender "the Ruby Group"); ER 533-535 (lender "Argyll Investments" until 2007); ER 1195-1196 (ending relationship with Argyll to work with "Ayuda Funding"); ER 539-540 (leaving Ayuda to broker different loan product for Argyll once again).

[5] *See* ER 1984 (Defense Exhibit 1154, documenting over 210 loans over the years.)

[6] *See e.g*. ER 1568 ("Q: They could hedge it right? A: Yes. Q: They could use it as collateral in their own transactions. A: Yes."); ER 1293-1295 ("Q:

Eventually, it came to light that one of the lenders, Argyll, was not what it seemed. Though Argyll represented to Spanier and others that it had vast holdings to loan as capital,[7] in reality, Argyll was immediately selling the stock *to fund the loan in the first place.*[8]

Spanier professed his innocence as to Argyll's wrongdoing. And there was never solid evidence to show that he knew that Argyll was selling stock in order to fund the loans. Rather, the government relied on circumstantial evidence to suggest that Spanier *should have known* that fraud was afoot.[9] Moreover, the government's case was largely founded on things that Spanier allegedly failed to disclose in brokering deals with investors.[10] Evidence showed that over the years, several borrowers had ended up in litigation and alleged that Argyll had

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Argyll has rights as to what it could do with the collateral, right? What it could do with the stock? Is that correct? A: Right. Q: And those rights shall include without limitation a whole host of things, right? A: Yes, that's what it says.")

7 *See e.g.* ER 494 ("they appeared to be a real lender with real resources. . . ")

8 *See e.g.* ER 912-913 (government forensic accountant testifying that "the next day after [the stock] was pledged, they began selling the stock.")

9 *See e.g.* ER 35 (*Jewell* deliberate-ignorance instruction, given over objection).

10 *See* Statement of Facts, *infra*, at III. C.

improperly sold stock.[11] The government argued that Spanier committed fraud by failing to disclose those prior disputes to subsequent borrowers. Spanier countered that these complaints were a small percentage of borrowers compared to the overall flow of business.[12] His defense was that although he did not volunteer prior lawsuits, he always truthfully answered any questions that borrowers asked about them.[13]

The government also argued that Spanier committed fraud by taking an undisclosed "back-end" fee on each loan. But evidence showed—corroborated by contemporaneous emails[14]—that he believed that any additional compensation came from Argyll's own investment profit, not from loan proceeds.[15] Spanier also argued that an S.E.C. inquiry had not found any wrongdoing, thus bolstering his

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11 *See e.g.*, ER 1931 ("Q: Did you file a lawsuit against Mr. Miceli and Mr. Spanier? A: Yes. I had run out of patience.")

12 *See e.g.* ER 497-499. *See also* ER 1984-1989.

13 *See e.g.* ER 1100 ("Q. But you asked him about the one [lawsuit], and he answered about the one; is that correct? A. Yes. Q. That is also true? A. Yes.") *See also* ER 975-976 (same, corroborated by government witness).

14 *See* ER 1990 (Government's Exhibit 104, email from Spanier describing only one fee "from [loan] proceeds.") *See also* ER 502-503.

15 *See* ER 500-503.

confidence in Argyll.[16] Evidence showed that Spanier had no access to Argyll's accounts or books.[17] The defense, in summary, was that Argyll had lied to Spanier as well as to the borrowers.

The government's case against Spanier was thus circumstantial, based primarily on omissions, and eminently defensible.

II. Court proceedings from 2012-2016: acquittals, a mistrial, and a conviction reversed for violation of the Speedy Trial Act.

A. The first trial ends in acquittals and a mistrial.

At the first trial, the government's case relied heavily on the things that Spanier allegedly failed to disclose to borrowers in brokering their stock loans.[18] At the close of the first trial, Spanier cited prevailing Ninth Circuit law[19] and argued that omissions could not form the basis of fraud liability absent a fiduciary relationship or some other duty to speak.

The district court agreed, instructing the jury that "a party has a duty to disclose material inside information to another party only if there is a fiduciary

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16 *See e.g.* ER 1896.

17 *See e.g.* ER 923-928.

18 *See e.g.* ER 2294-2326.

19 *See* Argument, *infra,* at I.

relationship or a similar relationship of trust and confidence between the parties. Whether the fiduciary relationship exists is a matter of fact for you, the jury, to determine. . . ."[20] The district court also instructed the jury that "when an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak . . . ."[21] Given the government's heavy reliance on alleged omissions throughout the trial, the jury zeroed in on this issue during deliberations, as reflected in a series of juror notes to the district court.[22] After several days of deliberations, the jury returned six not-guilty verdicts in Spanier's favor. It deadlocked on all remaining charges.

B. The rules change at the second trial.

But at the retrial, the rules changed. The trial court reversed its prior decisions and refused to give the omissions instructions that supported the defense.[23] Only after introducing the same evidence and argument regarding omissions—but without proper jury instructions—was the government able to secure convictions on all counts.

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20 ER 214.

21 ER 214-215. *See also id.* (defining "fiduciary relationship").

22 ER 217-218.

23 ER 2247-2285.

C. Speedy Trial violation and dismissal by this Court.

But a lengthy delay before the second trial violated the Speedy Trial Act.[24] The district court denied a motion to dismiss, reasoning—retroactively—that an earlier trial was not practical and asserting that a review of counsel's billing records reflected his need for more time to prepare.[25] With respect to its complexity and ends-of-justice rationale, the court explained: "[T]he Court has not detailed these findings on the record since the new Speedy Trial Act clock began to run earlier this year. However, it is sufficient to detail these previously-made-but-not-announced findings on the record, now, in denying the motion to dismiss."[26]

The government used the delay to obtain the testimony of a cooperating witness shortly before the second trial began—and well after the Speedy Trial clock had expired.[27] This time, with the help of the new cooperator and the change in jury instructions described above, the government obtained a conviction.

Spanier appealed. He argued, *inter alia*, that the district court had erred in denying his motion to dismiss based on the Speedy Trial violation. A three-judge

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24 *See* 18 U.S.C. § 3161 *et seq.*

25 ER 2286-2293.

26 ER 2291.

27 ER 2180-2218.

panel of this Court agreed.[28] The panel held that "the [district] court's proffered justification that the continuances were granted due to counsel's need for time to prepare is belied by the record."[29] It continued: "regrettably, the district court's practice in this case of retroactively characterizing a continuance to justify a violation of the Speedy Trial Act was inconsistent with the language and policy of the Act."[30]

But importantly, this Court did not remand the case to the district court with instructions to dismiss the indictment. *It dismissed the indictment itself.* The mandate read:

AFFIRMED IN PART; ***INDICTMENT DISMISSED***, and CASE REMANDED WITH INSTRUCTIONS TO REASSIGN FOR LIMITED PURPOSE OF DETERMINING WHETHER DISMISSAL IS WITH OR WITHOUT PREJUDICE.[31]

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28 *See United States v. Spanier*, 637 Fed. Appx. 998 (9th Cir. 2016).

29 *Id*. at 1000.

30 *Id*. The panel also held, without substantive analysis, that the district court's refusal to give omission instructions was not error. *Id.* This unpublished result has since been abrogated by this Court's published decision in *United States v. Shields*, 844 F.3d 819, 822-823 (9th Cir. 2016). *See* Argument infra at I.

31 ER 2099.

The government did not petition for rehearing, so the mandate issued on February 16, 2016.[32] The trial court spread that mandate on February 29th.[33]

D. The government re-indicts, but more than 60 days after the mandate is spread.

On remand, Spanier argued that the dismissal should be with prejudice.[34] He argued that the circumstances of the Speedy Trial violation required dismissal with prejudice, beginning with the fact that the government had used the delay to secure a key immunized witness—Manny Bello—against Spanier.[35]

Spanier further argued that two other factors supported dismissal with prejudice. First, he reasoned that the administration of justice would be ill-served by allowing a third trial when Spanier was still facing an active investigation by the Securities and Exchange Commission, which would potentially result in a substantial judgment against him ordering payment of restitution and other significant monetary penalties.[36] Second, Spanier argued that the administration

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32 ER 2112.

33 ER 2113.

34 ER 2130, CR 445 (12cr918).

35 ER 2135.

36 CR 445 at 11.

of justice required dismissal with prejudice due to the district court's post-hoc efforts to avoid dismissing the indictment, all of which found no support in the record as noted by this Court in *Spanier I*. Spanier reasoned that the district court could have dismissed the indictment without prejudice if it believed that the prosecution should not be terminated. Instead, the district court flouted the Speedy Trial Act with improper post-hoc rationalizations, which diminished the credibility of the system, the administration of justice, and the fairness of the proceedings. For this reason too, Spanier requested dismissal with prejudice.

The government opposed Spanier's motion, and following a hearing, the district court issued a written order denying Spanier's request for dismissal with prejudice.[37] In dismissing without prejudice, the district court did not address or discuss Spanier's argument that the district court's unfounded post-hoc rationalizations warranted dismissal with prejudice under this Court's precedent. The district court further held that "Spanier fails to articulate how Bello's testimony unfairly prejudiced him in any manner," despite the evidence presented by Spanier about the substance of Bello's testimony and how the government used Bello to undermine Spanier's defenses from the first trial.[38] Lastly, the district

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37 *See* CR 451, ER 100.

38 ER 2180-2218.

court failed to address Spanier's arguments about the pending SEC investigation and its impact on the administration of justice.

The government eventually re-indicted the case—but more than 60 days after the dismissal, as set forth below.

III. Proceedings in 16cr1545: Time-barred indictments and another conviction without omissions instructions.

A. The government returns a new indictment outside the statute of limitations, and the district court dismisses 18 counts of the indictment—temporarily.

The government returned a new indictment on July 1, 2016.[39] But none of the counts or overt acts alleged were within the preceding five years. Spanier moved to dismiss the new indictment as being barred by the statute of limitations.[40]

The issue became whether 18 U.S.C. §§ 3288 and 3289 tolled the statute of limitations.[41] The crux of Spanier's argument was that this Court's dismissal became final in February of 2016 when the mandate spread, and that the re-

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39 CR 1, ER 2115.

40 CR 21, ER 2093.

41 Both statutes provide in pertinent part that when an indictment is dismissed, the statute of limitations does not bar a new indictment if it is returned "in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final."

indictment was time-barred because it occurred more than 60 days later.[42] The government's response was that this Court's dismissal did not become "final" until the later ruling on whether the government could re-indict or not.

The trial court rejected the government's arguments, dismissing Counts 2-18.[43] It observed first that "[a] decision of the court of appeals generally becomes final when the mandate issues."[44] It then found that this Court—not the district court—dismissed the case in its mandate:

> The phrase 'indictment dismissed' is declarative. The opinion explains that remand is for the assignment of a different judge 'solely' to make the prejudice determination. The sentence may contain some ambiguity, but clearly gives the district court only one job – deciding whether the dismissal (which the court of appeals ordered) will be with or without prejudice.[45]

And it rejected the government's "finality" argument: "The problem with this argument is that there is no authority in support" the district court wrote. "The Government cites no cases. This Court has found no cases that discuss the meaning of "final" in this context and none that hold the finality of an appeals court decision

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42 *See* ER 2098. *See also* 18 U.S.C. § § 3288, 3289 (providing that the statute of limitations is only tolled when indictment after appeal occurs within 60 days of dismissal).

43 CR 34, ER 2082.

44 ER 2085.

45 ER 2086.

depends on later actions by the district court. In contrast, there are many cases that judge finality by the issuance of the mandate.[46]

Finally, the district court observed that criminal limitations statutes are to be liberally construed in favor of repose.[47] It dismissed Counts 2-18 accordingly.

The government then returned a superseding indictment.[48] Spanier moved to dismiss *that* indictment.[49] He argued that both the original indictment and the superseding indictment were time-barred, and that in any event the superseding indictment could not relate back to the date of filing of the original indictment because it substantially amended and broadened the original charges.[50] Further, Spanier reasoned that the securities fraud alleged in Count 2 of the superseding indictment could not be considered a continuing offense,[51] and that even if it

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46 ER 2089-2090 (collecting cases).

47 "In view of the ambiguity, the statute must be construed in favor of repose." ER 2090 (citing *United States v. Habig*, 390 U. S. 222, 227 (1968) ("[W]e reiterate the principle that criminal limitations statutes are to be liberally interpreted in favor of repose.")).

48 CR 52, ER 2070.

49 CR 54, ER 2027.

50 *Id.*

51 *Id*. The securities-fraud count was Count 19 in the original indictment, and became Count 2 in the superseding indictment after the Court dismissed Counts 2-18 as time-barred.

occurred, it was completed at the latest in 2004. Spanier thus moved to dismiss every count as time-barred.

The government did not respond to the motion to dismiss the superseding indictment. Instead, it prevailed upon the district court to make Spanier stand trial on the potentially time-barred counts, and defer ruling until post-trial motions. Spanier preserved his objection to having to stand trial on an indictment that he had moved to dismiss.

B. The district court reverses itself on the morning of trial, reviving 18 counts in the indictment and denying a continuance to prepare for the new charges.

Spanier arrived for the first day of trial prepared to try Counts 1 and 2 of the superseding indictment, with an applicable limitations date of July 1, 2011. But before summoning the jury, the district court announced that it had received a motion to reconsider from the government the day before trial began.[52] Without giving Spanier a chance to respond, and over his objection, the district court

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[52] ER 1790 (The Court: "I received yesterday a motion for reconsideration filed by the government").

granted the government's motion and revived the 18 mail and wire fraud counts that it had dismissed the month before.[53]

Spanier moved for a continuance.[54] He explained that the last-minute addition of 18 charges was unfair, and because of his reliance on the prior statute-of-limitations holding, the reconsideration had undermined his trial defense.[55] The trial court disagreed, stating "why would [the statute of limitations] no longer be an issue?" The court assured Spanier that it would still give jury instructions requiring the jury to find that the crimes occurred after July 1, 2011.[56] "I'm going to give you every chance you get" the district court stated.[57] It denied the continuance request accordingly.[58]

Thus, the trial began—without rulings on whether securities fraud was a continuing offense; whether count 1 related back to the original indictments

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53 ER 1799. The trial court believed that this result was fair "in an abundance of caution" to preserve the government's right to reconsideration.

54 ER 1804

55 ER 1805.

56 ER 1805-1806.

57 *Id.*

58 ER 1808. The government moved orally to combine Count 1 of the superseding indictment with Counts 2-19 of the first indictment, ostensibly under Fed. R. Crim. 13. The court granted the request over objection.

sufficient to toll the statute of limitations; whether all counts were time-barred; or whether the government's motion to reconsider the dismissal of counts 2-18 had any legal support.

C. The government relies on an omissions theory of liability at trial, and the district court again refuses to give the instructions that resulted in acquittals and mistrials at the first trial.

As before, the government relied heavily on alleged non-disclosures by Spanier.

1. Omissions alleged in the indictment.

In almost its first words to the jury, the trial court read the government's summary of the case, which explicitly included an omissions theory of liability. As to Court 1, the trial court instructed, "It is alleged that the purpose and object of the conspiracy was to devise a scheme and artifice to defraud and obtain money from borrowers and clients of two lenders by means of false, fraudulent, and material pretenses, representations, promises, *and omissions of material fact.*"[59] The summary of the other counts in the indictment included the same language.[60]

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[59] ER 1812.

[60] *See id*. (same for mail fraud); ER 1812-1813 (same for wire fraud).

These alleged omissions were consistent with the charges in the indictment itself.[61] The substantive counts charged the same allegations of omissions.[62]

2. Omissions in evidence at trial.

Omissions were a key theme for the government during the trial itself. Through witness after witness, the government hammered relentlessly on things that Spanier *did not say* and *did not disclose* to borrowers. The following colloquy happened with its first witness:

Q. Now in 2006, did Spanier discuss with you any other clients that were having any problems with getting their stock back from Argyll?

A. No.

Q. Did Spanier tell you he was having any problems with Argyll at this time, in 2006?

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61 *See* ER 2072 (alleging fraud "by means of false, fraudulent and material pretenses, representations, promises *and omissions of material fact*"); ER 2075 (alleging "a back end fee *that was not disclosed* to SW prior to executing the loan agreement"); ER 2076 (same); *id*. (same); ER 2078 (alleging securities fraud by "*omitting to state facts* necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

62 *See e.g.* ER 2117 (alleging "false, fraudulent and material pretenses, representations, promises and *omissions of material fact.*")

A. No.

Q. Did Spanier tell you that there was an SEC Investigation in the summer of 2006?

A. No.

Q. Did Spanier tell you that one of his other clients, Louis Paolino, had not gotten his stock back from Argyll at this time?

A. No.

Q. Did Spanier tell you that Paolino had explained that Argyll had sold his stock?

A. No. . . .[63]

The same pattern emerged with the next witness:

Q. Now during this time you were negotiating the loan and you were trying to get your stock back, did Spanier ever tell you there had been any lawsuits filed against him or against Argyll from other investors that didn't get their stock back?

A. No.

Q. Would that have been important for you to know?

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[63] ER 1922.

A. Yes.

Q. Why is that?

[Defense counsel]: Objection. Omissions and *Laurenti*.[64]

The court: Overruled.[65]

This pattern continued with almost every single witness that the government called at trial. *See:*

- ER 1724 (witness Mark Peikin, non-disclosure of fees that Spanier believed were not from borrowers' funds);
- ER 1757 (witness Kenyan Yao, same);
- ER 1273 (witness Thomas Piccoli, same);
- ER 716-717 (non-disclosure of other customer complaints);
- ER 1389 (witness Steven Van der Velden, non-disclosure of payments from Argyll);
- ER 1407 (same witness, non-disclosure of grand-jury subpoena);

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64 *See United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010) (holding that omissions cannot form the basis of a securities-fraud conviction absent a fiduciary relationship or other duty to disclose).

65 ER 1640. *See also* ER 1627 (non-disclosure of fees that Mr. Spanier believed came from Argyll, not borrowers funds); ER 1640 (non-disclosure of grand jury subpoena).

- ER 1469 (witness David Weinstein, alleged omission of prior lawsuits);
- ER 1479 (Weinstein, grand jury subpoena);
- ER 975 (Francis Burke, lawsuits)
- ER 1027 (Richard Sellers, other complaints)
- ER 1028 (same witness, other lawsuits);
- ER 1061 (same witness, grand jury subpoena);

Importantly, the evidence showed that Spanier answered any questions put to him by potential borrowers. The thrust of the government's arguments that was Spanier did not *volunteer* additional damaging information during his sales calls with potential borrowers:

Q. How many lawsuits did he tell you about?

A. Just the one I asked about.

Q. He didn't volunteer that there had been other litigation?

A. He did not volunteer any new information.[66]

[66] ER 976 (emphasis provided). The government went on to question the witness with a litany of alleged omissions.

Another witness confirmed that Spanier answered all questions about whatever lawsuits they asked him about.[67] And after Spanier testified in his own defense, the government cross examined him repeatedly on alleged non-disclosures.[68]

In so doing, the government also suggested that the regulations that applied to licensed securities brokers applied to these arms-length loans:

Q. As a licensed security broker, are you aware that you have an obligation to disclose fees?

[Defense counsel]: Your honor, objection. That is misleading. It is apples and oranges.

The court: Overruled.[69]

The government returned to this misleading theme again and again on cross:

Q. You're a registered securities dealer, right?

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67 *See* ER 1100 ("Q. But you asked him about the one [lawsuit], and he answered about the one; is that correct? A. Yes. Q. That is also true? A. Yes.")

68 *See e.g.* ER 606.

69 *See also* ER 603.

A. No.

Q. Broker?

A. I was a registered broker for a year. I may have gotten licensed in '95, but I stopped being a broker in '96. It wasn't for me.

Q. But you knew what a securities transaction was, correct?

A. Yes.

. . . .

Q. And you knew you had an obligation to disclose to the borrowers that you were getting an undisclosed fee?

[Defense counsel]: Same objection.

The court: Overruled.[70]

The government cross-examined other defense witnesses in the same vein.[71]

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70 ER 610.

71 *See* ER 648-649 (cross-examining former Argyll employee on disclosure rules for public companies, despite inapplicability to this closely-held company).

And in its closing arguments, the government strenuously argued guilt from these alleged non-disclosures.[72]

3. Jury instructions (and lack thereof) permitted conviction on a pure omissions theory.

But in deliberations, the jury was left without any guidance on how to handle this omissions theory in determining Spanier's guilt or innocence. Unlike the first trial, the trial court refused to give the instructions on omissions versus half-truths that were crucial to Spanier's defense.

Instead, every instruction on the elements permitted the jury to convict on pure omissions. The mail fraud elements, for example, instructed the jury that fraudulent scheme could be based on omissions.[73] The instructions were identical

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[72] ER 307 (""it was important for Mr. Spanier to tell his borrowers fully how much in fees he was going to earn. . . . *You heard some of the chairmen testify that that was an important fact they wanted to know.*); ER 321 ("*The defendant told you on the stand he was only going to talk about what he was asked about. He wasn't going to volunteer any information. Because he doesn't want them to be fully informed.*"); ER 324-325 ("You know what that prospectus *doesn't have*? *It doesn't contain the number of lawsuits that were filed. It doesn't contain the number of borrowers who complained about getting their stock back");* ER 388-389 *("No, ladies and gentlemen, the defendant didn't want to tell people about all those lawsuits. That is why he only answered the question that was asked.")*

[73] *See* ER 24 (describing "the statements made *or facts omitted* as part of the [mail fraud] scheme were material"). It also instructed that "[t]he government is not required to prove that the defendant knew that his acts *or omissions* were unlawful. You may consider evidence of the defendant's

for wire fraud.[74] The jury was also permitted to convict on an omissions theory for the Count 19 securities fraud charge.[75] The trial court granted each of these instruction over Spanier's objections.[76] The trial court specifically stated that Spanier's objections for instructions not given were preserved.[77]

Finally, in response to the government's claim that it was relying on a "half-truths" theory of liability, Spanier proposed the following instruction:

> Some witnesses have discussed certain alleged omissions or non-disclosures in discussions between themselves and the defendant. You are instructed that a fraud conviction cannot be based on omissions or non-disclosures alone, unless they rise to the level of deliberate misrepresentations or half-truths with the intent to defraud. Unless you find beyond a reasonable doubt that alleged omissions or non-disclosures were deliberate misrepresentations or deliberate half-truths, you may not find the defendant guilty of conspiracy to

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words, acts, *or omissions*, along with all the other evidence, in deciding whether the defendant acted knowingly.") ER 24-25 (emphasis provided).

74 *See* ER 26-27 ("the statements made *or facts omitted* as part of the scheme were material") (emphasis provided).

75 ER 29 ("*failed to disclose a material fact* that resulted in making the defendant's statements misleading"; *see also* ER 29-30 ("You may consider evidence of the defendant's words, acts, *or omissions*, along with all the other evidence, in deciding whether the defendant acted willfully.") (emphasis provided).

76 *Cf.* CR 76, ER 1230 (Spanier proposed instructions, excising omissions language from instruction); ER 9 (jury instructions given, including omissions language).

77 ER 278.

commit fraud, wire fraud, mail fraud, or securities fraud based on non-disclosures alone.[78]

The district court rejected that instruction too.[79]

D. The district court also refuses to give other theory-of-the defense instructions.

Despite its earlier assurances in denying Spanier's motion for continuance, the trial court refused to instruct on the statute of limitations for Counts 2-18.[80] And it also refused to give the withdrawal and multiple-conspiracies instructions that were necessary to provide any meaningful statute-of-limitations defense on any of the counts, as discussed below.

1. Withdrawal instruction.

Only one witness described any conduct that would have continued the alleged conspiracy past the relevant cut-off date, July 1, 2011. Borrower Richard Sellers testified that in the summer of 2011, he was negotiating a loan with Spanier when he learned that the FBI was investigating Argyll. He testified that he called Spanier in response, who confirmed that he had learned the same thing and was investigating the matter.[81] By June of 2011—the month before the statute-of-

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78 ER 1243.

79 *See* ER 9 et seq.

80 *See* ER 679. *See also* ER 9 et seq.

81 ER 1060.

limitations cut-off—Spanier affirmatively stated that they would not consummate any more loans with Argyll. "We both decided it was not wise to proceed," Sellers testified.[82]

In fact, in June of 2011, Spanier told Sellers that they would not do additional loans with Argyll, "no matter what."[83] And by that time, Spanier was affirmatively helping Sellers try to get his shares back from earlier loans.[84] Although the government introduced evidence that Argyll arguably continued its conspiracy involving Sellers, Spanier was out of the picture by that point. "In my mind, I'm solely dealing with Argyll" at that point, Sellers testified. "They have my asset. I have no reason to contact Jeffrey at this point."[85] Sellers testified that Spanier was "sort of out of it by that point."[86] Spanier confirmed this account through his own testimony, testifying that he requested that Argyll redeliver Seller's asset back to him.[87] He elaborated that by June, any discussions about

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82 ER 1070.

83 ER 1112-1113.

84 *Id. See also* ER 1110.

85 ER 1122.

86 *Id.*

87 ER 548.

trying to do stock loans had stopped.[88] He requested that the collateral be returned, and he had been instructed by counsel not to speak to Argyll.[89] He attempted to communicate with Argyll multiple times regarding regaining Sellers' stock and the fact that he was "not supposed to be involved in any client-related areas," but despite many phone calls,[90] he was "not being very successful in speaking with them."[91]

At the end of evidence, Spanier requested an instruction regarding withdrawal from the conspiracy.[92] He based his request of off Ninth Circuit Model Instruction 8.24.[93]

Nevertheless, the district court refused to give the instruction. It did so not on the basis of whether there was *any* evidence to support a *jury instruction*, but

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88 ER 612.

89 *Id.*

90 ER 613-614.

91 ER 614.

92 ER 1234-1235.

93 ER 1235. *Cf.* Ninth Cir. Model Instr. 8.24 (same).

rather on whether Spanier had demonstrated withdrawal from a conspiracy *as a matter of law.*

> "THE COURT: the law requires some evidence of an affirmative -- let me see if I can find the language . . . where fraud constitutes a standard operating procedure of a business enterprise, affirmative action *sufficient to show withdrawal as a matter of law* from that conspiracy *may be demonstrated* by the retirement of a retirement from the business, comma, severance of all ties to the business, comma, and consequent deprivation to the remaining conspirator group of the services that constituted the retirer's contribution to the fraud. I don't believe that any of the exhibits, 239, whatever it is, a through f, or the testimony of Mr. Sellers provides any kind of a factual basis for a withdrawal of defense."[94]

Although Spanier had already informed the district court that the standard for a *jury instruction* was much less stringent,[95] the district court still refused to give the instruction.[96]

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94 ER 277.

95 *See e.g.* ER 681.

96 ER 277. Later, when orally instructing the jury, the trial court accidentally read the withdrawal instruction that had remained in the packet with all of the other instructions, ER 289, see also ER 341-342, but it then followed up by telling the jury explicitly that the instruction "does not apply in this case." ER 391. That instruction was not included in the packet that went back to the jury room. *See generally* ER 9 et seq. (Court's instructions given, withdrawal not included).

2. Statute of Limitations.

Despite the assurances pretrial, the district court stated that it would also not give statute-of-limitations instructions for the new counts of the indictment, 2-18.[97] Spanier argued that statutes of limitations were an issue for Counts 2-18 also, and that the crimes were time-barred if the government did not indict within 5 years of commission. The trial court disagreed, suggesting that to do so would somehow be a "material amendment" of the indictment.[98] While the district court asserted that it would be "structural error" not to include a statute of limitations instruction for the conspiracy charge,[99] it still would not give a statute-of-limitations instruction for Counts 2-18.[100]

Spanier reiterated his statute-of-limitations objections to the securities-fraud count, and specifically the premise that that a securities-fraud conviction is an ongoing offense.[101]

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97 ER 674.

98 ER 675-676.

99 ER 678.

100 ER 679.

101 ER 692.

3. Multiple Conspiracies.

Evidence at trial also undercut the government's theory that Spanier had participated in one overarching conspiracy from 2003 until 2011. Instead, the evidence showed that Spanier worked as a broker with the lender Argyll from 2003 until approximately 2007, at which time he stopped working with them entirely and began working with a different lender called Ayuda. Spanier testified that Argyll had become engrossed in a biotech venture and stopped doing stock-loan business with him.[102] He testified that it had been a "slap in the face" when they did not include him in their new business venture,[103] and that he began to work for a different lender entirely.[104] He worked exclusively with the new, different lender until late 2009, when Argyll called him back and announced that they were going back into the stock loan business.[105] Spanier thus left Ayuda and began to work with Argyll once more, but selling an entirely different kind of stock-loan product.[106]

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102 ER 533-535.

103 ER 537.

104 *Id*.

105 ER 539.

106 ER 540.

The government's own witness, Manny Bello, was the owner of Ayuda Funding, the new lender. He confirmed that his work with Spanier was entirely separate from the overarching conspiracy that the government alleged in the indictment. For example, Bello testified that he had first met Spanier in 2007 or so, and that Spanier began to broker stock-loan deals with him thereafter.[107] Bello understood that when Spanier started doing loans with him, it was because Argyll had gone into a different line of work. Argyll "was starting to concentrate on other things" like a Biotech company, and represented that they were not in the stock loan business anymore.[108] Although Bello had learned the stock loan business from Argyll early on, he had since started his own company that was completely separate from Argyll.[109] Moreover, Bello testified emphatically that he was not running a fraudulent business.[110] He flatly denied that he had ever

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107 ER 1141.

108 ER 1195.

109 ER 1196. *See also* ER 1197 (confirming that his business was separate from Argyll).

110 ER 1183-1184.

conspired with Argyll to defraud borrowers.[111] Similarly, he testified that he never conspired with Spanier to defraud anybody.[112]

Spanier requested the Ninth Circuit model instruction on multiple conspiracies.[113] The district court rejected the request it on the premise that it was the court's job to determine whether there was one conspiracy, rather than leaving that factual determination to the jury.[114]

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111 ER 1184-1185.

112 ER 1185.

113 ER 1256.

114 *See* ER 281-282:

> [Defense counsel]: No multiple conspiracies instruction? It seems to me the evidence does support that there was a –
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> The Court: I think we argued this once before, didn't we, last time around? And I think I concluded that there was one conspiracy.
>
> [Defense counsel]: I think it is a jury question whether Manny Bello and Ayuda is a different deal or not. . .
>
> The Court: And I think I concluded then that it was a single conspiracy, right. All right.

Finally, the district court gave a *Pinkerton* instruction. Thus, the jury could convict on every count in the indictment if it found him guilty only of the conspiracy alleged in Count 1.[115]

The jury convicted Spanier of all counts.

E. Unlike the prior trial where the verdicts were favorable to Spanier, the trial court instructs the jury not to discuss deliberations with anyone, ever.

After the trial court received the guilty verdict, it told the jury that "*I would instruct you* not to discuss anything that went on in that jury deliberation room *with anyone*, okay."[116] It continued, "So it may be that these lawyers contact you and ask you about what you think, etc. I would urge you to discuss their presentation of the case but *not to discuss the evidence or again to discuss what was discussed in the jury deliberation room."*[117]

This instruction followed earlier warnings to the jurors that "there are some really bad things that can happen to you" for failure to follow the trial court's

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115 *See* ER 32.

116 ER 262 (emphasis provided).

117 *Id*. (emphasis provided).

admonitions—including the threat that "I can fine you or order you into custody."[118] The threats of custody happened repeatedly.[119]

Spanier objected to the jury instruction. He moved to rescind the order.[120] The district court denied the motion.[121]

F. The district court denies post-trial motions.

After Spanier's conviction, this Court decided *United States v. Shields*.[122] *Shields* squarely held that "it was error to not instruct the jury that it must find a relationship creating a duty to disclose before it could conclude that a material non-disclosure supports a wire fraud charge."[123] Spanier again moved to dismiss the indictment—or in the alternative, for a new trial with proper instructions—based on this binding precedent.[124] But the district court denied the motion, finding that Spanier's case was distinguishable from *Shields* because it allegedly involved

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118 *See e.g.* ER 1860.

119 See ER 395.

120 ER 272.

121 *Id*.

122 844 F.3d 819 (9th Cir. 2016).

123 *Id*. at 823.

124 ER 190 *et seq.*

"half-truths" instead of "omissions."[125] It did not address the fact that it refused to give a jury instruction allowing the jury to make that precise distinction. In a post-trial written order, the trial court also affirmed its decision to reinstate Counts 2 through 18 of the original indictment, claiming for the first time that a *six-year* statute applied under 18 U.S.C. § 3301 to all counts—including mail and wire fraud.[126]

Spanier was sentenced to eight years in prison, and denied bail pending appeal. This appeal follows.

SUMMARY OF THE ARGUMENT

These convictions should be set aside for five reasons.

First, the government secured convictions against Spanier though an improper "omissions" theory of fraud liability, *see e.g.*, *United States v. Shields*, 844 F.3d 819 (9th Cir. 2016). In the first trial, the district court gave omissions instructions consistent with Ninth Circuit law. That jury acquitted Spanier of six counts and deadlocked on the remainder. But in the retrial, the district court refused to give instructions consistent with its earlier rulings. The district court

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125 ER 3-8.

126 ER 1-2. That was simply untrue, as § 3301 applies only to securities-fraud offenses, not wire and mail fraud.

later tried to distinguish *Shields*, characterizing this as a "half-truths" case rather than an omissions one. But that argument ignored: 1) that the grand jury indicted on omissions, not half-truths; 2) that the elements-of-the-offense instructions described omissions, not half-truths; 3) that the evidence and testimony showed omissions, not half-truths; and 4) that the district court refused a specific jury instruction that would have allowed the jury to decide if it was omissions instead of half-truths. The result was a conviction that was likely based on pure omissions, contrary to this Court's precedent. *Shields* requires reversal.

Second, every count of the indictment was time-barred. Counts 1-18 of the original indictment failed to allege crimes or overt acts within the prior five years, and a five-year statute of limitations applied to each. Count 19 was time-barred also, because securities fraud is not a continuing offense. A later superseding indictment failed to remedy the problem, because it impermissibly broadened the charges, and the first indictment was untimely anyway. And there was no tolling under 18 U.S.C. § § 3288 and 3289, because this Court's dismissal of a prior indictment was final when the mandate spread—more than 60 days prior to the new indictment. Finally, even if these issues were factual questions, the district court failed to give the jury proper instructions to resolve them.

Third, even setting aside the statute-of-limitations issue, it was independent reversible error to fail to give a multiple-conspiracies instruction. While the

government indicted on one overarching conspiracy, evidence supported a theory of multiple, smaller agreements. The district court wrongly took this issue away from the jury, and the error was harmful because the district court also gave a *Pinkerton* instruction that allowed a finding of conspiracy to result in convictions for the other 18 counts in the indictment. Because harmless error is impossible under these circumstances, reversal should result.

Fourth, after this Court dismissed a previous case for a Speedy Trial violation, the district court wrongly determined that the dismissal should be without prejudice. Dismissal should have been with prejudice because: 1) the speedy-trial violation allowed the government to secure a key immunized witness against Spanier; 2) the district court and the government made findings and arguments that this Court found were "belied by the record" in failing to dismiss; and, 3) the prospect of S.E.C. proceedings still serves as a powerful mechanism to obtain justice in this matter. The district court's ruling ignored these factors, and was thus error.

Fifth, Spanier had a Fifth and Sixth Amendment right to inquire into whether the jury's verdict could have been tainted by improper considerations, and the district court violated those rights by prohibiting the jury from discussing any potential issues with defense counsel. The district court's order was a prior

restraint on speech contrary to the First Amendment, and the record did not justify the scope of the restriction imposed. For this reason too, reversal should result.

ARGUMENT

I. The district court erred in failing to instruct the jury that it had to find a relationship creating a duty to disclose before it could convict Spanier on the government's "omissions" theory of liability.

A. Standard of review.

"The standard of review for an alleged error in jury instructions depends on the nature of the claimed error."[127] Where the "instructions are challenged as a misstatement of the law, they are then reviewed *de novo*."[128] Incomplete instructions are treated as legal errors and reviewed *de novo* as well.[129]

B. *Shields* squarely holds that it is "error to not instruct the jury that it must find a relationship creating a duty to disclose before it could conclude that a material non-disclosure supports a wire fraud charge."

United States v. Shields,[130] controlled here and it was reversible error for the district court to hold otherwise. In *Shields*, the defendants were accused of mail,

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127 *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th Cir.1994).

128 *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir.2000) (per curiam) (internal quotation marks and citation omitted).

129 *Dang v. Cross*, 422 F.3d 800, 804–06 (9th Cir. 2005).

130 844 F.3d 819 (9th Cir. 2016).

wire, and securities fraud after a real-estate investment venture.[131] Defendants argued on appeal that the district court erred in permitting the jury to convict on the basis of a material omission without first instructing the jury that it had to find a duty to disclose the information.[132] In a published opinion, this Court agreed: "Defendants are correct that a nondisclosure can support a wire fraud charge only when there exists an independent duty that has been breached by the person so charged."[133]

Ultimately, this Court concluded that "it was error to not instruct the jury that it must find a relationship creating a duty to disclose before it could conclude that a material non-disclosure supports a wire fraud charge." The Court "adopt[ed] the definition of such a relationship" established in *United States v. Milovanovic*, 678 F.3d 713, 723-724 (9th Cir. 2012), and found that it should be applied "to wire fraud charges *when an omissions theory of fraud is alleged*." (emphasis provided). *Id*. at 823. This Court added: "specifically, the relationship creating a duty to disclose may be a formal fiduciary relationship, or an 'informal,' 'trusting

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131 *Id*. at 821.

132 *Id*. at 822.

133 *Id*. (internal punctuation and citation omitted).

relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise.' *This is a factual determination to be made by a properly-instructed jury.*" *Id.* at 823 (internal citations omitted). But despite Spanier's requests, no such instructions were given here. Reversal should result accordingly.

C. The jury did not convict on a "half-truths" theory of fraud.

The district court proffered two reasons to deny Spanier's motion for a new trial. First, the district court decided that *Shields* did not control here because "*Shields* is an omissions case while Defendant's is a half-truths case."[134] But the court reached this conclusion without offering any reasoning or explanation, and without referencing any evidence presented at trial. The court's conclusory statement that "Defendant was convicted of telling fraudulent half-truths,"[135] finds no support in the indictment, the evidence, the jury's verdict, or anywhere else in the record. As discussed in detail in the statement of facts at III.C., *supra*, the government charged an omissions case in the indictment, used witness after witness at trial to argue that Spanier had acted fraudulently through non-disclosures, and it affirmatively requested jury instructions including "omissions"

134 ER 4.

135 ER 5.

(but not half-truth) language. In these circumstances, *Shields* required the instructions requested by Spanier, and it was error not to give them.

The authority relied upon by the district court did not compel a different conclusion. Neither *Lustiger v. United States*, 386 F.2d 132 (9th Cir. 1967), nor *United States v. Woods*, 335 F.3d 993 (9th Cir. 2003) address the question at issue here. Here, the district court relied upon *Lustiger* to find that "deceitful half-truths… have been found to violate the mail fraud statute."[136] But Spanier has never argued to the contrary. If the government had charged and attempted to prove only a "half-truth" or "misrepresentations" theory of fraud, and the jury was instructed accordingly, then there would have been no error. But here, the indictment alleged omissions, the evidence at trial attempted to establish fraud liability through omissions, and the jury instructions for each offense authorized convictions based on omissions. In the context of these omissions, *Shields* controls, and it was error for the district court to hold otherwise.

Woods is more of the same. There, the defendants challenged their convictions by contending that the wire fraud and mail fraud statutes required the jury be instructed to find specific false statements before liability could attach. See *Woods*, *supra*, at 997. But, as with *Lustiger*, *Woods* says nothing about the

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136 ER 6.

omissions *instructions*. Instead, it stands for the proposition that the government may premise fraud liability on a range of conduct, including omissions and half-truths. *Id.* at 999. But the issue here is not whether the government may ever convict based on half-truth or omissions, but what instructions are required to lawfully do so.

In sum, the efforts to frame this case as a "half-truths" or "misrepresentations" case are contradicted by the record. In fact, Spanier proposed an instruction specifically asking the jury to make the distinction between omissions and half-truths, but the government opposed it and the district court rejected it.[137] The jury, then, did not receive the tools to decide an omission versus a misrepresentation, so there is no way to determine that the jury convicted Spanier "of telling fraudulent half-truths." Reversal should result accordingly.

D. The district court abused its discretion in applying the "law of the case" doctrine.

The district court also found that the "law of the case" doctrine precluded the court from applying *Shields*. That too was error. Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously

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137 *See* ER 1243-1244.

decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

Here, the district court found that the "law of the case" applied because this Court had "already approved of this Court's use of the model jury instructions for Spanier's trial."[138] But this Court's *holding* in *Spanier I* was that the Speedy Trial Act compelled dismissal of the indictment. Anything beyond that was dicta because it was not essential to the Court's decision. And "[o]f course, the law of the case doctrine gives no preclusive effect to dicta." *Milgard Tempering v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990). Because there was no reasoned decision from this Court about the legality of the challenged jury instructions, the issue never became the law of this case.

But even if it was, that must yield to intervening controlling precedent. While new precedent from a higher court is certainly an "intervening change in the law" for purposes of the law-of-the-case doctrine, "[a]n independent change of law *by the same court* is not much different." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478 at n.55 (collecting cases) (emphasis provided). "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority*, 393 U.S.

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138 ER 4.

268, 281 (1969). "The 'law of the case' doctrine does not compel a different result." *Doe v. Anrig*, 728 F.2d 30, 31 (1st Cir. 1984) (holding that a decision by the same court of appeals changed applicable law and precluded application of the law-of-the case doctrine). Because *Shields* now stands as controlling precedent, and an unpublished memorandum must yield to that authority, law of the case did not support the district court's refusal to properly instruct the jury.

In summary, the jury was misinstructed under *Shields* and the law of the case doctrine does not save the government here. For all these reasons, the district court erred in denying Spanier's motion for a new trial.

E. The error was harmful.

And that error was harmful. In the first trial, the Court gave instructions that were consistent with the law of omissions. Not coincidentally, the jury homed in on the duty-to-disclose issue during deliberations, and it acquitted Spanier of six counts and hung on the remainder. Under these circumstances, the government cannot credibly argue harmful error. Reversal should result.

II. Every count of conviction was barred by the statute of limitations.

The government's July 1 indictment charged 19 counts: Count 1 was a conspiracy to commit mail, wire, and securities fraud under 18 U.S.C. § 371; Counts 2-18 were substantive mail and wire fraud allegations; and Count 19 was a securities-fraud count. Although both Counts 1 and 19 made conclusory

allegations that the conspiracies continued into the limitations period, the last alleged overt acts occurred in June of 2011—the month prior to the July 1, 2011 cutoff for limitations purposes.

The government later returned a superseding indictment, alleging additional overt acts *after* July 1 of 2011. Spanier moved to dismiss that count also. He argued that it was also time-barred and that it did not "relate back" to the prior, deficient indictment. Thus, Spanier moved to dismiss each count that ultimately went to the jury, and the district court denied each motion. That was error, as discussed below.

A. Standards of review.

This Court reviews statute-of-limitations issues *de novo*. *See United States v. Leo Sure Chief*, 438 F.3d 920, 922 (9th Cir. 2006). The determination of when a limitations period begins to run is also a question of law reviewed *de novo*. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 780 (9th Cir. 2002). Denial of a jury instruction based on a question of law is reviewed *de novo*. *See United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010). Whether jury instructions adequately cover a defendant's proffered defense is also a question of law reviewed *de novo*. *See United States v. Morsette*, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam). Finally, "whether the evidence was sufficient to support the

giving of a multiple conspiracies instruction should be subject to *de novo* review." *United States v. Anguiano,* 873 F.2d 1314, 1317 (9th Cir. 1989).

B. Counts 1-18 were barred by a five-year statute of limitations.

A five-year statute of limitations applies to wire and mail fraud. *See* 18 U.S.C. § 3282. There is no dispute that Counts 2-18 of the indictment are governed by a five-year statute. Because the indictment charging counts 2-18 was returned on July 1, 2016, the counts must have occurred *after* July 21, 2011 to be timely. None did so.

Count 1 of the July 1 indictment was also untimely, because it did not allege an overt act within the limitations period. In conspiracy cases, the statute of limitations starts to run on the date of the last overt act alleged in the indictment. *See United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976). This has been Supreme Court law for over 100 years: "the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate *allegation* and proof." *Brown v. Elliott,* 225 U.S. 392, 401

(1912) (emphasis provided). But the last overt act alleged occurred in June of 2011, a month before the applicable cut-off.[139]

When the government fails to allege an overt act within the statutory limitation period, the indictment is invalid and must be dismissed. *See United States v. Ben Zvi*, 242 F.3d 89, 97 (2d Cir. 2001) (indictment "was time barred because none of the alleged overt acts occurred within five years of the indictment's return."). Even if *evidence* of overt acts might be proven to fall within the limitations period, the allegations must be included within the indictment to save it from being time-barred. *See United States v. Davis,* 533 F.2d 921, 929 (5th Cir. 1976) (rejecting government argument to the contrary, holding that "for purposes of the statute of limitations the overt acts *alleged in the indictment* and proved at trial mark the duration of the conspiracy") (emphasis provided).

The government is not permitted to draft its way around the statute of limitations by simply alleging an ongoing conspiracy without factual support. *See e.g. Fiswick v. United States*, 329 U.S. 211, 216 (1944) (end of conspiracy measured from date of last overt act described in the indictment, even though indictment generally alleged a conspiracy continuing until the date of the

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[139] *See* ER 2123-2126 (alleging the earliest offense as December 10, 2009 and the latest as June 15, 2011).

indictment itself). *See also Bridges v. United States*, 346 U.S. 209, 222-23 (1953) ("The embellishment of the indictment does not lengthen the time for prosecution. It is the statutory definition of the offense that determines whether or not the statute of limitations" has been violated.") Thus, although the government generally alleged a conspiracy that continued into the limitations period, the July 1 indictment lacked any overt acts or factual support for these claims. That does not satisfy the statute of limitations under the law described above. For these reasons, the fraud and conspiracy allegations in the first indictment (Counts 1-18) were barred by a five-year statute of limitations.

C. The superseding indictment was also time-barred, and did not relate back to the July 1 indictment.

The government later tried to extend the limitations period by returning a superseding indictment that alleged overt acts stretching into August of 2011 (the month after the July 1, 2011 cutoff). But that indictment was returned on October 30, 2016 (more than five years after the latest overt act) so the charges were still time-barred unless the superseding indictment "related back" to the July 1 indictment.

But the superseding indictment did not relate back. The rule is that "[a] superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending *and was timely* and the

superseding indictment *does not broaden or substantially amend the original charges.*" *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir. 1990) (emphasis provided). Here, the original indictment was itself not "timely" for the reasons discussed *supra.*

But a superseding indictment also fails to "relate back" if "it broadens or substantially amends" the charges in the original indictment. *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 778-79 (9th Cir. 1986). *See also United States v. Hickey*, 580 F.3d 922, 929 (9th Cir. 2009) (finding relation back because the superseding indictment "did not broaden or substantially amend the original indictment"). The superseding indictment added six crucial overt acts, alleging a cover-up and lulling activity after the FBI had seized assets and executed a search warrant.[140] Those acts were the difference between a time-barred indictment and a timely one. And they introduced a new factual matrix as well: the question was no longer whether Spanier knew that Argyll was selling stock to funds loans and was making false representations to induce borrowers to pledge stock. Instead, the factual questions became whether there was an after-the-fact cover-up; whether there was "lulling" that constituted an offense within the limitations period, or whether the alleged conspiracy had already been completed. An entirely different

[140] ER 2070 *et seq*.

body of law governs these questions also. *See e.g. Grunewald v. United States*, 353 U.S. 391, 406 (1957); *Krulewitch v. United States*, 336 U.S. 440, 444 (1949).

Simply put, the superseding indictment presented a different case with different factual and legal issues than the one the government charged in July. Those theories and factual questions substantially amended and broadened the July 1st indictment such that the superseding indictment did not relate back. The statute of limitations was not tolled accordingly, and the superseding indictment should have been dismissed.

D. The limitations period was not tolled by 18 U.S.C. §§ 3288 or 3289.

As described above, counts 1-18 were subject to dismissal unless the statute of limitations was somehow tolled. The only potentially applicable provisions are found in two statutes, 18 U.S.C. §§ 3288 and 3289. One applies to statutes that have run out before a count was dismissed; the other applies to statutes that are about to expire. [141] But they function similarly. The key language is the same in both, as each allows an indictment to be returned within 60 days of dismissal on appeal. *Cf.* § 3288 ("a new indictment may be returned . . . in the event of an

[141] *Cf.* § 3288 ("Indictments and information dismissed after period of limitations") *with* § 3289 ("Indictments and information dismissed before period of limitations").

appeal, within 60 days of the date the dismissal of the indictment or information becomes final"); § 3289 (same). Thus, "in the event of an appeal"—which was the posture of this case—both § 3288 and § 3299 required the government to reindict within 60 days of dismissal to invoke the tolling provision.

But that did not happen. The mandate dismissing the underlying case issued on February 16th. The district court spread the mandate on February 29th. But the government did not re-indict until July 1, 2016—more than 60 days after the dismissal became final. The tolling provisions did not apply consequently.

The government argued that the dismissal actually occurred on May 11, when the district court ruled that it was without prejudice.[142] But the mandate was clear:

AFFIRMED IN PART; ***INDICTMENT DISMISSED***, and CASE REMANDED WITH INSTRUCTIONS TO REASSIGN FOR LIMITED PURPOSE OF DETERMINING WHETHER DISMISSAL IS WITH OR WITHOUT PREJUDICE.[143]

The remand back to the district court was only "for [the] limited purpose of determining whether dismissal is with or without prejudice." The case was dismissed once this Court said it was dismissed, not when the district court said it

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142 *See* ER 100 *et seq*.

143 *See* ER 2111.

was, because "[a] district court, upon receiving the mandate of an appellate court cannot vary it or examine it for any other purpose than execution."[144]

The government also argued that the dismissal was not "final" until the district court later determined that it was without prejudice. But the law is to the contrary. A decision of the court of appeals generally becomes final when the mandate issues. *United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015) (quoting *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990)); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) ("An appellate court's decision is not yet final until its mandate issues").

There is no authority to suggest that the rules of finality are somehow different for tolling under § 3288 and § 3289. The government could not cite any in the district court, and the trial court could not find any either. In the absence of clear authority, the normal rule that this Court's order is final upon the spreading of the mandate should apply. This is particularly true because it is a bedrock "principle that criminal limitations statutes are to be liberally interpreted in favor of repose." *United States v. Habig*, 390 U. S. 222, 227 (1968).

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144 *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (internal quotation marks omitted)).

For these reasons, the tolling provisions of § 3288 and § 3289 did not apply, and the indictment was time-barred.

E. Although a six-year statute of limitations applies to securities-fraud offenses, that does not save Count 19 or Count 1 from being time-barred.

It is true that in 2010, the Dodd-Frank Act extended the statute of limitations to six years for securities-fraud offenses and conspiracies based on the same. *See* 18 U.S.C. § 3301. The government will argue that this provision saves Counts 1 (the conspiracy) and 19 (the securities-fraud count) from dismissal. The government is mistaken.

1. Securities fraud is not a continuing offense, thus the count alleging a single securities-fraud offense that spanned from 2003-2013 was time-barred.

Although the securities-fraud count in the indictment (Count 19) admittedly carries a six-year statute of limitations, it suffered from its own problems. The securities-fraud count did not allege that a specific crime was committed on a date certain. Rather, it alleged that "*[b]eginning in or around February 2003, and continuing up to and including October 25, 2013*" Spanier committed securities fraud under 15 U.S.C. §§ 78j(b) and 78ff.[145]

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145 *See* ER 2126. The superseding indictment similarly alleged a decade-long range of conduct, but for some reason alleged a stopping point of March 14, 2012. *See* ER 2078.

The key premise in the construction of this count is that securities fraud is a continuing offense. Otherwise, it could not span from 2003-2013. But securities fraud is not a continuing offense. The seminal case on continuing offenses is *United States v. Toussie*, 397 U.S. 112 (1970). In *Toussie*, the Supreme Court held that failing to register for the draft was not a continuing offense for statute of limitations purposes, even though the defendant repeated his failure to register every successive day. The Court explained that "the doctrine of continuing offenses should be applied in only limited circumstances" and affirmed "the principle that criminal limitations statutes are to be liberally interpreted in favor of repose." *Id.* at 115.

This Court applies *Toussie* faithfully—so much so that it has articulated a presumption *against* continuing offenses. "This Court has held that there is a presumption against finding continuing violations unless the language of the statute compels such a conclusion or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *United States v. Nash*, 115 F.3d 1431, 1441 (9th Cir. 1997). *See also United States v. Niven*, 952 F.2d 289, 291 (9th Cir. 1991).

And even before *Toussie*, securities fraud was already not a continuing offense under Ninth Circuit law. In *Carroll v. United States*, 326 F.2d 72, (9th Cir. 1963), the government alleged fraud in the sale of securities under 15 U.S.C. §

77q(a). This Court held that "[i]t is established law that the statute of limitations begins to run when an offense is completed." It then observed that substantive mail fraud is deemed "completed when the defendants received the money that was intended to be obtained by their fraud, and that certain subsequent transactions (banking transactions) were merely incidental and collateral to it, and not a part of it." *Id.* It affirmed the same rule for securities fraud. Accordingly, this Court reversed the convictions, holding that they were time-barred.[146]

Thus, even taking the government's allegations at face value, the crime of securities fraud was complete as soon as the first investor was purportedly defrauded—back in 2004 or so, according to the government's claims. The allegations twelve years later are time-barred, and this Court should reverse Count 19 with instructions to dismiss.

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[146] For additional authority holding that securities fraud is not a continuing offense, *see United States v. Motz*, 652 F. Supp. 2d 284, 294 (E.D.N.Y. 2009) (securities fraud under 18 U.S.C. § 1348 is not a continuing offense); *Sanders v. United States*, 415 F.2d 621, 626 (5th Cir. 1969) (under 15 U.S.C. § 77q(a), "each fraudulent offer or sale of any security accompanied by mailing or use of any means or instruments of transportation or communication in interstate commerce is a separate crime"). *See also In Finkel v. Stratton Corporation*, 962 F.2d 169, 173 (2d Cir. 1992) (holding that statute of limitations begins to run in securities-fraud case at "the moment that the parties become contractually bound to the deal"—even if the parties have not yet fully performed on the contract for sale).

2. A five-year statute should apply to Count 1 because it charges a conspiracy to commit mail and wire fraud in addition to securities, and there is no way to tell which object of the conspiracy offense the jury agreed upon.

The conspiracy charged in Count 1 alleged three different object offenses: mail fraud, wire fraud, and securities fraud.[147] The government will argue that because one of the three of these crimes, securities fraud, now has a six-year statute-of-limitations period under the Dodd-Frank Act, then the entire count has a six-year limitations period. But the law does not support that argument.

The Supreme Court has held that when a general verdict could be based on a ground that is time-barred, the verdict should be set aside. *See Yates v. United States*, 354 U.S. 298, 312 (1957). "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether for example, the action in question . . . is time barred . . . .When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). This Court has relied on *Griffin* and *Yates* to reverse a conviction when "the jury could have based its general verdict on acts alleged in the indictment that occurred outside the

147 *See* ER 2072.

limitations period" and there was no way to tell the true basis of the conviction. *United States v. Fuchs*, 218 F.3d 957, 962 (9th Cir. 2000).

So it is here. The district court did not give a special verdict form. There is no way to tell whether the jury found a securities-fraud conspiracy, which would have a six-year statute, or a mail or wire fraud conspiracy, which would have a five-year limitations period. *Fuchs*, *Yates*, and *Griffin* all call for reversal in this situation.

The fact that jury convicted Spanier of substantive securities fraud does not change this result. The district court gave wide-ranging *Pinkerton* and aiding-and-abetting instructions over defense objection, so the jury could well have convicted on a time-barred wire-fraud conspiracy, and then found Spanier guilty of securities fraud as a "foreseeable consequence" under *Pinkerton*. Additionally, the securities-fraud count was time-barred in its own right, as set forth above.

For all these reasons, the Dodd-Frank Act does not save the government. Counts 1 and 19 remain time-barred. Reversal should result.

F. If it was a jury question whether the statute of limitations applied, then the convictions must still be reversed because the jury instructions were erroneous.

Even if the district court properly denied the motions to dismiss for violation of the statute of limitations, it still committed reversible error by failing to instruct the jury on Spanier's possible defenses.

1. It was error to fail to give a withdrawal instruction given its interaction with a statute-of-limitations defense.

At the close of evidence, Spanier asked for the Ninth Circuit Model instruction on withdrawal from a conspiracy, which states:

> Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.[148]

There was enough evidence to support giving that instruction, and allowing the jury to decide if it applied. By June of 2011—the month before the statute-of-limitations cut-off—Spanier affirmatively stated that he would not consummate any more loans with Argyll. "We both decided it was not wise to proceed," one of the borrowers testified.[149] In fact, in June of 2011, Spanier announced that he

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148 ER 1234. Cf. Ninth Cir. Model Instr. 8.24 (same).

149 ER 1070.

would not do additional loans with Argyll, "no matter what."[150] And by that time, Spanier was affirmatively trying to help the borrower get his shares back.[151] Spanier confirmed this account through his own testimony, testifying that he requested that Argyll redeliver Seller's asset back to him.[152] He elaborated that by June, any discussions about trying to do stock loans had stopped.[153] He requested that the collateral be returned, and he had been instructed by counsel not to speak to Argyll.[154] He attempted to communicate with Argyll multiple times regarding regaining Sellers' stock and the fact that he was "not supposed to be involved in any client-related areas," but despite many phone calls,[155] he was "not being very successful in speaking with them."[156]

There was additional evidence that Spanier had withdrawn from any conspiracy involving Argyll in 2007, when he left to join a different lender. The

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150 ER 1112-1113.

151 *Id*. *See also* ER 1110.

152 ER 548.

153 ER 612.

154 *Id*.

155 ER 613-614.

156 ER 614.

evidence showed that Spanier worked as a broker with the lender Argyll from 2003 until approximately 2007, at which time he stopped working with them entirely and began working with a different lender called Ayuda. Spanier testified that Argyll had become engrossed in a biotech venture and stopped doing stock-loan business with him.[157] He testified that it had been a "slap in the face" when they did not include him in their new business venture,[158] and that he began to work for a different lender entirely.[159] Leaving to work with a new lender could have supported a finding of withdrawal also.

These two possible instances of withdrawal should have been enough to get a jury instruction. "The general principle is well established that a criminal defendant is entitled to have a jury instruction on *any defense* which provides a legal defense to the charge against him." *United States v. Escobar de Bright*, 742 F.2d 1196, 1198 (9th Cir. 1984) (emphasis provided). All that is required is "*some* foundation in the evidence," *id.* at 1198 (emphasis in original). That is so "even though the evidence may be weak, insufficient, inconsistent, or of doubtful

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157 ER 533-535.

158 ER 547.

159 *Id*. He worked exclusively with the new, different ender until late 2009, when Argyll called him back and announced that they were going back into the stock loan business. ER 539.

credibility." *Id.* Failure to give such an instruction is a violation of constitutional magnitude. *See Conde v. Henry*, 198 F.3d 734, 740 (9th Cir. 1999).

But the district court did not rely on that legal standard. Instead, it relied on language from the case *United States v. Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992), where this Court held that "[w]hen the defendant has introduced prima facie evidence of withdrawal from participation in the scheme, however, the government, *to overcome a motion for acquittal*, must rebut the showing of withdrawal." (emphasis provided).[160] But Spanier did not move for acquittal based on withdrawal. He simply wanted a jury instruction to allow the jury to decide. Confusing those standards was error.

The error was harmful, because "[u]pon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution." *Smith v. United States*, 568 U.S. 106, 107 (2013). Put differently, withdrawal is a defense to conspiracy "only when coupled with the defense of the statute of limitations." *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981). "It is thus only the interaction of the two

160 ER 277.

defenses of withdrawal and the statute of limitations which shields the defendant from liability." *Id.*

By failing to give the instruction, the district court deprived Spanier of a potential complete defense. This was harmful error, and it should result in reversal of all counts of conviction.

2. It was error to fail to give a multiple-conspiracies instruction also.

The district court also wrongly refused to give a multiple-conspiracies instruction. "Evidence sufficient to support a multiple conspiracies instruction is present where a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." *United States v. Mincoff*, 574 F.3d 1186, 1196 (9th Cir. 2009) (quoting *United States v. Fernandez*, 388 F.3d 1199, 1247 (9th Cir. 2004)). "If the evidence indicates two or more conspiracies may exist, a multiple conspiracies instruction *must be given.*" *United States v. Taren-Palma*, 997 F.2d 525, 530 (9th Cir. 1993) (emphasis provided).

This is so even if the evidence could arguably support either a single overarching conspiracy, or multiple conspiracies. In *United States v. Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979), this Court held that "[t]he evidence here was sufficient to support the jury's finding that a single conspiracy had occurred; but it

was also sufficient to warrant a jury instruction on the possibility of finding multiple conspiracies." "Thus the trial judge should have instructed the jury on the multiple conspiracy issue." *Id.* As the Seventh Circuit put it, "[s]ince the existence of multiple conspiracies is really a fact question as to the nature of the agreement, it is for the jury to decide whether there is one agreement or several." *United States v. Varelli*, 407 F.2d 735, 746 (7th Cir. 1969).

The evidence showed that Spanier worked with several different stock lenders over the years, and that the stock lenders were not in business with each other.[161] The government's own witness, Manny Bello, was the owner of Ayuda Funding—the new lender. He confirmed that his work with Spanier was entirely separate from the overarching conspiracy that the government alleged in the indictment. For example, Bello testified that he had first met Spanier in 2007 or so, and that Spanier began to broker stock-loan deals with him thereafter.[162] Bello understood that when Spanier started doing loans with him, it was because Argyll had gone into a different line of work. Argyll "was starting to concentrate

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161 *See* ER 1954 (lender "the Ruby Group"); ER 533-535 (lender "Argyll Investments" until 2007); ER 1195-1196 (ending relationship with Argyll to work with "Ayuda Funding"); ER 539-540 (leaving Ayuda to broker different loan product for Argyll once again).

162 ER 1141.

on other things" like a Biotech company, and represented that they were not in the stock loan business anymore.[163] Although Bello had learned the stock loan business from Argyll early on, he had since started his own company that was completely separate from Argyll.[164] Moreover, Bello—who again, was the government's own witness—testified emphatically that he was not running a fraudulent business.[165] Similarly, he testified that he never conspired with Spanier to defraud anybody.[166]

The jury should have determined whether Spanier's arrangement with Bello and Ayuda, which began in 2007, was separate from his dealings with Argyll. If so, it would have strengthened a statute-of-limitations defense, because the Argyll conspiracy would have ended in 2007. The same is true if the jury found a separate Argyll agreement to sell a different product in 2010, for the same reasons. There was enough evidence to support a multiple-conspiracies instruction, and it was error not to give one.

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163 ER 1195.

164 ER 1196. *See also* ER 1197 (confirming that his business was separate from Argyll).

165 ER 1183-1184.

166 ER 1185.

III. Failure to give a multiple-conspiracies instruction was harmful error independent of the statute-of-limitations issues.

Failure to give a multiple-conspiracies instruction was reversible error even if there was no statute-of-limitations defense. "Evidence sufficient to support a multiple conspiracies instruction is present where a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." *Mincoff*, 574 F.3d at 1196. "If the evidence indicates two or more conspiracies may exist, a multiple conspiracies instruction *must be given.*" *Taren-Palma*, 997 F.2d at 530 (emphasis provided).

This was particularly true here, because the conspiracy charge in Count 1 opened the door to conviction on literally every other charge in the indictment. The district court gave a *Pinkerton* instruction, whereby the jury could convict Spanier of all of the other counts if it found him guilty of the overarching conspiracy alleged in Count 1.[167] There was no special verdict form to discern whether or not the jury did exactly that. These instructions were erroneous, with or without the statute of limitations. Reversal should result.

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167 *See* ER 32.

IV. The earlier dismissal for violation of the Speedy Trial Act should have been with prejudice.

A. Standard of review

This Court reviews the district court's decision to dismiss an indictment under the Speedy Trial Act without prejudice for an abuse of discretion. *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008). A court abuses its discretion if it "failed to consider all the factors relevant to the choice" and the "factors it did rely on were unsupported by factual findings or evidence in the record." *Id*.

B. The Speedy Trial Act required dismissal of the indictment with prejudice.

The Speedy Trial Act enumerates three factors to determine whether dismissal should be with or without prejudice. The Act states: "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2). There is no preference for dismissals without prejudice: "[T]he choice of whether to dismiss with or without prejudice depends on a careful application of the statutorily enumerated factors to the particular case, there is no presumption in favor of either sanction." *United States v. Clymer*, 25

F.3d 824, 831 (9th Cir. 1994). The totality of these factors required dismissal of the indictment with prejudice.

1. The seriousness of the offense weighs in Spanier's favor based on the facts of this white-collar case.

The first factor is the seriousness of the offense. It weighs in favor of dismissal with prejudice. The charges here involve economic crimes, which typically are considered less serious than others, like violent crime or major drug trafficking. Cf. U.S.S.G. § 4B1.1. And while the government claims a substantial amount of loss, the Court recognized at the time of sentencing that the alleged victims were sophisticated and successful executives, often represented by counsel, who were actually given millions of dollars in loans; they were generally not particularly vulnerable victims who were rendered penniless by the defendants' actions.

Moreover, in considering Spanier's role in the alleged fraudulent conduct, the evidence at both trials established that Argyll's owners were principally responsible for the scheme. Spanier was simply a middleman. Indeed, the jury at Spanier's first trial struggled with the issue of culpability, acquitting him on several counts and deadlocking on the rest. The government's evidence showed, at best, that Spanier had allegedly been put on notice about Argyll's fraudulent

conduct and decided to turn a blind eye. On balance, the seriousness of the offense weighed in Spanier's favor.

2. The facts and circumstances of the Speedy Trial violation favored dismissal with prejudice.

The second factor under § 3162(a)(2) also favors dismissal with prejudice. The record is clear that the government requested and convinced the district court to set a retrial date beyond the 70 days authorized by statute. It did so because it was interested in securing an immunized witness to use against Spanier at trial.[168] That process caused the retrial to begin approximately four months after the Speedy Trial clock had expired. In *Clymer*, 25 F.3d at 832, this Court found that an improper delay of five months weighed in favor of dismissal with prejudice under the second factor.

This Court also reasoned that the delay in *Clymer* resulted in actual prejudice to the defendant. *Id.* at 832. Here the delay prejudiced Spanier by allowing the government to secure a key cooperating witness against him, one that became a central part of the government's case-in-chief. *See also United States v. Hall*, 181 F.3d 1057, 1063 (9th Cir. 1999) (speedy trial delay prejudiced defendant by allowing government to secure a cooperating witness).

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168 *See* ER 2177-2178.

The government's conduct during the appeal also weighs in favor of dismissal with prejudice. Instead of recognizing the district court's clear violation of the Act, the government defended the improper post-hoc rationalizations that defied longstanding Ninth Circuit precedent. For example, the government claimed that the delay was proper because defense counsel had requested a continuance to prepare for trial. But the record shows that in response to the government's request for a September 2013 date (which was already beyond the 70-day clock), defense counsel specifically stated that he was only concerned about his pre-paid vacation from September 20 to October 4, 2013, and that he could do the retrial earlier.[169]

Further, the government's positions contributed to the case remaining on appeal for 15 months, further exacerbating the original delay. More than four years elapsed between Spanier's original indictment and his indictment in this case, with two years of the delay being directly attributable to the government's conduct before this Court and the district court. Dismissal with prejudice is proper in these circumstances. *See, e.g., United States v. Lopez-Avila*, 678 F.3d 955, 965-66 (9th Cir. 2012) (misrepresentations of the record may justify dismissal with prejudice); *United States v. Kojayan*, 8 F.3d 1315, 1320, 1324-25 (9th Cir. 1993)

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169 ER 2166.

(government's continued failure to appreciate violation on appeal can be basis for dismissal with prejudice).

3. The district court's post-hoc reasoning in support of an "ends-of-justice" continuance overwhelmingly favor dismissal with prejudice.

The third factor, which considers the impact on the administration of the Act and the administration of justice, perhaps most strongly weighs in favor of dismissal with prejudice. In finding that the third factor strongly weighed in favor of dismissal with prejudice in *Clymer*, the Ninth Circuit cited the attempt by the district court and the government to retroactively implement an "ends of justice" continuance in violation of this Court's longstanding precedent. The Court explained: "[W]e believe that the Act's most severe sanction is appropriate where the surrounding circumstances lead us to conclude that district courts and United States Attorneys' offices have failed to recognize or implement our long-standing precedents." *Clymer*, 25 F.3d at 832.

Importantly, in this case, the district court claimed that its post hoc rationalizations were actually made at the time it granted the continuances, and the government defended that claim despite the fact that it was belied by the record. If a district court believes that a prosecution should not be terminated, it can always dismiss the indictment without prejudice in accordance with the Act. The answer is not to flout the Act and diminish the credibility of the system through post-hoc

rationalization. This Court has held dismissal with prejudice to be appropriate in similar circumstances—see *Clymer*, supra—and so it should be here.

4. Dismissal with prejudice was proper because the lead defendants suffered devastating consequences and Spanier still faces an active SEC investigation.

"Dismissal with prejudice also serves the more general interest in the administration of justice." *Clymer*, 25 F.3d at 833. Like the defendant in *Clymer*, Spanier's codefendants were more "central participant[s] in the scheme . . . ." *Id.* at 833. Spanier was ranked third of the three defendants in the indictment. The lead defendant, Miceli, committed suicide before trial, and the second defendant, McClain, received a sentence of 15 years. Thus, this case has had devastating consequences for the main participants. Furthermore, Spanier still faces an active SEC civil action, which can certainly exact restitution and substantial penalties if justified.

For all these reasons, the district court abused its discretion in dismissing the indictment without prejudice. Reversal should result.

V. It was structural error for the trial court to forbid jurors, in perpetuity, from discussing deliberations after the verdict.

"[A]bsent good cause for restraint, petit jurors are free to discuss their service if they choose to do so." *See, e.g.*, *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982). As this Court has noted, "under our constitutional system

prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances." *Columbia Broadcasting Systems, Inc., v. U.S. Dist. Court for Cent. Dist. of California*, 729 F.2d 1174, 1183 (9th Cir. 1984).

This Court has explicitly extended these constitutional principles to post-trial communication with jurors. In *United States v. Sherman*, 581 F.2d 1358, 1362 (9th Cir. 1978), the Court held that the district court erred "as a matter of law" in prohibiting post-trial contact with jurors. The Court explained that such an order needed to be supported by a finding that "the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest" and that "the restraint must be narrowly drawn and no reasonable alternatives, having a lesser impact on First Amendment freedoms, must be available." *Id*. at 1361. An order to the contrary was "was clearly erroneous as a matter of law." *Id.*

The same is true here. The district court expressly forbid jurors to speak to defense counsel about legal and legitimate subjects of inquiry, telling the jury: "*I would instruct you* not to discuss anything that went on in that jury deliberation room *with anyone*, okay."[170] It continued, "So it may be that these lawyers contact you and ask you about what you think, etc. I would urge you to discuss their

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[170] ER 262 (emphasis provided).

presentation of the case but *not to discuss the evidence or again to discuss what was discussed in the jury deliberation room."*[171]

In making this admonition, the district court violated Spanier's Fifth and Sixth Amendment rights to explore legitimate bases to challenge his verdict. Indeed, Fed. R. Evid. 606(b) allows a juror to testify about "whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." But the district court's order made it impossible for Spanier to even attempt to inquire with the jurors about whether any of those factors could have influenced the outcome of the case.

And in *Pena Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), the Supreme Court recognized that both Rule 606(b) and its underlying principles must give way to a defendant's constitutional rights to avoid being subjected to a verdict based on his or her race. 133 S.Ct. at 868. The Court's decision rested on the presumption that jurors would be free to discuss these race-based concerns with

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171 *Id*. (emphasis provided).

defense counsel or other parties. *Id*. at 869. But a juror in this case would have been prohibited from making such a statement to defense counsel due to the scope of the district court's gag order.

In sum, the district court's order prejudiced Spanier by prohibiting jurors from discussing or even approaching defense counsel with these concerns. It also precluded Spanier from even attempting to inquire with jurors about the areas specifically authorized by Fed. R. Evid. 606(b). Because no valid reasons supported the broad gag order imposed in this case, the trial court's order amounted to an unconstitutional prior restraint contrary to the First Amendment, and violated Spanier's Fifth and Sixth Amendment rights. For these reasons, reversal should result, and this Court should remand for a new trial.

CONCLUSION

For all these reasons, every count should be reversed and dismissed. In the alternative, a new trial should be granted.

Dated: August 21, 2017

Respectfully submitted,

s/ Timothy A. Scott

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Certificate of Related Cases

Counsel for appellant is unaware of any cases currently pending in this Court that are related for purposes of Circuit Rule 28-2.6.

Dated: August 21, 2017

Respectfully submitted,

/s/ *Timothy A. Scott*

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I hereby certify that 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 on (date) August 21, 2017 .

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

Signature (use "s/" format) s/ Timothy A. Scott

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) .

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 17-50128

I, Timothy A. Scott , certify that this brief is identical to the version submitted electronically on [date] August 21, 2017 .

Date August 28, 2017

Signature s/ Timothy A. Scott

(either manual signature or "s/" plus typed name is acceptable)