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. 16cr1545-BEN

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

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Introduction

There is a saying: "If you have the law, pound the law; if you have the facts, pound the facts. If you have neither, pound the table."[1] This appears to be a pound-the-table case for the government. Mr. Spanier has the law: Ninth Circuit precedent now vindicates his objections to an omissions theory of liability;[2] his counts of conviction were plainly time-barred; and the district court exacerbated

[1] See https://quoteinvestigator.com/2010/07/04/legal-adage (last visited March 5, 2018).

[2] *United States v. Shields*, 844 F.3d 819, 822 (9th Cir. 2016)

the error by denying jury instructions consistent with these principles. And he has the facts: when his jury was properly instructed in a prior trial, he won acquittals and a mistrial. So the government's response brief makes a host of arguments that contradict the record and misinterpret the law. Mr. Spanier respectfully provides this reply brief to respond to this rhetorical table-pounding.

Argument

I. *Shields* controlled here, and it was error for the district court to find otherwise.

United States v. Shields, 844 F.3d 819, 822 (9th Cir. 2016) 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." This Court's model fraud instructions have since been modified accordingly. *See* Ninth Cir. Model Instr. 8.121, 8.124. Mr. Spanier was convicted despite preserving these precise issues and proposing jury instructions to the contrary.

The government recognizes that *Shields* is a significant problem. So despite extensive evidence in the record to the contrary, it makes three arguments why *Shields* doesn't apply: 1) It insists that "the United States never presented an omissions theory of fraud in this case." Government's Answering Brief ("GAB") at 45. 2) It argues that "law of the case" required the district court to ignore binding intervening precedent. GAB at 42. And, 3) it claims that error was harmless. GAB at 49.

Each argument is addressed below.

A. The record belies any claim that the government relied on a "half-truth" theory of fraud.

The government simply ignores the record in arguing that it did not rely on an omissions theory. As set forth at length in the opening brief—*see* Appellant's Opening Brief ("AOB") at 19-28—the salient facts can be summarized as follows:

- The indictment alleged scores of purported material omissions and non-disclosures. *See, e.g.*, ER 2072, 2075, 2076, *id.* (different omission), 2078, and 2124.
- The government included omissions in its summary of the charges that the district court provided the jury at the beginning of the case. *See* ER 1812-1813.[3]
- The government elicited "omissions" testimony from virtually every alleged victim at trial. *See* ER 1922 (government's first witness, T. Paul Bulmahn, asking "Did Mr. Spanier tell you…?" about previous issues with Argyll, an SEC investigation, prior complaints, prior lawsuits); ER 1640-1645 (same, second witness, Scott Wolstein); ER 1724 (same, different witness); ER 1757 (same, different witness); ER 1273 (same, different witness); ER 1389, 1407

[3] "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*" (emphasis provided).

(same, different witness); ER 1469 (same, different witness); ER 975 (same, different witness); ER 1027-1028, 1061 (same, different witness).

- The government strenuously argued guilt from the alleged omissions. *See* ER 1878-1879 (opening statement); ER 321, 324-325, 325-326, 388-389 (closing arguments).
- Jury instructions permitted conviction based on omissions. *See* ER 24-25 (mail fraud elements); ER 26-27 (wire fraud elements); ER 29-30 (securities-fraud elements).
- Mr. Spanier's proposed jury instructions on the issue were rejected. *See* CR 76, ER 1230 (elements of the offenses, without "omissions"); ER 9, 278, 1243 (proposed instruction describing difference between omission and "half-truth" for jury).

The record thus belies the government's claim that it "never presented an omissions theory of fraud in this case." GAB at 45. Tellingly, the government's brief does not even attempt to challenge the exhaustive citations set forth in the opening brief and summarized above. *See e.g.* GAB 49. Instead, the government simply pretends that these parts of the record do not exist, insisting that it presented a "half-truths" theory instead. *Id.* Whether the government chooses to acknowledge them or not, these facts required an omissions instruction under

Shields. 844 F.3d at 822-823. That did not happen. As in *Shields*, reversal should result.

B. The "law of the case" doctrine did not apply.

The government next claims that the "law-of-the-case" doctrine somehow required the district court to disregard intervening binding precedent. *See* GAB at 42-44. That argument is flawed for three reasons.

1. The unpublished memorandum did not provide any reasoning or analysis, and did not decide whether this was an omissions or a "half-truths" case.

First, there was no "law-of-the-case" regarding the legality of the jury instructions, because this Court's holding in *Spanier I*—an unpublished memorandum disposition—was primarily that the Speedy Trial Act required dismissal of the indictment. But even the jury instruction issue in *Spanier I* was properly considered, it would have to yield to *Shields* because it was "conclusory" and did not include any substantive analysis of the jury issues at stake. It concluded, at most, that the district court did not abuse its discretion in giving what were then model jury instructions. But it did not resolve whether the government presented a "half-truth" versus an "omissions" theory of liability.

United States v. Manzo, 675 F.3d 1204 (9th Cir. 2012), is instructive. There, the defendant brought a § 2255 petition that argued, *inter alia*, that the government breached the plea agreement during his sentencing. This Court had already rejected

that claim in a direct appeal. Nevertheless, because the prior decision was "conclusory" and provided "no hint of the reasoning supporting that decision" a subsequent panel addressed the claim on the merits, holding that law of the case did not apply. *Manzo*, 675 F.3d at 1211 n.3.

So it is here. *Spanier I* did not reveal what, if any, reasoning supported its decision. Even if it were a holding, it is a conclusory one not supported by analysis. That kind of decision must yield to a considered analysis of the facts and law—especially in light of a published decision directly on point.

2. A published opinion is intervening precedent, even if law-of-the-case applied.

But even if the panel's statements in *Spanier I* became law of the case, *Shields* was intervening law. *See* AOB at 46-47. *Spanier I* wrote that "the district court acted well within its discretion in using the model jury instructions, *and Spanier has cited no persuasive authority holding otherwise*." *Id*. (Emphasis provided). But now, *Shields* represents not just persuasive authority, but binding precedent. Once *Shields* was decided, the district court was bound to follow it. "Circuit law…binds all courts within a particular circuit, including the court of appeals itself." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

The government has not provided authority for the notion that a district court can ignore binding, if intervening, Circuit precedent in favor an earlier unpublished memorandum. Nor could it: "The prudential doctrine of law of the case does not

bar reconsideration of an issue when controlling authority has since made a contrary decision of the law applicable to such issues." *Dean v. Trans World Airlines*, 924 F.2d 805, 810 (9th Cir. 1991) (internal quotations omitted). Reversal should result for this reason, too.

3. The law-of-the-case is discretionary in any event, and should not have been rigidly applied in light of intervening law.

Finally, the "law of the case is a discretionary doctrine." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.1997). A decision on the merits of an issue in a prior appeal should not be followed if "the decision is clearly erroneous and its enforcement would work a manifest injustice." *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir.1995). The panel's statements in *Spanier I* were later overruled by *Shields*, and Spanier would suffer manifest injustice if this Court rejects his *Shields* challenge by relying on the law-of-the-case doctrine. For all these reasons, reversal should result.

C. Under this Court's precedent, the results of the first trial establish the harmfulness of the error.

The government also claims that any *Shields* error was harmless beyond a reasonable doubt. *See* GAB at 49-51. That argument too is belied by the record. In the first trial, the district court gave duty-to-disclose instructions. *See* ER 213-215. The district court instructed the jury, for example, that "a party has a duty to disclose material inside information to another party only if there is a fiduciary

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. . . " ER 214. 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 . . . " ER 215. The district court also tried to define "fiduciary relationship" and when this duty to disclose arises. ER 214-215.

And sure enough, the jury zeroed in on the duty-to-disclose issue with a series of questions during deliberations. *See e.g*. ER 217-218. For example, the jury asked whether "all fees have to be disclosed in stock loans according to the law?" *Id*. at 217. The jury asked several other "omissions" and "duty to disclose"-related questions. *See* CR 221, 12cr918-BEN. Thereafter, the trial ended with acquittals on six counts and a hung jury on the remainder.

But then the rules changed. The government persuaded the district court to reverse its prior decisions and to omit any duty-to-disclose instructions. Only after proceeding on an omissions theory without proper jury instructions was the government able to secure convictions in the subsequent trials.

That record is evidence of harmfulness under this Court's precedent. In *United States v. Thompson*, 37 F.3d 450 (9th Cir. 1994), for example, the defendant argued lack of fingerprint evidence in a no-knowledge drug case. In the first trial, the defendant pointed to the lack of fingerprint evidence and the jury

hung. In the second trial, the government convinced the district court to preclude any fingerprint argument and the defendant was convicted. This Court reversed: "Here, Thompson's first trial led to a hung jury while the second trial, in which she was not allowed to comment on the lack of fingerprints, resulted in a conviction. That is persuasive evidence that the district court's error affected the verdict." *Id.* at 454.

Similarly, in *United States v. Geston*, 299 F.3d 1130, 1136 (9th Cir. 2002), this Court reversed a district court for allowing questions during a retrial that did not occur in the first trial. The Court compared the two trials to find the error not harmless: "[Defendant]'s first trial, which did not include the improper questioning, resulted in a mistrial, with the jury unable to reach a verdict. This circumstance leads us to conclude that the improper questioning impacted [his] due process rights." *Id.*

The Court did the same in *United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987), holding that, "particularly in view of the prior hung jury, we conclude that the error was not harmless beyond a reasonable doubt." *See also United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997) ("We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this evidence.")

So it should be here. When the jury received guidance and instructions on omissions and duty-to-disclose, it acquitted Spanier on numerous counts and hung on the rest. When those instructions were omitted in subsequent trials, the jury returned convictions. The record, then, does not support a finding that the *Shields* error was harmless beyond a reasonable doubt under this Court's precedent. Reversal should result accordingly.

II. All counts of conviction were time-barred.

Each count of conviction in the indictment and the superseding indictment was time-barred. The first indictment was time-barred because Counts 1-18 did not allege crimes or overt acts committed within the previous five years, and a five-year statute of limitations applied. AOB at 49-51. Count 19 was time-barred because securities fraud is not a continuing offense. Further, the limitations period was not tolled because the indictment was not returned within 60 days after dismissal, as required by 18 U.S.C. §§ 3288, 3289. Lastly, the superseding indictment was also time-barred because the additional overt acts alleged in the conspiracy count were outside the five-year limitations period and could not relate back to the original indictment because that indictment was also time-barred and the new charges broadened the conspiracy alleged. *See* AOB at 51-60.

The government's arguments in response should not be well-taken.

A. The indictment became final once this Court's mandate in *Spanier I* issued.

The government first argues that the first indictment was timely because this Court's dismissal of the indictment did not become "final" until long after the mandate spread. GAB at 22. But this Court's mandate in *Spanier I* was clear: "INDICTMENT DISMISSED…" ER 2111. That should be the end of the inquiry. On remand, the district court had no authority to determine whether the indictment would be dismissed, or when that would occur. The indictment *had already been dismissed by this Court*. The only question was whether the government would be permitted to refile at some point in the future. That dismissal became "final" when the mandate issued in February 2016. *See* AOB at 55. The 60-day clock began to run on that date. In any event, any ambiguity about the nature of the "finality" referenced by these provisions must be resolved in favor of repose. *See United States v. Habig*, 390 U.S. 222, 227 (1968).

The district court's analysis of whether to dismiss with or without prejudice had no bearing on the finality of the dismissal. The dismissal was an express part of this Court's mandate and could not be altered by a lower court. And while the government argues that "it was not until Judge Miller issued his dismissal order that the United States knew it could return to the grand jury to seek a new indictment" and that Spanier's position "takes the ability to reindict out of the government's hands," GAB at 24, it cites no authority for either proposition. The

government does not need the district court's permission to seek an indictment. As the Supreme Court has held, "the grand jury requires no authorization from its constituting court to initiate an investigation, *nor does the prosecutor require leave of court to seek a grand jury indictment*." *United States v. Williams*, 504 U.S. 36, 48 (1992) (emphasis provided). Thus, the government could have protected its rights by reindicting Spanier immediately upon learning that the indictment had been dismissed by this Court.

The government could also have made the district court on remand aware of the 60-day tolling period and requested a more expeditious ruling on the nature of the dismissal. It did neither. Indeed, the government waited almost two months to reindict after the district court found dismissal should be without prejudice. Because the government did not reindict until July 1, the tolling provisions of the Speedy Trial Act did not apply. Dismissal should result accordingly.

B. The district court applied the wrong statute of limitations in reinstating Counts 2-18 of the original indictment.

Tellingly, the government ignores entirely the district court's clearly erroneous finding that a six-year statute of limitations applied to all counts of conviction. *See* ER 1-2. The statute referenced by the trial court, 18 U.S.C. § 3301, applies only to the securities fraud charge. *See* 18 U.S.C. § 3301(b) ("No person shall be prosecuted, tried, or punished *for a securities fraud offense*, unless the indictment is found or the information is instituted within 6 years after the

commission of the offense.") The district court committed clear legal error by relying on this statute to justify its decision to reinstate Counts 2-18 of the original indictment, which did not charge any securities fraud offenses. For this reason alone, the district court should be reversed in this case.

C. Under this Court's precedent, the statute of limitations for the conspiracy count began to run on the date of the last overt act alleged.

Citing out-of-circuit authority while ignoring Ninth Circuit law, the government also claims that the conspiracy count in the indictment was timely. GAB at 26. But the record shows otherwise. The last overt act alleged in that indictment took place in May 11, 2011. *See* ER 2122. Under this Court's precedent, that is the date the limitations period for that count began to run. *See United States v. Charnay*, 537 F.2d 341, 354 (9th Cir. 1976) ("*(the) statute of limitations starts to run on the date of the last overt act alleged to have caused the complainant injury*.") (Emphasis provided). *See also United States v. Walker*, 653 F.2d 1343, 1347 (9th Cir. 1981). Tellingly, the government does not mention any of this precedent, instead relying on an out-of-Circuit case, *United States v. Rutkoske*, 506 F.3d 170, 175 (2d Cir. 2007). *See* GAB at 28-29. Obviously, *Rutkoske* is unpersuasive authority where binding precedent from this Court establishes the applicable rule of law.

And 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 held time-barred when no overt acts alleged within limitations period). Even if evidence of overt acts might be proven to fall within the limitations period, they must be included within the indictment to save it from being time-barred. Put differently, charging a timely overt act in the indictment is mandatory; proof at trial does not save an indictment missing this key element. *See United States v. Davis*, 533 F.2d 921, 929 n.11 (5th Cir. 1976) (describing "our repeated holdings that proof of a conspiracy must be based on *allegation* and proof of both the criminal agreement and of the commission by one of the conspirators of an overt act in furtherance of the conspiracy") (emphasis in original).

Because here the original indictment did not allege any overt acts within the limitations period, it should have been dismissed as untimely. Reversal should result accordingly.

D. The superseding indictment did not "relate back" to the initial indictment.

Under this same authority, the conspiracy alleged in the superseding indictment was also untimely, as the last overt act it alleges occurred in August 2011 and that indictment was returned more than five years later in October 2016. ER 2077. Contrary to the government's claim, the superseding indictment did not "relate back" to the initial indictment. *Cf.* GAB at 31-33. To toll the statute of limitations, the relation-back doctrine requires a "timely" underlying indictment.

See AOB 51-53 (collecting cases). Because the initial indictment was untimely, as argued above, the superseding indictment could not legally "relate back" to it and should have been dismissed accordingly.

Beyond the untimeliness described above, the new allegations did not relate back insofar as they impermissibly broadened the scope of the conspiracy. As this Court has noted, "[t]he central concern in determining whether the counts in a superseding indictment should be tolled based on similar counts included in the earlier indictment is notice." *United States v. Liu*, 731 F.3d 982, 997 (9th Cir. 2013). This Court also looks to "whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence.'" *Id*. at 996, *quoting United States v. Yielding*, 657 F.3d 688, 704 (8th Cir. 2011).

All those factors weigh against a finding that the superseding indictment in this case related back to the original indictment. Despite the government's attempts to frame the new overt acts as "additional details that Spanier and his coconspirators took to perpetuate the initial fraud carried out on" Richard Sellers, GAB at 32, the record shows otherwise. The superseding indictment added six overt acts that—despite five years of litigation, several indictments, and two trials—*had never been previously alleged*. ER 2077. The new allegations also charged a scheme by Spanier and Argyll to cover up their alleged conspiracy and

mislead Sellers after the FBI raided Argyll's offices and executed search warrants. *See* ER 1062-1088. The new overt acts also include an additional instance of wire fraud that had never been previously alleged. *See* ER 2077.

The initial indictment—or any of the litigation in *Spanier I*—had not given Spanier notice that the government would be charging him with "lulling" borrowers at this late date. Significantly, this newly alleged lulling was *after* the date when the FBI had raided Argyll, executed search warrants, served subpoenas on Spanier, and even seized Spanier's bank accounts. *See* ER 1074. There was simply no notice of this new allegation from prior charging documents.

These new allegations were an impermissible broadening of the scope of the conspiracy that could not relate back to initial indictment. Spanier did not have notice about the "lulling" and cover up theory from the first indictment, nor had the government advanced those allegations in the previous two trials. The new claims were also based on different evidence, and even included a new count of wire fraud. *See* ER 1063-1087 (Government introducing 11 new exhibits—239-B through 239-L—through Sellers's testimony). Reversal should result.

E. Securities fraud is not continuing offense, similar to this Court's precedent regarding the mail and wire fraud statutes.

Lastly, the government attempts to argue that the securities fraud counts in both indictments are timely because securities fraud is a continuing offense. *See* GAB at 33-39. It admits that there is a presumption *against* continuing

offenses unless "the language of the statute *compels* such a conclusion" or "Congress must *assuredly* have intended" a continuing offense based on the nature of the crime. GAB at 38 (emphasis provided). *See United States v. Toussie*, 397 U.S. 112 (1970), *United States v. Nash*, 115 F.3d 1431, 1441 (9th Cir. 1997). But it argues that Congress—apparently silently *and* "assuredly"—intended to create a continuing offense because securities fraud can include a "device, scheme, or artifice to defraud." *Id.* (citing 17 C.F.R. § 240.10b-5).

But the government has a problem: wire fraud and mail fraud statutes contain the same language. And this Court has already found that wire fraud and mail fraud are *not* continuing offenses. As the Court held in *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991) "the offenses at issue—18 U.S.C. §§ 1341 and 1343—criminalize each specific use of the mail or wire. Each offense is complete when the fraudulent matter is placed in the mail or transmitted by wire, respectively. Thus, the offenses . . . are not continuing offenses." *Id.* (emphasis provided). *See also United States v. Scarano*, 975 F.2d 580, 585 (9th Cir. 1992) ("[defendant] argues that his mail fraud was a 'continuing offense' that was not completed until after the November 1, 1987 effective date of the guidelines. . . .

This court has already concluded, however, that mail and wire fraud are *not continuing offenses*") (emphasis provided).[4]

That is existing law as to continuing offenses and fraud. And the Court "presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (quoting *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85, (1988)). Thus, the government's argument is that Congress "assuredly" *meant* for securities fraud to be a continuing offense even though it did not *say* so. And Congress purportedly maintained this silent intent in the face of clear law holding that there is a presumption *against* continuing offenses. And Congress held steadfast to its silent-but-assured intent despite case law holding that mail and wire fraud—which describe identical "schemes" and "artifices" to securities fraud—are not continuing offenses. There is simply too much inferring and speculating in this argument to overcome *Toussie* and *Nash*. It cannot be fairly said that Congress "assuredly"

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[44] *Niven* and *Scarano* both analyzed whether wire fraud was a continuing offense that would trigger different sentencing guidelines, rather than statutes of limitations. But there is no principled reason to call wire fraud a non-continuing offense in that context but not in this one, especially considering that "criminal limitations statutes are to be liberally interpreted in favor of repose." *Toussie* at 115. Furthermore, courts have cited *Niven* and *Scarano*'s holdings favorably when analyzing statute-of-limitations issues. *See e.g. United States v. Winn*, 58 F. Supp. 3d 1119, 1122 (D. Nev. 2014).

intended that securities fraud be considered a continuing offense, when mail and wire fraud are not.

United States v. Brown, 578 F.2d 1280 (9th Cir. 1978) does not change this result. The government's reliance upon it is misplaced. First, *Brown* was decided before this Court's cases holding that mail and wire fraud are not continuing offenses. *See Id*. at 1285 (suggesting that mail fraud is a continuing offense). As discussed above, this Court should rely on that precedent and modern interpretation of those statutes to find that 15 U.S.C. § 78j(b) does not establish a continuing offense. Second, *Brown* involves 15 U.S.C. § 77q, a different statute than the one at issue here. That statute focuses on the use of fraud in interstate transactions, and directly prohibits different types of fraudulent activity. *See* 15 U.S.C. § 77q. And that case is distinguishable on its facts: it involved a scheme in which the defendant entered into fraudulent land-sale contracts with borrowers and sent monthly payments to the borrowers as part of the arrangement. The defendant alleged that the statute of limitations began to run on the date when the land-sale contracts with borrowers were completed. *Brown*, 578 F.2d at 1285. The government countered that the limitations period began on the dates when defendant made the follow-up "lulling" monthly payments to the borrowers. On those facts, this Court held that "the mailings of purported monthly payments to the purchasers of the land contracts, in our view, constitute an integral part of the

transaction which the court found to be fraudulent." *Id*. *Brown* is thus best read as a lulling case, not a pronouncement that securities fraud is a continuing offense.

But the securities fraud alleged in this case consisted of a different scheme. Here, the alleged scheme involved borrowers pledging stock to Argyll in exchange for loans. The alleged fraud consisted of the fact that Argyll then turned around and sold the stock almost immediately in order to fund the loans. As opposed to *Brown*, the fraud in this case did not involve follow-up transactions or payments to borrowers regarding the securities. The securities fraud here was completed the moment the borrowers pledged their stock to Argyll, and those should have been the operative dates for the statute of limitations in accordance with the charging statute and this Court's precedent, including *Carroll v. United States*, 326 F.2d 72 (9th Cir.1963). It was error for the district court to find otherwise.

Finally, the error was compounded by the failure to give proper jury instructions on the issue. The jury was not instructed to find that a particular fraudulent act was committed within the limitations period nor was it given a special verdict form to determine what conduct it found amounted to securities fraud or when that conduct occurred. *See* ER 29-30. Particularly given that any ambiguity must be resolved in Spanier's behalf under the rules of lenity and repose, *United States v. Toussie*, 397 U.S. 112, 115 (1970), reversal should result.

III. The district court both compounded the statute-of-limitations errors and created independent error through faulty jury instructions.

A. Where the government sought to extend the conspiracy beyond the takedown and seizure of assets, and Mr. Spanier made clear that he was not doing additional loans, the evidence supported a withdrawal instruction.

The government argues that the district court did not err in refusing Spanier's proposed withdrawal instruction because "Spanier did not provide a sufficient evidentiary basis for a withdrawal instruction." GAB at 51. The government is mistaken. Even the government admits that there are several avenues to a withdrawal instruction, any one of which will suffice: that a defendant "*either* disavow[ed] the unlawful goal of the conspiracy, *[or]* affirmatively act[ed] to defeat the purpose of the conspiracy, *or* [took] definite, decisive, and positive steps to show that the defendant's disassociation from the conspiracy is sufficient." GAB at 52 (emphasis provided).

Here, the evidence showed that Spanier had withdrawn from any alleged conspiracy with Argyll on at least two separate occasions. The first withdrawal involved Spanier's break with Argyll in late 2007. Spanier testified that by late 2007 and early 2008, Argyll's focus turned away from stock loans and towards their biotech division, Immunosyn. ER 533-534. He testified that they "weren't even including me in Immunosyn." ER 536. Argyll rejected his concerns and severed their relationship with Spanier, which to him was "a slap in my face." ER 537.

As a result, Spanier "stopped working with Argyll and was working with a new lender." ER 522. The new lender was Manny Bello. ER 537. Spanier had a "different" position with Bello "than what he had with Argyll." *Id*. Bello worked with Argyll "in late 2004, early 2005." ER 1135. He then founded his own company, Ayuda Funding. ER 1134. Ayuda and Argyll were separate companies. ER 1196. Bello acknowledged that he had no reason to believe that Spanier was "doing loans with Argyll" while he was working with Ayuda. ER 1152-1153. Bello—who received immunity for his testimony—also testified that he was not conspiring with Argyll, James Miceli, or Douglas McClain to defraud anyone. ER 1185. Nor was he conspiring with Spanier to defraud anyone. *Id*. But the evidence also showed that Bello was also in the stock loan business, paid Spanier fees on each transaction, and used alleged "hedging" strategies to fund the loans. *See* ER 1144-1152, 1186-1188.

Spanier worked with Bello until late 2009, when he received a call from James Miceli. Miceli "told me he is getting back into the loan business" with an entirely new product. ER 539. With this "new product" the stock could not be sold under any circumstances under the terms of the contract. ER 541. Spanier testified that he made it clear to borrowers "for that new product that that stock would not be sold." ER 542. Spanier stated that these new kinds of loans were different from the loans he had worked on with Argyll between 2003 and 2008. *Id*.

The second withdrawal began in April 2011. At that time, Spanier received a subpoena from the FBI requesting production of documents related to his business with Argyll. ER 543. In response, Spanier spoke to Argyll "the next day." ER 545. He then contacted Bret Shapiro, the representative for borrower Steven Van der Velden, to advise him of the investigation. *Id*. In June 2011, Spanier dissuaded borrower Richard Sellers from going forward with his pending loan with Argyll. ER 548. By that month, Spanier had told Sellers that "no matter what, we're not going to do [the loan]. ER 1112. He was also trying to actively help Sellers retrieve his stock from Argyll. *See* ER 1110. The evidence also showed that throughout this time period, Spanier was constantly attempting to contact Argyll but "the communication channels were not open" as a result of the pending FBI investigation and instructions from counsel not to talk to Spanier. ER 613-614.

That evidence more than sufficed under this Court's precedent to support Spanier's requests for a withdrawal instruction. "[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). "The legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, *even if the evidence is weak, insufficient, inconsistent, or*

of doubtful credibility. A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense." *United States v. Houston*, 648 F.3d 806, 816 (9th Cir. 2011), *quoting United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) (emphasis provided).

Here, the evidence showed that Spanier had taken "definite, decisive, and positive steps to disassociate himself" from any alleged conspiracy on at least two occasions. Spanier's relationship with Bello and his later conduct with Sellers were "inconsistent with the purpose of the conspiracy." Ninth Cir. Crim. Jury Inst. 8.24. Further, Spanier made "reasonable efforts to tell the co-conspirators about those acts." *Id*. *See also* ER 613-614. He made considerable efforts to contact Argyll regarding the Sellers transaction. *Id*. Further, the evidence showed that Spanier stopped dealing with Argyll in late 2007 after they rejected his proposal to join their equities division. ER 537. The record, then, supported giving the instruction, particularly considering Spanier's statute-of-limitations claims. *See* AOB at 64.

B. A multiple-conspiracies instruction was also proper.

The government also argues that a multiple-conspiracy instruction was not required because "there was no evidence or plausible argument that Spanier was involved only in a conspiracy with Manny Bello." GAB at 57. As the facts set forth above demonstrate, the record contradicts that claim. Further, a multiple-

conspiracy instruction is *required* where "the evidence indicates two or more conspiracies may exist…" *United States v. Taren-Palma*, 997 F.2d 525, 530 (9th Cir. 1993) (emphasis provided). The district court erred in finding to the contrary. Reversal should result accordingly.

IV. The indictment should have been dismissed with prejudice and the district court erred in holding otherwise.

The government argues that the district court properly denied Spanier's motion to dismiss the indictment with prejudice for the Speedy Trial violation that this Court found. While the government claims that the district court "carefully considered the statutory factors and properly concluded that they weighed in favor of dismissal with prejudice," GAB at 15, the government neglects to mention the facts that the district court failed to discuss in its order dismissing without prejudice. The district court did not address Spanier's main argument in favor of dismissal with prejudice: the improper post-hoc rationalizations made by the trial court to justify denying Spanier's Speedy Trial claim, and the government's staunch defense of them on appeal. In denying Spanier's motion to dismiss under the Speedy Trial Act, the district court claimed that its post-hoc rationalizations were actually made at the time it granted the continuances, and the government doubled down on that claim on appeal despite the fact that it was clearly belied by the record. If 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 unfounded post-hoc rationalizations. That factor alone weighed heavily in favor of dismissing the indictment with prejudice, and the district court did not mention or account for it in its analysis. *See* ER 100-109. Further the district court did not account for the availability of an alternate remedy—the pending SEC proceedings against Spanier—in dismissing without prejudice. Both are reasons in support of finding that the court abused its discretion in dismissing without prejudice.

V. The district court's gag order on the jury violated the First, Fifth and Sixth Amendments to the Constitution.

Finally, the government claims that the district court's orders to the jury preventing it from speaking to Spanier were proper. See GAB 58-62. The government makes the striking claim that "it is improper and unethical for lawyers to interview jurors to discover what was the course of deliberation of a trial jury." GAB at 60. First, this is rank hypocrisy. The government conducted precisely these kinds of interviews after the first trial ended in acquittals and a hung jury. *See* ER 184. As the government well knows, it does so in virtually every case. This blanket statement is also legally inaccurate, at least in a criminal case. The authority that the government cites can be traced back to a sixty-year-old civil railroad case, *Northern Pacific Railway Co. v. Mely*, 219 F.2d 199, 202 (9th Cir.

1954),[5] which neither considered nor resolved the rights of a criminal defendant in general, nor First Amendment rights in particular.

The government also claims that Mr. Spanier did not establish prejudice. But it does not explain how Spanier could determine whether external influences or impermissible "stereotypes or animus" tainted deliberations, *cf. Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), when the jury was forbidden from discussing deliberations at all. The government's argument to the contrary are circular and disingenuous.

Ultimately, the district court's gag order was also one-sided in the course of this litigation. When the first jury reached a result that was favorable to Spanier, the government was permitted to interview the jury and attempt to question the verdict. But when Spanier was convicted, access to the jury was restricted. That was prejudicial in light of the facts of this case and all of the claims of error discussed here and in the opening brief. Reversal should result accordingly.

[5] The government cited *People of Territory of Guam v. Marquez*, 963 F.2d 1311, 1315 (9th Cir. 1992) for this proposition, which cited *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972), which cited *Northern Pacific Railway v. Mely*. Neither *Mely* nor any case since addressed the constitutional issues preserved and raised in this appeal.

CONCLUSION

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

Dated: March 5, 2018

Respectfully submitted,

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