No. 17-10407

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

GLENN GUILLORY,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 14-cr-00607-PJH-3
The Honorable Phyllis J. Hamilton

APPELLANT'S REPLY

Jarod M. Bona
Aaron R. Gott
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92037
858-964-4589

Counsel for Appellant
Glenn Guillory

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INTRODUCTION

The government's answering brief relies on the same assumption that it did at trial: that rounds are *ipso facto* evidence of an agreement to rig bids. At trial, it presented cumulative evidence of Mr. Guillory's participation in rounds—a fact he readily admitted—and told the jury that his participation in rounds was all that it needed to convict. That error was compounded several times over: the jury instructions were not clear and a clarifying instruction given in other cases was omitted. Mr. Guillory was prevented from negating the government's case through its preemptive motion in limine. His counsel failed to make proper objections and his rambling arguments only added to that confusion.

Mr. Guillory's participation in rounds is, at best, circumstantial evidence that is consistent with independent or otherwise lawful conduct. And that distinction matters under substantive antitrust law: a defendant's agreement to join a conspiracy cannot be inferred from circumstantial evidence unless that evidence excludes the possibility of independent conduct.

The government is confused about the distinction between direct and circumstantial evidence of a naked bid-rigging agreement. The

evidence it relied upon—Mr. Guillory's participation in rounds—is circumstantial evidence that is as consistent with lawful competition as it is an agreement to restrain trade.

The other evidence presented by the government is also circumstantial. To be sure, the government's witnesses ***speculated*** about the possibility of an agreement made between Mr. Guillory and others, but none could testify to an actual agreement. They discussed the *modus operandi* of the conspiracy, the reasons why ***they*** participated in rounds, and about conversations involving Mr. Guillory they did not hear. But they ultimately admitted they did not witness Mr. Guillory's agreement to rig bids. Conveniently, the government did not call the two conspirators who were involved in these alleged conversations. Instead, it relied on a circular argument: Mr. Guillory participated in rounds; the conspiracy used rounds to further the conspiracy; therefore, Mr. Guillory participated in the conspiracy.

The result was a foregone conclusion: the jury deliberated for less than an hour and returned a guilty verdict because the trial revolved around rounds, the government told the jury to presume that participation in rounds satisfied the intent to join a bid rigging conspiracy

element, and the jury instructions didn't even mention rounds. The Court does not even need to entertain a hypothetical counterfactual: in a related case involving similar facts but with a jury instruction clarifying the significance of rounds, the jury returned a not guilty verdict.

Glenn Guillory's ability to negate the government's case was crippled under the effective presumption at trial that he entered a naked bid-rigging agreement. His counsel made objectively unreasonable errors. All of this compounded to an unfair outcome: Mr. Guillory was convicted of a *per se* illegal antitrust felony because of evidence that he participated in actions that were consistent with lawful or independent conduct but instead treated as a presumptively illegal naked bid-rigging conspiracy.

ARGUMENT

I. THE TRIAL REVOLVED AROUND ROUNDS

Mr. Guillory's conviction was based on compounding errors:

- The government presented cumulative circumstantial evidence of Mr. Guillory's participation in rounds but failed to present evidence excluding the possibility of permissible or independent conduct;

- Mr. Guillory was excluded from presenting evidence to negate the government's case;
- The government told the jury that all it needed to convict was Mr. Guillory's admission that he participated in rounds;
- The jury instructions failed to include an instruction about rounds that was given in other cases that led to an acquittal on similar facts—evidence of the defendant's participation in rounds, but the absence of evidence showing a bid-rigging agreement; and
- Mr. Guillory's counsel failed to provide effective assistance in several key respects, which affected the ultimate result.

The government's brief addresses each of these issues in a vacuum, and argues that each should be separately dispatched under a plain error standard (or, in the case of ineffective assistance of counsel, not reviewed at all). But all of these arguments concern the legal significance of rounds and how the jury understood and applied the evidence. The government's case, for all it claims it to be, relied entirely on Mr. Guillory's participation in rounds. That alone, it claimed, was enough to convict him

of a bid-rigging conspiracy. And the jury knew no better: the instructions didn't even mention rounds. Instructions like those given to Victor Marr's jury might have been a cure for the government's misconduct. Even better, an instruction that explained the government's reliance on circumstantial evidence required it to exclude the possibility of independent or otherwise lawful conduct would have definitively prevented all confusion.

A. The Legal Significance of Rounds

The government is correct that criminal law generally does not require a distinction between direct and circumstantial evidence. But this is not a typical criminal case—it is a criminal antitrust case. Absent direct evidence of an agreement to rig bids, the government must present evidence that ***excludes the possibility*** of permissible conduct beyond a reasonable doubt. *In re Citric Acid Litig.*, 191 F.3d 1090, 1106 (9th Cir. 1999) ("[T]he evidence in the record, though it clearly shows that several citric acid producers conspired to fix prices and to allocate market shares, does not tend to exclude the possibility that Cargill acted independently—and thus does not support a reasonable inference that *Cargill* was involved in the citric acid price-fixing conspiracy."); *Hartford*

Accident & Indem. Co. v. Sullivan, 846 F.2d 377, 383 (7th Cir. 1988). Put differently, if the government relies on circumstantial evidence that the defendant joined the conspiracy, then it must present evidence that excludes the possibility of lawful alternative explanations for the defendant's conduct. *Citric Acid,* 191 F.3d at 1096.

Citric Acid, a civil case involving the much lower threshold of proof, rejected a "plethora of evidence" that the plaintiff claimed was sufficient to show that a specific defendant—Cargill—joined a conspiracy that had been admitted by other conspirators. *Id.* at 1097. Among that evidence was Cargill's membership in a trade association that the plaintiff claimed was a front for conspiratorial activities. *Id.* Like the government here, the plaintiff offered *modus operandi* evidence about the conspiracy (e.g., the use of codewords like "masters and Sherpas," and the practice of holding an "unofficial" meeting geographically and temporally close to the official trade association meeting at which conspiratorial activities were undertaken). *Id.* The plaintiff did not have direct evidence of Cargill conspiring with its competitors, but argued that it was reasonable to infer that Cargill had joined the conspiracy since it participated in the trade association that was used to further the conspiracy. *Id.* at 1097–98. A

panel of this Court disagreed, holding that Cargill's participation in information exchanges was as consistent with legitimate behavior as an unlawful conspiracy, and that the plaintiff failed to produce evidence tending to exclude the possibility that Cargill acted independently. *Id*. at 1098–99.

Citric Acid is quite like the government's case against Mr. Guillory: the government presented a plethora of evidence about the bid-rigging conspiracy that had been admitted by others, including *modus operandi* evidence—the use of signs and signals to signify agreements and the existence of rounds. And like the plaintiff in *Citric Acid*, the government did not have direct evidence of Mr. Guillory's involvement in the unlawful anticompetitive conduct.

The government had the same burden as the plaintiff in *Citric Acid* to produce evidence excluding the possibility that its defendant acted independently—except that the government's standard of proof is actually higher because this is a criminal case. *See Hartford*, 846 F.2d at 383 (requirements to establish a criminal or civil conspiracy are the same apart from the higher standard of proof in criminal cases). The government failed to meet that burden.

The government relies heavily on *United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010), which is not an antitrust case. There, the prosecution sought the unsurprising inference that a defendant who was found with a gun in his lap actually possessed the gun. That is very different than the long-established legal requirement that the possibility of independent conduct be precluded before an inference of an antitrust conspiracy can be made. The standard in *Nevils* is correct: " 'viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether [it] . . . is adequate to allow ***any*** rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.' " 568 F.3d at 1164 (citation omitted). But in an antitrust case involving only circumstantial evidence of a conspiracy, the question is whether any rational trier of fact could find that the evidence excludes the possibility of independent (or otherwise lawful) conduct beyond a reasonable doubt. *Citric Acid,* 191 F.3d at 1099.

In this case, no rational trier of fact could have found beyond a reasonable doubt that Mr. Guillory could not have acted independently or lawfully. Indeed, the evidence presented to convict Mr. Guillory was wholly circumstantial and did not exclude the possibility of independent

conduct. "In essence, the Government again invited the jury to do what *Nevils* forbids: engage in mere speculation on critical elements of proof." *United States v. Katakis*, 800 F.3d 1017, 1028 (9th Cir. 2015).

B. The Evidence Revolved Around Rounds

The government is partially correct in characterizing its evidence as "overwhelming." All of its evidence—testimony from Thomas Bishop, Wesley Barta, Timothy Powers, and Charles Rock, and documentary evidence such as round sheets, ledgers, and checks—overwhelmingly prove what Mr. Guillory admits: that he participated in rounds.

The focus on rounds was also overwhelmingly singular. None of the evidence presented was direct evidence of an agreement to rig bids. The circumstantial evidence did not exclude the possibility that Mr. Guillory acted independently or otherwise lawfully. The rest of what the government characterizes as evidence is inadmissible speculation—which *Nevils* itself forbids. *Katakis*, 800 F.3d at 1028. A closer look at the evidence allows only one conclusion: the witnesses, the government, and ultimately the jury decided that Mr. Guillory agreed to rig bids ***because*** of overwhelming evidence that he participated in rounds.

During trial, the government established the *modus operandi* of co-conspirators bid-rigging agreements: it was by a "nod', a "nudge", some "signal" through which a co-conspirator demonstrated an agreement to bid-rig on a property with his cohorts. (FER 11:15–20, FER 14:18–20, FER:19–21, FER 16:19–24). It even repeats this *modus operandi* in its answering brief. Answering Br. 11. The agreement was consummated by some kind of ***action*** between co-conspirators during the primary auction.

But the government skipped over that part when it came to connecting Mr. Guillory: none of the government's witnesses testified to any signal or other action indicating Mr. Guillory's intent to join the bid-rigging conspiracy. This is, by the way, the same kind of priming tactic that the government used in *Katakis* to overcome a gaping hole in its proof: it used overwhelming *modus operandi* and circumstantial evidence in the hopes that the jury will not notice. 800 F.3d at 1028–29. What the government elicited was evidence of Mr. Guillory's participation in rounds. But that issue wasn't in dispute.

Mr. Bishop did not witness Mr. Guillory agree to rig any bids. He first stated that Mr. Guillory had agreed to bid rig because he had stopped bidding. ER 169:7–15. He later clarified that he didn't pay

attention to Mr. Guillory in the primary auction; rather, he assumed such an agreement was made because Mr. Guillory participated in rounds. FER 17:3–7 ("I just took [Guillory's] actions [i.e. participating in the round] as being affirmative that he understood what was going on."). But participation in rounds is consistent with lawful behavior: Mr. Guillory participated in rounds because at times it was the ***only way*** to get obtain research on the investment viability of a property. Opening Br. 8–9, 34–36; ER 215:10–218:14; *cf.* ER 226:3–229:9.

Mr. Barta did not witness any agreement by Mr. Guillory—he didn't "nod" or "nudge" or otherwise indicate to Mr. Barta that he was joining a bid-rigging conspiracy. FER 20:8–15. Instead, Mr. Barta ***assumed*** Mr. Guillory and Mike Marr "worked something out" on the phone. *Id.* Not a single fact about what was said in the phone conversation between Mr. Guillory and Mr. Marr was offered to the jury—not even a single "ok." Mr. Barta opines that Mr. Guillory joined his conspiracy because he didn't win the bidding and participated in a round. But the facts Mr. Barta described are again consistent with lawful conduct: Mr. Guillory represented hundreds of clients in these real-estate foreclosure auctions. It was common that a client for whom he was

bidding on a particular property to call during the auction to ask for updates or give new instructions—including to stop bidding. (*See* FER 29:2–8).

Mr. Powers similarly did not witness Mr. Guillory engaging in the activities the government had established as the *modus operandi* for the bid-rigging conspiracies. Mr. Powers makes a number a conclusory statements and asserts Guillory participated in bid-rigging because "I was there." (FER 22:6–10). He did not point to any specific moment or instance when Mr. Guillory gave him a ***signal*** to indicate his intent to join a bid-rigging conspiracy—he simply presumed it because Mr. Guillory participated in rounds. (FER 22:14–18). But, again, participation in rounds is consistent with lawful behavior. Indeed, Mr. Guillory participated in rounds because at times it was the ***only way*** to get obtain research on the investment viability of a property. Opening Br. 8–9.

Mr. Rock did not witness Mr. Guillory agreeing to rig bids, but eluded to a whispered he never heard. (ER 193:2–13). In fact, Mr. Rock did not offer the jury any insight into Mr. Guillory's conversation with Galloway, whether Guillory manifested his intent to rig bids—he literally

testified that "You would have to ask Mr. Galloway about his conversation with Guillory." (ER 193:11–15). The government did not call Mr. Galloway to testify. Having a conversation during the primary auction, of course, is consistent with lawful behavior. Indeed, Mr. Guillory would often talk to and exchange research on property with other bidders to determine whether it would be a good investment for his clients and whether he should bid. Importantly, he was a real-estate agent bidding on behalf of multiple clients at these chaotic auctions.

Mr. Rock makes a good point: Why didn't the government produce Mr. Galloway as a witness in this case? What about Mr. Marr? According to the government's witnesses, the actual evidence was with these two individuals. That is, they suggested Mr. Galloway and Mr. Marr could establish ***direct*** evidence of Mr. Guillory's alleged agreement to rig bids.

Why did the government present witnesses who, despite their deals with the government, could not truthfully establish Mr. Guillory's intent to join a bid-rigging conspiracy? Even without Mr. Galloway and Mr. Marr—according to the government's established *modus operandi*—it should have been easy: any signal would do. And despite its numerous plea agreements, informants, undercover operations, and wiretapping,

SER 412–414; FER 30:22–32:9, 33:5–35:4, the government could not elicit a single example of Mr. Guillory doing so.

Instead, the government relied entirely on speculation (supposed conversations that might have occurred) and circumstantial evidence (Mr. Guillory's admitted participation in rounds). All of its documentary evidence—ledgers, round sheets, and checks—implicated Mr. Guillory as a rounds participant and nothing more. ER 175, 188, 312–313, SER 79–83, 87–90, 92, 170, 190–194, 197, 199–200, 204, 207, 209–210, 212, 217, 221–222, 225–226, 228–238, 245, 267–270; FER 21, 25–26. And the government made a big deal out of that evidence, bridging the gap between what it proved and what the government sought to prove by using inflammatory terms like "pay-offs." SER 78:19–25 ("The defendant unfairly purchased properties and lined his pockets with illegal payoffs. The defendant took what was Supposed to be a fair and competitive process, and made it work to his advantage. He got paid and he paid out payoffs for losing, payoffs for throwing the fight. And he chose to commit this crime over and over again as part of a well-organized conspiracy."); *see also* SER 81:5–10, 82:7–14.

The Court need look no further than the government's answering brief to see that the record in this case is saturated with evidence that Mr. Guillory participated in rounds. Answering Br. 15 (four co-conspirators testified to participating in rounds with Guillory), 16–17 (Guillory admitted to participating in rounds). The brief, the evidence itself, and the government's closing argument focus on rounds because that is the only reliable evidence that the government could elicit. That is not good enough: the government failed to establish Mr. Guillory's agreement to enter into a naked bid-rigging agreement or otherwise exclude the possibility of lawful conduct.

C. The Government's Argument Revolved Around Rounds

The government takes issue with the closing statement excerpts quoted in Mr. Guillory's opening brief, but the full clarifying statement fares no better:

> And rounds, rounds are illegal. Rounds exist because there was an agreement to stop bidding at the public auction. . . . That's why you have a round, because you had an agreement to stop bidding.

(ER 236:12–18).

The clarification is circular at best: rounds are illegal because there was an agreement; Mr. Guillory admitted to participating in rounds, so

Mr. Guillory made an agreement. But the government failed to prove Mr. Guillory made an agreement rig bids. If it had more than circumstantial evidence—Mr. Guillory's participation in rounds—it would not have felt compelled to tell the jury that Mr. Guillory's participation in rounds was sufficient to find that he agreed to rig bids.

It is not enough for the government to prove that a conspiracy existed, that conspirators used rounds in furtherance of a conspiracy, and that Mr. Guillory also participated in rounds. The government was required to prove Mr. Guillory's intent to join a naked bid-rigging conspiracy. Since it relied on circumstantial evidence, the government was required—as a matter of law—to present evidence that excluded the possibility of independent or lawful conduct. It failed to do so, and sought to salvage a victory by misleading the jury on the appropriate standard.

D. The Verdict Was Based on Rounds

The jury deliberated for one after hearing four days' testimony and documentary evidence about rounds. The evidence ***revolved*** around rounds; the government argued that participation in rounds is sufficient evidence of a bid-rigging agreement; the jury instructions ***didn't even mention*** rounds; and a defendant in a related case was ***acquitted on***

similar facts by a jury with a rounds-specific instruction. Only one explanation makes sense: the jury improperly presumed criminal intent from Mr. Guillory's participation in rounds and held the government to a much lower standard of proof than antitrust law requires.

The government cites the district judge's comments that she was not confused and that she didn't think the jury was confused. But her subsequent comments suggested otherwise: she has overseen dozens of related cases and believed she gave a clarifying instruction in many of them (at least all of them after Mr. Guillory's), except Guillory's case. (ER 273). She also heard the prosecutor state that rounds are illegal in Mr. Guillory's case. In other cases, she gave the rounds instruction, and the government readily agreed to that instruction. (ER 273–74). Why, then, was it unnecessary in Mr. Guillory's case—a case that revolved around rounds?

Guillory's jury was not given that instruction, even though the government's entire case was based on Mr. Guillory's participation in rounds. The Court need not contemplate a hypothetical counterfactual because one actually exists. One other such trial similarly revolved around rounds—Victor Marr's. In that case, the jury was given the

clarifying instruction about rounds and it acquitted Mr. Marr. *See* Opening Br. 2–3; Dkt. 17 at 1–3 (Appellant's Motion for Judicial Notice).[1] That fact alone challenges the validity of the verdict against Mr. Guillory—considered with the government's misconduct and the jury's unreasonably short deliberation, the verdict is anything but just.

The government did not present direct evidence that Mr. Guillory agreed to a bid-rigging conspiracy. It presented *modus operandi* evidence of the conspiracy by others, and circumstantial evidence concerning Mr. Guillory—participation in rounds—that is consistent with lawful conduct. In the absence of evidence that excluded the possibility of lawful conduct—the legal standard for all antitrust cases where there is no direct evidence that the defendant joined the conspiracy—no rational trier of fact could have found that the government proved its case beyond

1. The government appears to object to the motion for judicial notice for the first time in its answering brief. The government waived any objection to the motion for judicial notice by failing to oppose it "within 10 days after service of the motion unless the court shortens or extends the time." Fed. R. App. P. 27(a)(3). In any event, the government's argument is undermined by its own reference to related cases. Answering Br. 6–7, 37, 39, 51. It is also a perplexing argument, considering that the government attempted to join Mr. Guillory to the Marr defendants' trial after his trial was severed from Mr. Joyce due to counsel's illness. (FER 5).

a reasonable doubt. The only sensible explanation is that this trier of fact was primed with *modus operandi* evidence, overwhelmed with evidence of Mr. Guillory's rounds participation, and misled by the government to believe that was all that was necessary to return a guilty verdict.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The government relies on its assertion that ineffective assistance claims are uncommon on direct review. But regardless of statistics in unrelated cases, this case meets each of the two exceptions that this Court has identified: (1) the record is sufficiently developed to permit determination of the issue, and (2) the legal representation was so inadequate that it obviously denies the defendant his Sixth Amendment rights.

It is difficult to imagine what other facts this Court would need to determine whether trial counsel made a crucial mistake in objecting to the jury instructions or requesting a curative instruction. The case turned on rounds; the government argued that rounds were sufficient for a conviction, and defense counsel did nothing. The district judge stated at the bail hearing that even the government agreed that the instruction should be given at other trials. (FER 38:23–39:1).

A. *De Novo* Review Is an Adequate Remedy for Ineffective Assistance

The Ninth Circuit reviews questions of law and due process violations stemming from ineffective assistance of counsel claims *de novo*. *Mohammed v. Gonzales*, 400 F.3d 785, 791–92, (9th Cir. 2005) (citing *Lin v. Ashcroft*, 377 F.3d 1014, 1023 (9th Cir. 2014)). Consistent with that standard, it should also apply a *de novo* standard to review jury instructions claimed to be unconstitutional on appeal where trial counsel unreasonably failed to object to below. *See Chess v. Dovey*, 790 F.3d 961, 970–72 (9th Cir. 2015) (holding that *de novo* rather than plain error review should apply when an unsophisticated litigant erroneously fails to object and court or opposing counsel should have known it was objectionable).

The government argues in its response that the plain error standard must apply when the court reviews appellant's claims concerning defective jury instructions, prosecutorial misconduct, and the insufficiency of evidence to convict Mr. Guillory. *See* Answering Br. 25–62. The plain error standard must apply, the government argues, because by trial counsel's failure to state "I object" in these instances, Guillory forfeited such arguments before the district court. *Id.*

This Court's approach to plain error review in the context of a legally unsophisticated *pro se* civil litigant's failure to preserve errors should similarly apply where a criminal defendant risks prison because of ineffective counsel. *See Chess*, 790 F.3d at 970–72; *see also* Fed. R. Civ. P. 51. In the civil context, the purpose of raising an objection is " 'to enable the trial judge to avoid error by affording him an opportunity to correct statements and avoid omissions in his charge before the cause has been decided by the jury.' " *Chess*, 790 F.3d at 971 (quoting *Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975)). In *Chess*, the Court decided to not punish a *pro se* litigant with plain error rather than *de novo* review because he failed to object when the trial judge and opposing counsel "knew why the instruction ***might*** be erroneous and what the objection would have been." (Emphasis added). *Id.* ("Chess was confused and legally unsophisticated. But the judge and defendants' lawyer were not. They knew what the problem was and debated the issue vigorously. In these circumstances, any objection by Chess would have been 'superfluous and futile' and plain error review would be too harsh a sanction for failure to object." (quoting *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1289 (9th Cir. 2014)).

Mr. Guillory meets the *Chess* requirements: he was legally unsophisticated insofar as he lacked competent counsel at trial. Likewise, the court and the government were aware of due process concerns related to the "legal significance of rounds" discussed and debated in over 50 related cases prosecuted by the Antitrust Division before the same judge. *See* ER 79:4–7 (at a pretrial conference, the government stated "I don't think there's going to be any dispute about the participation in the rounds. I think the dispute is going to be about what the significance of that participation is."); ER 272:23–275:9.

Indeed, the district court intimated that without a clarifying instruction concerning "rounds," the jury may have been confused. (ER 273:13–274:15). The court's statements alone are sufficient evidence to demonstrate that Guillory's trial counsel's actions were prejudicial. *See also Mohammed*, 400 F.3d at 793–94 ("[P]rejudice results when 'the performance of counsel was so inadequate that it ***may*** have affected the outcome of the proceedings.' " (quoting *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999)). This Court can find that trial counsel's actions were ineffectual and prejudicial to Guillory based upon the existing appellate

record. Mr. Guillory was in no better position than an unsophisticated *pro se* litigant.

Moreover, while Mr. Guillory's counsel acted unreasonably,[2] the district court and the government were well aware of the problems concerning the legal significance of rounds. ER 79:4–7 ("I think the dispute is going to be about what the significance of that participation [in the rounds] is."); ER 272:23–273:4 ("Now this [the legal significance of rounds] was certainly something that everyone was concerned about. You have to understand I've gone through 53 of these cases and 5 of them went to trial, and almost all of the issues were fully fleshed out at some point or another."). Justice is not served by punishing a criminal defendant under these circumstances. It should review those issues *de novo*.

B. Plain Error

Even if the court declines to undertake a *de novo* review, Mr. Guillory still meets the plain error standard. His opening brief properly

2. While we believe Mr. Guillory's counsel acted unreasonably as his counsel, it is not surprising under the difficult circumstances. Counsel had to race to try the case after a serious medical issue and had to continue to try the case as his wife was being evacuated from the courtroom to the ER.

argues due process violations stemming from the district court's application of a legal standard and law at odds with Section 1 of the Sherman Act. The misstatement of law and misapplication of the proper legal standard was made possible by Guillory's trial counsel's unreasonable failures to object to the court's errors, the unlawful jury instructions, and the government's misconduct—each individually and collectively contributing to a violation of Guillory's Sixth Amendment rights. At the root of Guillory's due process violation claims is an unconstitutional presumption of Guillory's criminal intent to rig bids. In this case, the presumption had the effect of convicting Guillory for his lawful participation in rounds.

The government was required to prove that Mr. Guillory "conspired to intentionally rig bids." *United States v. Guthrie*, 17 F.3d 397 (9th Cir. 1994). As a matter of antitrust law, the government was required to prove it either by (1) direct evidence of an agreement to conspire, or (2) circumstantial evidence excluding the possibility of independent conduct. *Citric Acid*, 191 F.3d at 1106. As a matter of criminal law, Mr. Guillory was presumed innocent until that proof was satisfied beyond a reasonable doubt.

The government failed to present either direct evidence of an agreement or circumstantial evidence excluding the possibility of independent (or otherwise lawful) conduct to the jury. The evidence fell short of the legal standard for antitrust cases lacking direct evidence of an agreement. The verdict was hastily decided based on an unconstitutional presumption that Mr. Guillory joined a bid-rigging conspiracy inferred from potentially lawful conduct, and the government expressly encouraged it. Mr. Guillory meets all four criteria under the plain error standard and " 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *See United States v. Marcus*, 560 U.S. 258, 265–66 (2010) (citation omitted).

III. THE MOTION *IN LIMINE*

The record does not support the government's argument that Mr. Guillory knowingly and intentionally relinquished a right with regard to the overbroad motion *in limine*. Rather, it suggests the opposite: the government sought to categorically exclude evidence specifically identified by the defense for multiple purposes other than arguments regarding the rule of reason. The court definitively granted that categorical request without reservation, and admonished trial counsel at

the first tangential hint of banks having something to do with the hidden horrors of foreclosure properties. Under Rule 103, Federal Rules of Evidence, the context was clear: Mr. Guillory was categorically excluded from offering expert testimony and other evidence that was specifically identified and would have been offered to negate the government's allegations of a naked bid-rigging conspiracy or its attempts to exclude the possibility of independent or otherwise lawful conduct.

B. The Motion *in Limine* Arguments, Order, and Enforcement

The government argued in its motion *in limine* that there are only three issues for the jury to decide: "(1) whether there were agreements to rig bids, (2) whether defendants knowingly participated in the agreements, and (3) whether their activities were in the flow of or affected interstate commerce." (ER 104:28–105:1–2). Among the evidence the government specifically sought to exclude was a declaration of a potential expert previously identified by the defendants in an earlier filing—a motion to proceed under the rule of reason—who specifically stated that the evidence would be offered not only in support of business justifications or procompetitive benefits, but also for other defenses,

including "whether the parties entered into a joint venture." (SER 423 n.1).

That is, the government sought the exclusion of specific evidence identified by the defense as relating not only to potential rule of reason arguments, but also to negate the government's case by showing independent conduct or that the agreement was not a naked agreement to restrain trade, i.e. a joint venture (which the government must prove to establish a *per se* offense in the first place).

The district court granted the motion definitively and without reservation. That order presupposed that any agreement was a naked bid rigging agreement, taking the issue away from the jury and, ultimately, relieving the government of even showing that any such agreement was naked.

At a pretrial hearing, the district judge elucidated on its ruling, stating that "there may be no evidence presented or argument by the defense as—attempting to justify the bid rigging agreements as reasonable . . . ." (FER 2:11–13 (reaffirmed FER 5)). And at the very start of trial, the district judge admonished trial counsel for being "dangerously close to crossing the line over [its] ruling in motion in limine

number 1" (FER 13:4). Trial counsel's offense was to mention banks' role in the problem of the hidden horrors of foreclosure properties that explained the necessity of Mr. Guillory's participation in rounds for some properties. (FER 12:21–25).

B. The Exclusion Was Preserved for Appeal

Rule 103, Federal Rules of Evidence, was amended in 2000 to clarify a claim of error regarding an exclusion of evidence is preserved where "a party informs the court of its substance by an offer of proof omitted the substance was apparent from the context." Fed. R. Evid. 103(a)(2). "Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Fed. R. Evid. 103(b).

Mr. Guillory's earlier offer of proof was the direct target of the government's motion *in limine*. The government specifically identified that offer of proof in its motion. The court granted the motion unconditionally and without reservation, aware that the evidence was offered for additional purposes, and set the tone at the start of trial by warning defense counsel for a fleeting reference to a justification for rounds participation in his opening argument. Mr. Guillory was not

required to test the district judge's patience to preserve an error—especially since it was invited by the government's motion *in limine* in the first place.

CONCLUSION

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

Date: May 9, 2018

BONA LAW PC

s/ Aaron R. Gott
AARON R. GOTT

Counsel for Appellant
Glenn Guillory

CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Date: May 9, 2018

BONA LAW PC

s/ Aaron R. Gott
AARON R. GOTT

Counsel for Appellant
Glenn Guillory

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: May 9, 2018

BONA LAW PC

s/ Aaron R. Gott
AARON R. GOTT

Counsel for Appellant
Glenn Guillory