No. _____

In The
Supreme Court of the United States

GERARD SMITH, *et al*.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD G. HIRSCH
Counsel of Record
WILLIAM J. GENEGO
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259
RichardGHirsch@AOL.com
Attorneys for Gerard Smith

KEVIN BARRY MCDERMOTT
8001 Irvine Center Drive
Suite 1420
Irvine, CA 92618
(949) 596-0102
Attorney for Gregory Thompson

Counsel for Petitioners

March 30, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether under the federal obstruction of justice statute, 18 U.S.C. § 1503, good faith is a complete defense where state law enforcement officers reasonably believe they are acting lawfully when carrying out the facially lawful orders of their commanding officers.

PARTIES TO THE PROCEEDING

Gerard Smith, Gregory Thompson, and Mickey Manzo.

Maricela Long, Scott Craig, Stephen Leavins, James Sexton.

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit issued an opinion and judgment on August 4, 2016, which appears at Joint Petitioners' Appendix at App. 1. On October 3, 2016, Petitioners filed a Petition for Rehearing and Rehearing En Banc. On October 31, 2016, the Ninth Circuit denied rehearing en banc. App. 54.

JURISDICTION

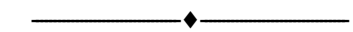
The court of appeals entered judgment on August 4, 2016. Petitioners timely filed a petition for rehearing en banc. The court of appeals denied the petition on October 31, 2016. This Court extended the time for filing this petition to March 30, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1503 provides, in pertinent part:

> (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures

> any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or an account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).



STATEMENT OF THE CASE

Petitioners are former law enforcement officers who were convicted of conspiracy and obstruction of justice based on actions that were directed and authorized by their commanding officers. The orders were issued by then-Sheriff Leroy Baca and other command-level officials, after the Sheriff discovered that the FBI had given a cell phone to an inmate in the county jail as part of a federal grand jury investigation into civil rights violations. None of the Petitioners were implicated in the civil rights investigation.

The orders given Petitioners were facially lawful and Petitioners' actions in carrying them out were within the scope of their regular duties. The case turned not on Petitioners' actions, which were largely undisputed, but on their intent and purpose in taking the actions. The critical question at trial was whether

Petitioners acted with unlawful intent for the purpose of obstructing a federal grand jury investigation.

Petitioners maintained that they had a good faith reasonable belief that the orders given to them were lawful, thus imposing upon them a duty to carry out these orders. Consequently, they could not be guilty of obstruction of justice since their belief that their actions were lawfully authorized was a complete defense and negated the element of unlawful intent. Petitioners requested, but were denied, an instruction on this theory. Instead, the district court instructed the jury that good faith was a factor they could consider in determining whether the Petitioners acted with unlawful intent rather than instructing the jury that good faith was a complete defense.

The Ninth Circuit upheld the denial of the requested instruction, in effect ruling that a subordinate law enforcement officer who acts on his duty to carry out what he reasonably believes are lawful orders can nonetheless be guilty of obstruction of justice.

FACTUAL BACKGROUND

Petitioners were subordinate officers in the Los Angeles County Sheriff's Department ("LASD"), at the time of the events in question. They were indicted on charges including obstruction and conspiracy to obstruct justice. The charges were based on actions taken in the Los Angeles County Jail on the command of their superiors after LASD officials learned that the

FBI had caused a cell phone to be given to an inmate at the county jail, and that the FBI, in conjunction with a federal grand jury, was investigating civil rights violations at LASD jails.

There was little dispute as to what Petitioners did. The case turned on whether the prosecution could prove they did it with the prohibited mens rea.[1]

Petitioners presented evidence that their acts were directed and authorized by their superiors, that they reasonably believed the orders were lawful, and that they had a duty to follow lawful orders. Petitioners maintained they acted for the purpose of carrying out what they reasonably believed were lawful orders, which negated the mens rea required for conviction. Petitioners requested an instruction advising the jury that to overcome this defense, the prosecution had to prove either that their acts were not authorized, or that they could not have reasonably believed that their superiors had authority to give the orders that they gave.[2] No one has authority to issue an order to obstruct justice, of course, and if the evidence showed a

---

[1] *See* App. 33 ("There is little dispute about what Appellants did, but a great deal of conflict about why they did it – their intent, motives, their purposes.").

[2] *See* App. 28, n.21 ("The defendants contend that to the extent he committed the acts alleged to constitute the charged crimes, his acts were authorized by a law enforcement official who he reasonably believed had such authority. In order for the defendant to be guilty of the charged offenses, the government must prove beyond a reasonable doubt that the defendant's acts were

deputy knew or should have known that a superior issued an order for that purpose, the defense would not apply. On the other hand, if the deputy reasonably believed the order was issued for a lawful purpose, the defense would apply even if the superior issued the order with intent to obstruct the grand jury investigation. The trial court denied the requested instruction without comment.

Over defense objection, the district court instructed the jury that a defendant's good faith reliance on a superior's order that the officer reasonably and objectively believed was lawful was merely "evidence you may consider," and not in and of itself a complete defense negating unlawful intent.[3] Thus, on the instructions given, the jury could have determined that Petitioners acted in good faith reliance on superiors' commands that they reasonably believed to be authorized and lawful, and nonetheless found them culpable.

Petitioners were convicted after a five week trial, and six days of jury deliberations.

---

not authorized by a law enforcement officer or that it was not reasonable for the defendant to believe the law enforcement officer had such authority.").

[3] *See* App. 26 ("Evidence that a defendant relied in good faith on the orders the defendant received from the defendants' superior officers and that the defendant reasonably and objectively believed those orders to be lawful is inconsistent with an unlawful intent and is evidence you may consider in determining if the Government has proven beyond a reasonable doubt that a defendant had the required unlawful intent.").

Petitioners' claims on appeal included that the trial court erred in refusing the requested jury instruction, and that the good faith instruction given by the lower court was incorrect and not a substitute for the defense instruction. The Ninth Circuit rejected both claims. App. 26-28.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH APPELLATE PRECEDENT

The ruling below conflicts with Ninth Circuit precedent. The rejected defense instruction required the jury to acquit unless the Government proved either that a defendant's acts were not authorized by a superior officer, or that a defendant could not have reasonably believed the superior officer authorized the conduct for a lawful purpose. The instruction is supported by appellate precedent establishing that a defendant's reasonable belief that his actions are lawfully authorized "negates the specific intent required for culpability."[4] If a defendant reasonably believed an order was issued for a lawful purpose, he had

[4] *United States v. Smith-Baltiher*, 424 F.3d 913, 924-25 (9th Cir. 2005) (defendant's claim that he believed he was authorized to enter the U.S. constitutes a "reasonable belief defense" that "negates the specific intent required for culpability") (citing *United States v. Petersen*, 513 F.2d 1133, 1134-35 (9th Cir. 1975) (defendant charged with specific intent crime of embezzlement or theft

what was in effect a mistake of fact defense, even if the superior officer issued the order with the subjective intent to obstruct justice.[5]

The defense instruction had special application and importance because Petitioners, as subordinate officers acting within the confines of a paramilitary-like organization, had a duty to follow lawful orders. Given the duty to act imposed on subordinate officers, there must be protection from liability where orders are carried out that the officer reasonably believes are lawful. This protection is necessary both to avoid a subordinate officer being punished unfairly and to ensure the effective operation of the hierarchical command structure that underlies all functional law enforcement agencies.

Moreover, as noted in the Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474, 192 L. Ed. 2d 416 (2015), "we recognize that '[r]unning a prison is an inordinately difficult undertaking,' *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), and that 'safety and order at these

---

was entitled to instruction on his defense that he reasonably believed the seller was legally authorized to sell the property and therefore he lacked the necessary specific intent)).

[5] *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982) (where a defendant is charged with a specific intent crime and contends he reasonably believed his acts were authorized, "the mistake of the law is for practical purposes a mistake of fact"); *see also United States v. Barker*, 546 F.2d 940, 945-54 (D.C. Cir. 1976) (Wilkey, J., concurring) (explaining that reasonable but mistaken belief one's actions have been lawfully authorized provides mistake of fact defense).

institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.'" *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. ___, ___, 132 S. Ct. 1510, 1515, 182 L. Ed. 2d 566 (2012).

Petitioners' actions in this case were carried out in a custodial setting where "legitimate interests that stem from need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 540, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). The Petitioners' good faith belief that their acts were lawful, and the orders that they were given by their commanding officers, has as much to do with the environment in which they were carried out, as with the fact that they were directly ordered by commanding officers to do such acts. That is to say, the reasonableness of good faith belief should be considered in light of the context in which it arises – i.e., a custodial setting.[6]

---

[6] The dangers posed by an inmate with a cell phone, cannot be understated. "The rise of 'smart phone' capabilities such as in-phone digital photography, email, and internet access pose additional risks. In January 2010, Texas officials confirmed that a death row inmate convicted of killing a law enforcement officer submitted a photo of himself to an inmate correspondence website. Access to photography poses obvious security and escape problems, and officials have noted particular concern about inmates' unsecure access to the internet." *Cell "Block" Silence: Why*

Rather than providing an officer who acts in good faith with a complete defense, the trial court's good faith instruction, made the officer's good faith but a factor to consider in deciding whether the Government had proven unlawful intent. The instruction advised the jury that it could find a defendant acted in good faith and still find he acted with unlawful intent. The Ninth Circuit's ruling upholding the denial of the defense instruction and approving the good faith instruction given by the trial court as an adequate substitute, conflicts with Ninth Circuit precedent.

The Government had to prove Petitioners acted with the unlawful intent to obstruct a federal grand jury investigation, and with the corrupt purpose of obstructing justice. App. 16, n.7. The defense maintained that a defendant's belief that his actions were lawfully authorized negates the unlawful intent to obstruct, and thus a subordinate officer who carried out a superior's orders that the officer reasonably believed were lawful cannot be guilty of obstruction of justice.

Ninth Circuit precedent recognizes that a reasonable belief defense "negates the specific intent required for culpability." *United States v. Smith-Baltiher*, 424

Contraband Cellular Telephone Use In Prisons Warrants Federal Legislation to Allow Jamming Technology, 2010 Wisc. L. Rev. 1269, 1274-75. "[C]onvicted criminals have used contraband cell phones to intimidate witnesses and occasionally harm them. They have also used the phones to plan escapes, or run ongoing illegal enterprises through organized crime and gangs." *Id.* at 1280-81.

F.3d 913, 924-25 (citing *Petersen*, 513 F.2d at 1134-35). Where a commanding officer issues a facially lawful order with the subjective intent of obstructing a grand jury investigation, and a subordinate officer carries it out based on the reasonable but mistaken belief it was issued for a lawful purpose, "the mistake of law is for practical purposes a mistake of fact," which negates unlawful intent. *Fierros*, 692 F.2d at 1294.

Just as "a mistake of fact provides a defense to a crime of specific intent such as attempted illegal reentry," *Smith-Baltiher*, 424 F.3d at 924, it provides a defense to the specific intent crime of obstruction of justice. *See United States v. Vasarajs*, 908 F.2d 443, 447, n.7 (9th Cir. 1990) (noting that "a mistake of fact can only be a valid defense if it negates the existence of a requisite mens rea component of the crime charged and if the crime allows for the interposition of such a defense") (citation omitted).[7] For example, if a superior officer ordered a deputy to move the FBI informant to a station jail, and the deputy reasonably believed the order was lawful, the deputy's belief would negate the mens rea required for conviction. That would be true even if the superior issued the order with the subjective intent to obstruct the grand jury investigation,

[7] *See Barker*, 546 F.2d at 946, 947-48, n.23 & n.24 (Wilkey, J., concurring) (noting that "[i]t is a fundamental tenet of criminal law that an honest mistake of fact negates criminal intent," even if the mistake is unreasonable as long as it is honestly held, and explaining that when applied in the context of a mistake of law, such as authorization, the mistake or belief must be reasonable).

and even if the transfer impeded the grand jury investigation.

The defense instruction had special force and application here given Petitioners' duty to follow lawful orders. *United States v. Barker*, 546 F.2d 940, 948 (D.C. Cir. 1976) (Wilkey, J., concurring) (noting that a reasonable belief defense is especially appropriate when a "citizen is under a legal obligation to respond to a proper summons and is in no position to second-guess the officer's determination that an arrest is proper"); *cf. Aguilera v. Baca*, 510 F.3d 1161, 1167, 1169 (9th Cir. 2007) (noting that police departments act as "the law enforcement arm of the state," and the resulting restrictions on officers "in the paramilitary environment of a police agency").

That duty affected Petitioners' culpability because they were not free and independent actors, and were instead obligated to carry out a facially lawful order unless they knew or should have known it was issued for an unlawful purpose. To require an officer to carry out all lawful orders, and then criminally punish him when he acts on what he reasonably believes is a lawful order is unfair, not only because the officer's intent and purpose of carrying out a lawful order forecloses the possibility that he is simultaneously acting with unlawful intent, but because he is acting at the direction of another and under the challenging circumstances of running a jail where safety and order are paramount. *See Barker*, 546 F.2d at 948; *Kingsley*, 135 S. Ct. at 2474.

Consistent with the above precedent and Petitioners' duty to act, the defense instruction provided that if a subordinate officer's actions were directed or authorized by a superior, and the subordinate officer reasonably believed the superior did so for a lawful purpose, it negated the mens rea element. App. 28, n.21.

In sum, the Ninth Circuit's ruling upholding the good faith instruction and deeming it an adequate substitute for the defense instruction conflicts with precedent and is wrong.

II. THE QUESTION OF LAW ENFORCEMENT OFFICERS' RELIANCE ON ORDERS OF SUPERIORS IS ONE OF SUBSTANTIAL AND RECURRING IMPORTANCE TO THE ADMINISTRATION OF JUSTICE

This case presents a question of exceptional importance because it significantly impacts the everyday activities of law enforcement officers, and the hierarchical command structure essential to the operation of functional law enforcement agencies.

As recognized long ago by drafters of the Model Penal Code, subordinate officers need to know that as long as they act on what they reasonably believe are lawful orders, they will be protected from liability.[8] The

[8] *See United States v. Barker*, 546 F.2d 940, 946, 966-67, n.35 & n.38 (D.C. Cir. 1976) (Leventhal, J., dissenting) (explaining that

ruling below eviscerates that protection and allows an officer to be punished "for failure to inquire as to the lawful basis" for a superior's order; if left unchanged it will "frustrate the effective functioning of the duly constituted police (and military) force and in its operation on the individual [officer] would compel a choice between the whirlpool and the rock." *Barker*, 546 F.2d at 966-67.

A subordinate officer's duty to follow all lawful orders is fundamental to the effective operation of any law enforcement agency. Providing subordinate officers with protection from liability if the officer reasonably believed an order was lawful is necessary for "the effective functioning of the duly constituted police (and military) force." *Barker*, 546 F.2d at 966-67.

The Ninth Circuit's ruling ends that protection. Officers are now faced with two equally undesirable options: abiding by the chain of command and potentially facing liability if it turns out the order was not lawful; or being circumspect about the orders received, and questioning them before acting.

The Ninth Circuit's expression of confidence that the mens rea standard for obstruction of justice "provides sufficient protection from conviction for law enforcement officers who are conducting lawful investigations without the requisite unlawful intent," may

---

the "A.L.I. recognizes limited curtailment of the doctrine excluding a mistake of law defense on the ground that the actor is under a duty to act") (citing Model Penal Code, 2.10, 3.03 (P.O.D. 1962)).

be true as applied to commanding officers. App. 26. It is not true, however, as to subordinate officers.

Commanding officers have full knowledge of all the facts, and have the authority and responsibility for directing the actions of others. Subordinate officers, like Petitioners here, have limited information, are not independent actors, and are trained and required to rely on the knowledge of their superiors.

While subordinate officers must be protected from liability, that does not mean an officer can escape liability by blindly following orders. If an officer knew or should have known an order was illegal, he is not protected. And if an officer knew or should have known in carrying out a facially lawful order that it was issued for an unlawful purpose, the officer is also liable. The appropriate measure of protection is that the officer is not liable if he or she reasonably believed the superior's order was lawful. *See Barker*, 546 F.2d at 947-48, n.23 & n.24 (Wilkey, J., concurring) (explaining that in applying a mistake of fact defense in the context of a mistake of law, such as authorization, the mistake or belief must be reasonable).

CONCLUSION

For the foregoing reasons, the Court should grant the petition and issue a writ of certiorari to the Ninth Circuit in this case.

Respectfully submitted,

RICHARD G. HIRSCH
Counsel of Record
WILLIAM J. GENEGO
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259
RichardGHirsch@AOL.com
Attorneys for Gerard Smith

KEVIN BARRY MCDERMOTT
8001 Irvine Center Drive
Suite 1420
Irvine, CA 92618
(949) 596-0102
Attorney for Gregory Thompson

Counsel for Petitioners

March 30, 2017

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GERARD SMITH, AKA Gerard Robert Smith, *Defendant-Appellant*.	No. 14-50440 D.C. No. 2:13-cr-00819-PA-3
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MARICELA LONG, *Defendant-Appellant*.	No. 14-50441 D.C. No. 2:13-cr-00819-PA-7
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GREGORY THOMPSON, *Defendant-Appellant*.	No. 14-50442 D.C. No. 2:13-cr-00819-PA-1

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MICKEY MANZO, AKA Mickey Shane Manzo, *Defendant-Appellant*.	No. 14-50446 D.C. No. 2:13-cr-00819-PA-4
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SCOTT CRAIG, AKA Scott Alan Craig, *Defendant-Appellant*.	No. 14-50449 D.C. No. 2:13-cr-00819-PA-6
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. STEPHEN LEAVINS, *Defendant-Appellant*.	No. 14-50455 D.C. No. 2:13-cr-00819-PA-2
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JAMES SEXTON, *Defendant-Appellant*.	No. 14-50583 D.C. No. 2:13-cr-00819-PA-5 OPINION

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted July 5, 2016
Pasadena, California

Filed August 4, 2016

Before: Ferdinand F. Fernandez, Richard R. Clifton, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Fernandez

SUMMARY*

Criminal Law

In an opinion addressing challenges to jury instructions, the panel affirmed the district court in a case in which seven defendants, who were members of the Los Angeles Sheriff's Department, were convicted for their roles in interfering with a federal investigation into civil rights abuses at Los Angeles County jails.

Rejecting an argument by six of the defendants (the Joint Appellants) that the instructions misstated the intent element of obstruction of justice under 18 U.S.C. § 1503(a)), the panel held that the instructions were correct and did not permit the jury to convict the Joint Appellants for obstructing an independent FBI

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

investigation rather than for obstructing the grand jury.

The panel rejected arguments that a defendant's unlawful purpose to obstruct justice must be sole or primary. The panel wrote that use of "merely incidental" or "dominant" should be eschewed, but on this record found no reversible error in the instruction given. The panel rejected a claim by James Sexton, who was tried separately, that the degree of unlawful purpose required by § 1503 is so ambiguous that the statute must be construed in his favor.

Rejecting the Joint Appellants' challenge to the adequacy of the district court's good faith instruction, the panel held that the instruction properly conveyed that good faith as to one purpose did not mean good faith as to all of them.

The panel held that the district court did not abuse its discretion in refusing to give an additional innocent intent instruction.

The panel held that in light of a clear instruction regarding the Joint Appellants' authority to investigate, any error in an instruction regarding whether or not federal agents violated California law was harmless.

Rejecting Scott Craig and Maricela Long's challenge to instructions regarding false statement counts, the panel wrote that neither the dual-purposes instruction nor the good faith instruction applied to the false statement counts, and that the false-statement

instructions in any event left no room for the jury to convict Craig and Long if they acted entirely in good faith.

The panel addressed other challenges to the defendants' convictions and sentences in a memorandum disposition.

COUNSEL

William J. Genego (argued), Law Office of William Genego, Santa Monica, California, for Defendant-Appellant Gerard Smith.

Karen Lee Landau (argued), Law Offices of Karen L. Landau, Oakland, California, for Defendant-Appellant Scott Craig.

Todd W. Burns (argued), Burns & Cohan, Attorneys at Law, San Diego, California, for Defendant-Appellant Stephen Leavins.

Thomas P. O'Brien (argued), Paul Hastings LLP, Los Angeles, California, for Defendant-Appellant James Sexton.

Hillary Potashner, Federal Public Defender; Gail Ivens and Elizabeth Richardson-Royer, Deputy Federal Public Defenders; Federal Public Defender's Office, Los Angeles, California; for Defendant-Appellant Maricela Long.

Kevin McDermott, Law Offices of Kevin Barry McDermott, Irvine, California, for Defendant-Appellant Gregory Thompson.

Matthew J. Lombard, Matthew J. Lombard Law Offices, Los Angeles, California, for Defendant-Appellant Mickey Manzo.

L. Ashley Aull (argued), Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; Eileen M. Decker, United States Attorney; Office of the United States Attorney, Los Angeles, California; for Plaintiff-Appellee.

OPINION

FERNANDEZ, Circuit Judge:

Gerard Smith, Maricela Long, Gregory Thompson, Mickey Manzo, Scott Craig, Stephen Leavins (collectively, the "Joint Appellants"), and James Sexton each appeal their convictions for obstruction of justice and conspiracy to obstruct justice. *See* 18 U.S.C. §§ 371, 1503(a). Long and Craig also appeal their convictions for making false statements. *See id.* § 1001(a)(2). Craig and Leavins also appeal their sentences. The Joint Appellants and Sexton raise a number of challenges to the jury instructions.[1] We affirm.

---

[1] They have also raised several other challenges to their convictions and sentences. We have addressed those in a memorandum disposition filed on the same date as this opinion.

BACKGROUND[2]

The Joint Appellants and Sexton were all members of the Los Angeles Sheriff's Department (LASD), and were convicted for their roles in interfering with a federal investigation into civil rights abuses at Los Angeles County jails. Leavins, Craig, and Long were members of the Internal Criminal Investigations Bureau (ICIB), an LASD unit that investigates criminal activity by LASD employees. Leavins was a lieutenant, while Craig and Long were sergeants. Thompson was a lieutenant who oversaw Operation Safe Jails (OSJ), an LASD unit that investigates inmates. Smith, Manzo, and Sexton were OSJ deputies.

A federal grand jury began to investigate allegations of civil rights violations in LASD jails in June 2011. The grand jury issued subpoenas to LASD that month, seeking documents regarding "use of force" incidents in jails. The Federal Bureau of Investigation (FBI) assisted the grand jury with its investigation. By late-August 2011, a number of grand jury subpoenas had been served, and were circulated among LASD personnel, including some of the Joint Appellants.

As part of the federal investigation, in July 2011, the FBI used an undercover agent to bribe LASD Deputy Gilbert Michel to smuggle a cell phone to Anthony Brown, a cooperating inmate at LASD's Men's Central

---

[2] In setting forth the background, we have "consider[ed] the evidence presented at trial in the light most favorable to the prosecution." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).

Jail (MCJ). The phone was intended to allow Brown to communicate contemporaneously with the FBI about claims of civil rights violations.

On August 8, 2011, LASD personnel found and seized the cell phone. Brown's possession of the cell phone was treated much like similar conduct by other inmates, until August 18, 2011, when Smith, Manzo, and Thompson learned that Brown and his cell phone were linked to an FBI civil rights investigator. That prompted Thompson to impose stringent restrictions on Brown, including "no phones, no visits, especially from outside LE [law enforcement] without my approval." It also prompted Smith and Manzo, later joined by Leavins, to interview Brown regarding the cell phone, civil rights violations, and the nature of Brown's involvement with the FBI.

On August 23, 2011, FBI Agents Leah Marx, Wayne Plympton, and David Dahle went to MCJ to interview Brown and determine what happened to the cell phone. About an hour after the interview began, it was terminated by an LASD sergeant who entered the room shouting that the FBI agents did not have permission to interview Brown; Brown was taken away, and the FBI agents left after telling Brown they would return for him. Shortly thereafter, Smith, Manzo, Leavins, and LASD Captain William Carey interviewed Brown about the details of his meeting with the FBI, including whether Brown was going to testify. Leavins told Brown that he would be transferred to another jail for his safety, and promised Brown additional privileges there.

Brown was moved to a medical ward in MCJ while they decided where to transfer him, and by that night, he was under 24-hour guard by OSJ deputies. The guards were told that no one, including federal law enforcement, could visit or see Brown. One guard testified that he knew that the FBI had given Brown a phone in connection with the investigation of illegal use of force in MCJ, and that the reason Brown had to be removed from MCJ was because the FBI was going to come to get him.

On August 24, 2011, Brown was interviewed again, this time by Manzo, Smith, Leavins, Craig, and Long. The interview immediately focused on the FBI, with Long asking Brown when he first came in contact with the FBI, what they were interested in, and who Brown's FBI contacts were. Brown told them that the FBI was primarily focused on assaults in the jail.

Meanwhile, believing that their investigation may have been compromised, the FBI approached both Deputy Michel and his girlfriend, Deputy Angela Caruso, on August 24, 2011. They served Deputy Caruso with a grand jury subpoena.

On August 25, 2011, the federal district court issued a writ for Brown's testimony before the federal grand jury; the writ required Brown's production on September 7, 2011. The United States Marshals employee responsible for serving writs followed her usual practice of calling LASD prior to service; she was initially told that Brown could not be found, and then that the person would have to speak to a supervisor. The

employee remembered faxing or emailing the writ to LASD thereafter, and telephone records confirmed two different faxes from the Marshals to LASD on the morning of August 25, 2011. LASD had no record of receiving the writ, but LASD personnel did become aware of it.[3]

Later that afternoon, OSJ deputies went to LASD's records office and asked that Brown be the released from the computer system. Although the clerks in the records office were reluctant to do so without a court order, they ultimately relented and "released" Brown. Sexton used his knowledge of LASD's computer systems to assist in rebooking Brown under an alias; Brown was thereafter released and rebooked under a series of aliases, each time without information linking the alias to his true identity. That made it impossible for the FBI, the Marshals, and anyone in LASD's Warrants and Detainers section to find Brown.

By the next day, August 26, 2011, Brown had been moved from MCJ to a jail in San Dimas, California. He continued to be guarded around the clock, and Deputy Sexton was one of those guards. Smith told one of Brown's guards that the FBI should not be allowed to speak to Brown, and that he needed to be hidden from any federal agency.[4] At 10:30 that night, Craig and

---

[3] In grand jury testimony that was admitted at his trial, Sexton said that he learned from LASD personnel in the Warrants and Detainers section that a writ for Brown had been received, and that he told Smith and Manzo.

[4] There was testimony that around this time, LASD personnel were told that, if a federal agent came to a facility to serve a

Long interviewed Brown again, mocking whether the FBI would return for him and whether the FBI could "take the [LASD] house down," as they had promised to do, since "the house [was] still there."

Several days later, on August 30, 2011, Leavins, Craig, and Long interviewed Deputy Michel. Michel told them that the FBI had questioned him about the use of excessive force in the jail, subpoenaed his girlfriend (Deputy Caruso), and asked him to cooperate with their investigation into misconduct. Leavins, Craig, and Long sought to dissuade Michel from cooperating, telling him that the FBI was manipulating him, lying to him, threatening him, and blackmailing him. Craig ordered Michel not to discuss these matters with anyone, including the FBI.

That afternoon, Leavins, Craig, and Long interviewed Deputy William Courson, who had alerted his supervisors that he had contact with Agent Marx outside of work. Leavins, Craig, and Long attempted to discourage Courson from cooperating with the FBI by leading him to believe he "was played" and "lied to" by Agent Marx. Craig and Leavins told Courson not to talk to anyone about this, and Craig told him that if he was threatened with a "Federal Grand Jury Subpoena" or "[s]ome nonsense like that" he should call Craig.

---

writ for Brown, LASD Undersheriff Paul Tanaka's cell phone should be called and the writ not honored. The message was disseminated in person so that there would be no written record of it and no chance for it to be captured on telephones that could be "bugged."

That same day, LASD received three additional grand jury subpoenas dated August 24, 2011, which included requests for records regarding Brown and Deputies Michel and Caruso. On August 31, 2011, Manzo's investigation notebook memorialized a meeting regarding "Fed. Grand Jury Inv. Subpoenas" and listed categories of documents requested with dates corresponding to the due dates of the August 24th subpoenas.

Brown was returned to MCJ by September 2, 2011, where he was interviewed briefly by Smith. Brown told Smith that he would have "nothing to do with [the FBI] anymore." The next day, Brown wrote a letter addressed to several LASD personnel, including Long and Leavins, confirming that he would not testify for the FBI, and that the evidence he had given to them would therefore "mean[] nothing." On September 12, 2011, Sexton re-booked Brown under his true name, and Brown was transferred to state custody that night.

Sometime during September 2011, an ICIB task force was created to investigate the use of force in jails and the cell phone found in Brown's possession. Leavins was the lead lieutenant, Craig and Long were lead investigators, and Smith and Manzo were members. In that first week after the creation of the task force, a shared drive that included all the federal grand jury subpoenas was established for the task force members.

On September 8, 2011, Craig applied for a state-court order requiring the FBI to produce materials regarding its investigation, but it was denied for lack of jurisdiction. The next day, Craig left a voicemail on a phone he believed to be Agent Marx's, stating that he was working on a warrant for her arrest. On September 13, 2011, members of the LASD Special Operations Group began to surveil Agent Marx at Craig's request. They tracked her to her apartment, identified her car, and followed her to work. Long and Craig then confronted Marx outside her apartment on September 26, 2011. Craig asked Marx if she knew she was "a named suspect in a felony complaint," and told her that he was "in the process of swearing out a declaration for an arrest warrant for you."

After this confrontation, Marx returned to the FBI office at the direction of her supervisor, Agent Narro. Narro called Craig and Long to ask them if there would be a warrant for Marx's arrest, and Long told him "[t]here's going to be," and that it could be issued as soon as the next day. After the phone call, Long mocked Narro, saying "They're scared! They're like, do you know when[ ] is the warrant – " and the room broke into laughter before the recording ended. As a result of these threats to Marx, the FBI agents postponed going to the jail to interview inmates and gather information because they were concerned that Marx would be arrested. No one on the investigation team returned to the jail for three months.

The Joint Appellants and Sexton were indicted for obstruction of justice and conspiracy to obstruct justice. In addition, Craig and Long were indicted for making false statements to the FBI. The Joint Appellants were tried, were convicted on all counts, and were sentenced to prison terms. Sexton was tried separately. His first trial ended in a mistrial, but his second trial resulted in his conviction on all counts. He was then sentenced to a prison term. These appeals followed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

We review the district court's "precise formulation" of jury instructions for abuse of discretion. *United States v. Lloyd*, 807 F.3d 1128, 1165 (9th Cir. 2015) (quoting *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000)); *see also United States v. Sarno*, 73 F.3d 1470, 1485 (9th Cir. 1995). We review constitutional challenges,[5] and whether the jury instructions misstated an element of the crime or adequately presented the defendant's theory of his case,[6] de novo.

We review for plain error those claimed errors that were not brought to the attention of the district court.

---

[5] *United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc).

[6] *Lloyd*, 807 F.3d at 1164-65; *see also Sarno*, 73 F.3d at 1485.

Fed. R. Crim. P. 52(b); *see also United States v. Pelisamen*, 641 F.3d 399, 404 (9th Cir. 2011); *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990).

DISCUSSION

There is little dispute about the conduct on which the Joint Appellants' and Sexton's indictments and convictions were predicated. Certain of them guarded Brown, transferred him to a new jail under various aliases, discouraged Brown and Deputies Michel and Courson from cooperating with the FBI, confronted FBI Agent Marx, and lied to her and her supervisor. Tape recordings, documents, and witness testimony (including from some of the appellants themselves) confirmed those activities. But whether the Joint Appellants and Sexton were guilty of the charged crimes crucially turned on the intent with which they acted. According to the Government, all acted with unlawful intent, and all were therefore guilty. According to the Joint Appellants and Sexton, all acted in good faith, motivated by an intent to follow orders, or to protect Brown from harm, or to investigate the FBI's complicity in smuggling contraband, or to conduct their own investigation into civil rights abuses. The juries in each trial determined that the Government's version was correct and convicted the Joint Appellants and Sexton.

Appellants now claim that a number of instructional errors undermined the verdicts. The Joint Appellants and Sexton all challenge jury instructions

from their respective trials. In reviewing those challenges we will keep in mind the admonition that an instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge," and "the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." *Lloyd*, 807 F.3d at 1164 (quoting *Dixon*, 201 F.3d at 1230).

(1) *Intent required for obstruction of justice*

The Joint Appellants argue that the jury instructions misstated the intent that the Government had to prove for obstruction of justice,[7] which, they assert,

[7] As relevant to this argument, the instructions given to the jury read as follows:

> In order for each defendant to be found guilty of [obstruction of justice], the Government must prove each of the following elements beyond a reasonable doubt.
>
> First, the defendant influenced obstructed or impeded or tried to influence, obstruct, or impede a federal grand jury investigation;
>
> And second, the defendant acted corruptly with knowledge of a pending federal grand jury investigation and with the intent to obstruct the federal grand jury investigation.
>
> As used in Section 1503 "corruptly" means that the act must be done with the purpose of obstructing justice. The government does not need to prove that defendants' conduct had the actual effect of obstruction. However, the Government must prove that the defendants' actions would have had the natural and probable effect of interfering with the grand jury investigation.
>
> . . . .

allowed the jury to convict them merely for obstructing an FBI investigation, rather than for obstructing the grand jury. We do not agree.

In order to violate 18 U.S.C. § 1503(a), a defendant must have acted "with an intent to influence . . . grand jury proceedings," not to influence "an investigation independent of the . . . grand jury's authority." *United States v. Aguilar*, 515 U.S. 593, 599, 115 S. Ct. 2357, 2362, 132 L. Ed. 2d 520 (1995). This court has already held that "a grand jury investigation constitutes a judicial proceeding for purposes of § 1503." *United States v. Duran*, 41 F.3d 540, 544 (9th Cir. 1994); *see also United States v. Macari*, 453 F.3d 926, 936 (7th Cir. 2006). Thus, the district court's use of the phrase "grand jury investigation," rather than "grand jury proceeding," was neither misleading nor an abuse of discretion in these circumstances.

We also see no possibility that the jury understood "grand jury investigation" to refer to things the FBI may have done as part of an investigation independent of the grand jury's authority. First, the jury instructions referred to a grand jury investigation, not an FBI investigation, and we presume that jurors follow their instructions. *See United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (en banc). Second, the evidence showed that the investigation was a grand jury investigation into civil rights abuses at LASD jails, and

---

One element the Government must prove beyond a reasonable doubt with respect to the obstruction of justice charges is that the defendant had the unlawful intent to obstruct a grand jury investigation.

there was no evidence that the FBI's efforts during this period were undertaken independently of the grand jury. *See United States v. Hopper*, 177 F.3d 824, 830 (9th Cir. 1999); *see also United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 169 (2d Cir. 2008); *cf. Aguilar*, 515 U.S. at 600-601, 115 S. Ct. at 2362-63.

There was no need for the district court to give an additional instruction proposed by the Joint Appellants which stated that it was insufficient for the Government to show that they obstructed an FBI investigation, as opposed to a grand jury investigation. To the extent that the FBI was operating as an arm of the grand jury, the trial jury was entitled to consider the Joint Appellants' obstructive acts as they related to the FBI. *See Macari*, 453 F.3d at 936-38; *see also Triumph Capital*, 544 F.3d at 169; *cf. Aguilar*, 515 U.S. at 600-601, 115 S. Ct. at 2362-63. It was not told to do otherwise. Although the Joint Appellants now claim that the district court should have given yet another instruction explaining what the Government must show to demonstrate that the FBI was acting as an arm of the grand jury, they never proposed one. Review is therefore for plain error,[8] but the Joint Appellants have not cited to any case that requires an instruction on that point and have not demonstrated that one was needed here. In fact, the other instructions told the

[8] *See Henderson v. United States*, ___ U.S. ___, 133 S. Ct. 1121, 1124, 1126-27, 1130-31, 185 L. Ed. 2d 85 (2013); *see also United States v. Houser*, 130 F.3d 867, 872 (9th Cir. 1997) (review is for plain error when no alternative instruction was proposed and no objection was made to the failure of the district court to give an alternative instruction).

jury that the Joint Appellants had to act with an intent to obstruct the grand jury investigation itself. Even if the failure to give an arm of the grand jury instruction sua sponte might be plain error in some circumstances, it would undoubtedly be harmless on this record. *See United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008). The evidence at trial pointed to the FBI's acting for the grand jury, and the Joint Appellants do not identify any evidence on which the jury could rely to find that the FBI was acting "separate and apart" from the grand jury investigation. *See Macari*, 453 F.3d at 936-38.

There was also no plain error in the district court's failure to give an instruction sua sponte that the Joint Appellants had to know that their conduct would have the "natural and probable effect" of influencing a grand jury investigation. *See Aguilar*, 515 U.S. at 599, 115 S. Ct. at 2362 (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)); *see also Duran*, 41 F.3d at 544. They claim that is required by *Aguilar*, but we have previously described that decision as requiring that there be a nexus between the agency (here the FBI) activity and the judicial proceeding, and that the jury can infer that nexus "if the 'natural and probable effect' of the defendant's conduct *vis à vis* the [FBI] proceeding would obstruct justice." *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006) (quoting *Aguilar*, 515 U.S. at 599, 115 S. Ct. at 2362). The district court here gave a nexus instruction that was substantively identical to the one that was jointly

proposed by the Joint Appellants and the Government,[9] and that accurately reflected the law. *See United States v. Fleming*, 215 F.3d 930, 938 (9th Cir. 2000); *see also United States v. Bonds*, 784 F.3d 582, 587-88 (9th Cir. 2015) (en banc) (N.R. Smith, J., concurring).[10] To the extent that *Triumph Capital* states that an additional instruction is required,[11] we disagree. *Aguilar*[12] does not require that essentially redundant instruction. Moreover, the instructions did require that the Government prove not only that the Joint Appellants' actions would have had the natural and probable effect of interfering with the grand jury investigation,[13] but also that the Joint Appellants did those acts "corruptly," that is, with the purpose of obstructing justice.[14]

The district court's instructions regarding the intent required for obstruction of justice were correct and did not permit the jury to convict the Joint Appellants

---

[9] *See supra* note 7 (fourth paragraph of quoted material).

[10] In *Bonds*, the "natural and probable effect" element of § 1503 was characterized as a "materiality requirement." Framed either as a nexus element or a materiality element, there is no requirement that the defendant, in addition to the specific intent to obstruct justice, also have knowledge that his acts may have the "natural and probable effect" of interfering with justice.

[11] *Triumph Capital*, 544 F.3d at 166-67 & n.16.

[12] *Aguilar*, 515 U.S. at 599, 115 S. Ct. at 2362.

[13] *Id.* at 601, 115 S. Ct. at 2363.

[14] *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981). The Joint Appellants also challenge *Rasheed*'s definition of "corruptly" as overly broad, but we are bound by that precedent and apply it here. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

on the invalid theory that they obstructed an independent FBI investigation.[15] We see no reason to believe that the jury's general verdict was based on a failure to follow the specific instructions regarding grand jury investigations while concomitantly seizing upon and crediting the factually-unsupported theory that the Joint Appellants obstructed an independent FBI investigation. *See Griffin v. United States*, 502 U.S. 46, 59-60, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371 (1991) (refusing to negate a verdict on the chance "that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient" (quoting *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991))); *see also United States v. Fulbright*, 105 F.3d 443, 451 n.5 (9th Cir. 1997), *overruled on other grounds by Heredia*, 483 F.3d at 921-22; *cf. McDonnell v. United States*, 579 U.S. ___, ___, 136 S. Ct. 2355, 2374-75, ___ L. Ed. 2d ___ (2016).

(2) *Dual purposes*

The Joint Appellants and Sexton challenge an instruction, given by the district court in each trial, which told the jury that the Government did not need

---

[15] We also reject the Joint Appellants' argument that tampering with grand jury witnesses is not a legally permissible theory under 18 U.S.C. § 1503. *See United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984). This court has already held to the contrary. *See United States v. Ladum*, 141 F.3d 1328, 1337-38 (9th Cir. 1998). We are bound by that precedent. *See Miller*, 335 F.3d at 899.

to prove that the defendants' sole or primary purpose was to obstruct justice.[16] They all argue that the instruction should have required the Government to prove that their unlawful purpose was the sole or primary purpose. Sexton further explicates that position by arguing that the district court should have instructed the jury that the unlawful purpose had to be dominant.

We reject the claim that a defendant's unlawful purpose to obstruct justice must be sole or primary. A defendant's unlawful purpose to obstruct justice is not negated by the simultaneous presence of another motive for his overall conduct. We noted that over two decades ago. *See United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988). In that case, the Internal Revenue Service sent a summons to a company of which Laurins was a director. It sought production of books and records, but Laurins concealed them instead. *Id.* at 533-34. He was prosecuted for obstruction, and we held that the concealment fell within the definition of corruptly obstructing justice. *Id.* at 536-37. He claimed that his intent was to wait until he was personally

---

[16] In the Joint Appellants' trial, the instruction said:

> The Government need not prove that the defendants' sole or even primary purpose was to obstruct justice so long as the Government proves beyond a reasonable doubt that one of the defendants' purposes was to obstruct justice. The defendants' purpose of obstructing justice must be more than merely incidental.

The instruction was the same in Sexton's trial, mutatis mutandis.

summoned so that he could "assert his fifth amendment privilege." *Id.* at 537. While that was a benign motive, we declared that it did not suffice to overcome the evidence of his corrupt motive to frustrate enforcement of the original summons. *Id.* at 537; *see also United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990) ("conduct [must be] prompted, at least in part, by a 'corrupt motive' " (quoting *United States v. Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985))); *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978) (same); *United States v. Fayer*, 523 F.2d 661, 663 (2d Cir. 1975) (the good motive was "outweighed" by the bad motive). And in a different context, we have recognized that where the purpose of an act was necessary to a conviction, it was not required to be the "primary or sole purpose" of that act. *United States v. Banks*, 514 F.3d 959, 969 (9th Cir. 2008).

The evidence was sufficient to suggest various motives for the Joint Appellants' and Sexton's conduct, so it was appropriate for the court to give an instruction regarding dual purposes. *See Heredia*, 483 F.3d at 923-24. Alternatively, the jury could have found that the Joint Appellants and Sexton undertook certain actions without a purpose to obstruct, but had that obstructive purpose with respect to other actions. *See id.* The instruction properly conveyed that concept. *See Banks*, 514 F.3d at 964-65, 969-70.

Sexton, however, adds that the district court's clarification that "the purpose must be more than merely incidental" was not specific enough about where the

strength of the purpose must fall on a continuum between "merely incidental" and sole or primary. At the district court he indicated that the jury should be told that the obstruction motive must be dominant and nothing less than that would do. The district court did not accept his position. Sexton relied on *Banks* in support of his argument. However, what *Banks* said was that in the "gang or racketeering enterprise" area the "purpose does not have to be the only purpose or the main purpose." *Id.* at 969. "But it does have to be a substantial purpose." *Id. Banks* then went on to say that it must be "one of the defendant's general purposes or dominant purposes." *Id.* at 970.

"Incidental" itself can be commonly defined as "subordinate, nonessential, or attendant in position or significance. . . ." Webster's Third New International Dictionary 1142 (Philip Babcock Gove, 3d ed. 1986). Thus, it would seem that, under the instruction given, the jury would have understood that the purpose must be essential in some sense – that is, substantial. Taken alone, "dominant" has a meaning of "commanding, controlling, or having supremacy or ascendancy over all others." *Id.* at 671. Plainly, however, we did not mean in *Banks* that the purpose in question must be *the* dominant purpose, hence our use of the phrase "one of." As we made clear in *Banks*, in the gang or racketeering area, when a person has two criminal purposes neither has to dominate (be the main purpose), but then neither can be "merely incidental" either. More simply put, perhaps, both purposes must be substantial. In any event, our effort in *Banks* does demonstrate the

difficulty in attempting to wrap words around the common sense idea that in order to be liable for a crime premised on gang involvement a person's criminal purpose must not only include the commission of a substantive crime, but also must include the additional criminal purpose of committing that crime as a gang-oriented activity. *See Banks*, 514 F.3d at 969.

Nonetheless, we see the use of the phrase "merely incidental" in instructions as infelicitous. So, too, is use of the word "dominant." Both should be eschewed. "Incidental" has a flavor that suggests that the standard is very low, even if that is not true as a definitional matter. "Dominant" has a flavor that suggests that the standard is very high. "Substantial" would convey the idea with more precision, but we decline to engage in the fascinating pursuit of choosing the exact word at this time – should it be "substantial" or "considerable" or "essential" or "significant" or "important" or "integral" or "strong," etc.? We decline because, regardless of the exact word used, on this record the jury would not have been misled by the instruction that was given. The jury was not asked to decide an issue where one alleged purpose was very strong and the other very weak. It had to choose between two starkly different stories and readings of the evidence, but none of the argued purposes appeared to be asthenic in nature. In another case, the "more than merely incidental" formulation may well lead to error, and that makes its use rather dangerous at best; thus, our admonition against using it. But on this record, we find no reversible error in the instruction given.

We also reject Sexton's claim that the degree of unlawful purpose required by 18 U.S.C. § 1503 is so ambiguous that the statute must be construed in his favor. He has identified no "grievous ambiguity" in the statute, and we see none. *See Banks*, 514 F.3d at 968. Moreover, we are confident that the mens rea required for a violation of the statute provides sufficient protection from conviction for law enforcement officers who are conducting lawful investigations without the requisite unlawful intent. *See United States v. Lee*, 183 F.3d 1029, 1032-33 (9th Cir. 1999).

(3) *Good faith*

Although in general "[a] defendant is not entitled to a separate good faith instruction,"[17] the district court gave one. The Joint Appellants challenge the instruction[18] on the ground that it suggested that good

---

[17] *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984); *see also United States v. Shipsey*, 363 F.3d 962, 967 (9th Cir. 2004).

[18] The instruction provided:

> Evidence that a defendant relied in good faith on the orders the defendant received from the defendants' superior officers and that the defendant reasonably and objectively believed those orders to be lawful is inconsistent with an unlawful intent and is evidence you may consider in determining if the Government has proven beyond a reasonable doubt that a defendant had the required unlawful intent.
>
> If you find, however, that a defendant carried out those orders with an unlawful intent to obstruct a grand jury investigation or that a defendant did not reasonably and objectively believe the superiors' orders to be lawful, the defendants' conduct is not excused by

faith was merely some evidence inconsistent with unlawful intent, not a complete defense to the charged crime. Of course, as described above, the evidence adduced at trial suggested that the Joint Appellants may have had a variety of motives for their conduct – some of which were consistent with good faith, and some of which were consistent with a purpose to obstruct justice. Good faith as to one purpose did not mean good faith as to all of them, and the good faith instruction properly conveyed that concept. Because the instruction was correct, it is immaterial that its precise wording differed from the one used in a different trial. *See United States v. Kilbride*, 584 F.3d 1240, 1249 n.5 (9th Cir. 2009).

To the extent that the Joint Appellants claim that this instruction may have allowed the jury to convict them of obstruction even if it determined that they acted exclusively in good faith, we are not convinced. Read in the context of the other instructions,[19] which specified that the Government had to show that the defendants "acted corruptly . . . with the intent to obstruct the federal grand jury investigation," "with the purpose of obstructing justice," and with "the unlawful intent to obstruct a grand jury investigation," there is no real likelihood that the jury would have drawn that far-fetched inference. *See Thomas*, 612 F.3d at 1122; *Kilbride*, 584 F.3d at 1249-50; *see also Middleton v. McNeil*, 541 U.S. 433, 438, 124 S. Ct. 1830, 1833, 158

---

a claim or evidence that the defendant might have been following orders of his or her superiors.

[19] *See Lloyd*, 807 F.3d at 1164.

L. Ed. 2d 701 (2004) (per curiam) (proposed "interpretation would require . . . a rare combination of extremely refined lawyerly parsing of an instruction, and extremely gullible acceptance of a result that makes no conceivable sense").[20]

(4) *Innocent Intent*

Joint Appellants also assert that the district court erred because it failed to give an instruction proposed by some of them which was intended to indicate that the Joint Appellants' intent was innocent – not unlawful – because they relied on orders from superior officers whom they reasonably believed had authority to issue the orders.[21] Essentially, that is an innocent

---

[20] We also reject the Joint Appellants' claim that the prejudice they suffered from this instruction was exacerbated by the district court's finalizing the instruction after closing arguments. Indeed, they have not demonstrated that their closing arguments were undermined by the change. Moreover, they were given an opportunity to object both before and after the court delivered the instructions but did not do so. *Cf. United States v. Liu*, 731 F.3d 982, 987-88 (9th Cir. 2013). Finally, they did not express surprise or seek further argument time. *Cf. United States v. Hannah*, 97 F.3d 1267, 1269 (9th Cir. 1996).

[21] The proposed instruction read:

> The defendants contend that to the extent he committed the acts alleged to constitute the charged crimes, his acts were authorized by a law enforcement official who he reasonably believed had such authority.
>
> In order for the defendant to be guilty of the charged offenses, the government must prove beyond a reasonable doubt that the defendant's acts were not authorized by a law enforcement officer or that it was not

intent defense. As we said in *United States v. Burrows*, 36 F.3d 875 (9th Cir. 1994):

> [T]he defendant may allege that he lacked criminal intent because he honestly believed he was performing the otherwise-criminal acts in cooperation with the government. "Innocent intent" is not a defense *per se*, but a defense strategy aimed at negating the *mens rea* for the crime, an essential element of the prosecution's case. . . .

Id. at 881 (second alteration in original) (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994)); *see also United States v. Jumah*, 493 F.3d 868, 873-75 (7th Cir. 2007). That is, they do not seek to rely upon an excuse for the commission of a crime,[22] rather they assert that they committed no crime at all. It is notable, however, that the Joint Appellants do not contend that they were committing criminal acts under orders or otherwise. Their contention is not that they were ordered to do anything that would be criminal (for example, hiding a person for the purpose of obstructing a grand jury investigation), but rather that the acts were intrinsically innocent (for example, hiding a person to shield him from danger). In any event, what their proposed instruction amounted to was a claim that they acted in good faith, and the good faith instruction that was given did incorporate

---

reasonable for the defendant to believe the law enforcement had such authority.

[22] *See United States v. Doe*, 705 F.3d 1134, 1145-46 (9th Cir. 2013); *Jumah*, 493 F.3d at 874-75.

the superior-officer order concept already.[23] The instructions adequately covered the Joint Appellants' claim that they did not have the requisite intent to obstruct. *See United States v. Sayakhom*, 186 F.3d 928, 939-40 (9th Cir.), *amended by* 197 F.3d 959, 959 (9th Cir. 1999). The district court did not abuse its discretion in refusing to give the additional innocent intent instruction.

(5) *California law*

The Joint Appellants also argue that the district court wrongly instructed the jury regarding the legality of the FBI's actions under California law. The instruction told the jury that certain sections of the California penal code "require the possession or introduction of contraband to be unauthorized in order for crimes to occur," and that "[i]f Anthony Brown possessed any contraband including a cellular phone at the direction of the FBI, such possession or introduction of contraband would be authorized and no violation of these California Penal codes would have occurred." *See* Cal. Penal Code §§ 4573(a), 4575(a).

The Joint Appellants and the Government dispute whether that instruction was correct as a matter of California law, and what impact the Supremacy Clause[24] has in these circumstances. But we need not parse those issues for purposes of this opinion because

---

[23] *See supra* note 18.

[24] U.S. Const. art. VI, cl. 2.

even if we assume, without deciding, that the instruction was incorrect, it is not a basis for overturning the verdicts.

The Joint Appellants were not prejudiced by any error. *See United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999); *see also Cherer*, 513 F.3d at 1155. They claim otherwise on the theory that if there was no crime, they could not investigate. However, that incorrect view was explicitly contradicted by the jury instructions. The jury was told that "[a] local officer has the authority to investigate potential violations of state law," which "includes the authority to investigate potential violations of state law by federal agents." The district court also told counsel that they could argue that the Joint Appellants had the right to conduct their investigation. In light of the clear instruction regarding the Joint Appellants' authority to investigate, any error in the instruction regarding whether or not federal agents actually violated California law was undoubtedly harmless. *See Cherer*, 513 F.3d at 1155.

(6) *Instructions regarding the false statement counts*

Craig and Long challenge the district court's instructions regarding the false statement counts, primarily on the ground that the district court's dual purposes instruction erroneously told the jury that it could convict them if they acted in good faith.[25] But the

[25] We do not consider Craig and Long's claim that an innocent intent instruction should have been given with respect to the false statement counts because they did not propose one and

dual purposes instruction did not apply to the false statement charges; it applied to the obstruction charges. It mentions obstruction of justice three times,[26] and appears in a section of the instructions discussing obstruction of justice.

Similarly, the good faith instruction did not apply to the false statement count, nor was the court asked to give one for that count. In any event, because the jury was properly instructed on the elements of the false statement offense,[27] the district court was not

---

raised the issue only in their reply brief. *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006).

[26] *See supra* note 16.

[27] The district court instructed:

> [T]he Government must prove each of the following elements beyond a reasonable doubt:
>
> First the defendant made a false statement in a matter within the jurisdiction of the Federal Bureau of Investigation.
>
> Second, the defendant knew the statement was false.
>
> Third, the defendant acted willfully.
>
> And fourth, the statement was material to the activities or decisions of the Federal Bureau of Investigation. That is, it had a natural tendency to influence or was capable of influencing the agency's decisions or activities.
>
> . . . .
>
> The word "willfully" means that the defendant made the statement voluntarily and purposely and with knowledge that the defendants' making of the statement was unlawful. That is, the defendant must have made the statement with a purpose to disobey or disregard the law.

required to instruct on good faith.[28] In short, the false-statement instructions required the jury to find that Craig and Long acted willfully with a purpose to disobey the law. Those instructions left no room for the jury to convict Craig and Long if they acted entirely in good faith. *See Green*, 745 F.2d at 1210.

CONCLUSION

There is little dispute about what Appellants did, but a good deal of conflict about why they did it – their intent, their motives, their purposes. They say that all was done for benign purposes but the Government says that what they did was for criminal purposes. Ultimately, a properly instructed jury had to decide whose narrative it believed – the amaranthine essence of the jury function. These juries were properly instructed, and accepted the Government's position.

AFFIRMED.

This is in accord with the statutory language of the offense. *See* 18 U.S.C. § 1001; *see also United States v. Camper*, 384 F.3d 1073, 1075 (9th Cir. 2004) ("The government must prove five elements to obtain a conviction for making a false statement under § 1001; (1) a statement, (2) falsity, (3) materiality, (4) specific intent, (5) agency jurisdiction."). Craig and Long do not argue that the instruction was incorrect.

[28] *See Shipsey*, 363 F.3d at 967; *Green*, 945 F.2d at 1209.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GERARD SMITH, AKA Gerard Robert Smith, Defendant-Appellant.	No. 14-50440 D.C. No. 2:13-cr-00819-PA-3 MEMORANDUM* (Filed Aug. 4, 2016)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARICELA LONG, Defendant-Appellant.	No. 14-50441 D.C. No. 2:13-cr-00819-PA-7
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY THOMPSON, Defendant-Appellant.	No. 14-50442 D.C. No. 2:13-cr-00819-PA-1

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICKEY MANZO, AKA Mickey Shane Manzo, Defendant-Appellant.	No. 14-50446 D.C. No. 2:13-cr-00819-PA-4
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT CRAIG, AKA Scott Alan Craig, Defendant-Appellant.	No. 14-50449 D.C. No. 2:13-cr-00819-PA-6
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEPHEN LEAVINS, Defendant-Appellant.	No. 14-50455 D.C. No. 2:13-cr-00819-PA-2
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES SEXTON, Defendant-Appellant.	No. 14-50583 D.C. No. 2:13-cr-00819-PA-5

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted July 5, 2016
Pasadena, California

Before: FERNANDEZ, CLIFTON, and FRIEDLAND, Circuit Judges.

Gerard Smith, Maricela Long, Gregory Thompson, Mickey Manzo, Scott Craig, Stephen Leavins (collectively, the "Joint Appellants"), and James Sexton each appeal their convictions for obstruction of justice and conspiracy to obstruct justice. *See* 18 U.S.C. §§ 371, 1503(a). Long and Craig also appeal their convictions for making false statements. *See id.* § 1001(a)(2). Craig and Leavins also appeal their sentences. The Joint Appellants and Sexton raise a number of issues.[1] We affirm.

A) Evidentiary ruling

The Joint Appellants and Sexton challenge a number of evidentiary rulings in their respective trials; all of their challenges fail.

[1] In addition to the issues disposed of herein, they have raised several jury instruction issues. We have addressed those in an opinion filed on the same date as this memorandum disposition.

(1) Challenges by the Joint Appellants

First, the district court did not abuse its discretion[1] by excluding the testimony of Paul Yoshinaga, Chief Legal Advisor to the LASD, on the grounds that it was irrelevant and its probative value was outweighed by the risk of confusing the jury. *See* Fed. R. Evid. 401-403; *see also United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015). While the evidence was somewhat relevant,[2] it was minimally probative[3] and risked misleading the jury with Yoshinaga's legal opinions.[4] Moreover, any error in excluding the evidence was harmless[5] and did not constitute a constitutional violation[6] in light of the marginal relevance of the evidence and the jury instruction that the Joint Appellants could investigate potential violations of California law by federal agents. Also, there was no misconduct[7] in the prosecution's questioning of Leavins or its summary of his testimony in closing argument, regardless of whether Leavins's and Yoshinaga's

---

[1] *United States v. Wiggan*, 700 F.3d 1204, 1210 (9th Cir. 2012); *see also United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

[2] *See United States v. Vallejo*, 237 F.3d 1008, 1015 (9th Cir.), *amended by* 246 F.3d 1150, 1150 (9th Cir. 2001); *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961).

[3] *See Wiggan*, 700 F.3d at 1213.

[4] *See id.* at 1214 n.19.

[5] *See United States v. Moran*, 493 F.3d 1002, 1014 (9th Cir. 2007) (per curiam).

[6] *See Haischer*, 780 F.3d at 1284.

[7] *See United States. v. Blueford*, 312 F.3d 962, 968, 974 (9th Cir. 2002).

recollections of their interactions may have differed to some extent.

Second, the district court did not abuse its discretion by excluding a video of an inmate breaking out of his jail cell and attacking another inmate. The video's minimal probative value was substantially outweighed by the time that would be wasted explaining the differences between the video and Brown's situation, including that the inmate victim was not held under 24-hour guard. *See United States v. Bussell*, 414 F.3d 1048, 1059 (9th Cir. 2005); Fed. R. Evid. 403.

Third, the district court did not abuse its discretion by permitting Deputies Michel and Courson to testify regarding certain incidents of inmate abuse. This limited evidence was properly admitted to rebut the implication that the federal investigation was unnecessary; it was not unfairly prejudicial because the jury was already aware of the abuse allegations and was given a limiting instruction. *See United States v. Hankey*, 203 F.3d 1160, 1172-73 & n.11 (9th Cir. 2000).

Fourth, the district court did not abuse its discretion by refusing to admit a video recording of a news interview with Sheriff Baca. The video was irrelevant[8] because none of the Joint Appellants had seen it, and their claim that certain witnesses relied on it is unsupported by the record. Moreover, the Joint Appellants

[8] *See* Fed. R. Evid. 401, 402.

were not prevented from properly presenting other evidence of Sheriff Baca's attitude and orders they may have received.

Fifth, because the Joint Appellants never sought to admit two exhibits[9] into evidence, the district court did not abuse its discretion by failing to admit them. No definitive ruling generally precluded evidence of Sheriff Baca's demeanor or attitude toward the FBI (in fact, other evidence on that topic was admitted) or rendered superfluous a request to admit the exhibits. *Cf. Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005).

Sixth, the district court did not abuse its discretion by not allowing the Joint Appellants to cross examine Deputy Pearson about conversations he had after he learned of the writ for Brown on the ground that it was beyond the scope of the prosecution's direct examination.[10] Moreover, any error was harmless[11] because Pearson admitted that his memory was impaired, and undermining the reliability of his recollection was the purpose of the Joint Appellants' questions. Likewise, there was no Confrontation Clause violation because the Joint Appellants were allowed to explore the reliability of Pearson's memory and the question about his subsequent conversations was only marginally

---

[9] A letter from Sheriff Baca to United States Attorney Andre Birotte and a memorandum summarizing an FBI interview with LASD Captain William Carey.

[10] *See* Fed. R. Evid. 611(b).

[11] *See Moran*, 493 F.3d at 1014.

relevant. *See Fowler v. Sacramento Cty. Sheriff's Dep't*, 421 F.3d 1027, 1036 (9th Cir. 2005); *see also* U.S. Const. amend. VI.

Seventh, the district court did not abuse its discretion by refusing to allow the Joint Appellants to renew their questioning of Deputy Martinez after they already had an opportunity for re-cross examination. *See* Fed. R. Evid. 611(a); *see also United States v. Miller*, 688 F.2d 652, 660-61 (9th Cir. 1982).

Eighth, assuming, without deciding, that the Joint Appellants should have been permitted to ask AUSA Middleton leading questions as an adverse witness,[12] any error was harmless.[13] The Joint Appellants do not claim that they were prejudiced by the district court's denial of Leavins's counsel's first request to lead Middleton on a question regarding Sheriff Baca. Moreover, after Leavins's counsel's later renewed request was denied, he did not attempt to ask Middleton more questions. Therefore, there was no prejudice from the denial of the renewed request to lead Middleton. *See id.*

Ninth, the Joint Appellants have failed to preserve the rest of their evidentiary challenges for review by failing to explain how they constituted abuses of discretion or materially affected the verdicts. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *see also*

---

[12] *See* Fed. R. Evid. 611(c)(2); *United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981).

[13] *See Moran*, 493 F.3d at 1014.

United States v. Williamson, 439 F.3d 1125, 1138 (9th Cir. 2006).

Tenth, we reject the Joint Appellants' argument that the district court's errors cumulatively require reversal. Most of its rulings were not erroneous, and as to the particular rulings that we have assumed were erroneous, but nevertheless harmless, we likewise conclude that their cumulative effect was harmless and not a constitutional violation. *See United States v. Fernandez*, 388 F.3d 1199, 1256-57 (9th Cir. 2004), *modified*, 425 F.3d 1248, 1249 (9th Cir. 2005); *cf. United States v. Stever*, 603 F.3d 747, 757 (9th Cir. 2010).

(2) Challenges by Craig, Long, and Leavins

We likewise reject Craig, Long, and Leavins's argument that the district court abused its discretion by excluding evidence of ruses used by the FBI and LASD.[14]

First, the district court properly prevented the Joint Appellants from questioning FBI agents about their use of ruses on the grounds that it was irrelevant, would waste time, and would confuse the jury. *See* Fed. R. Evid. 401, 403. To the extent that evidence of FBI practices was marginally relevant to what the Joint Appellants could do or did, it was still properly excluded because that slight relevance was outweighed

[14] Because we determine that the district court did not err in excluding these categories of evidence, we also reject Leavins's claim that those purported errors support a finding of cumulative error. *See Fernandez*, 388 F.3d at 1256.

by its tendency to misdirect the jury toward the logical fallacy that if the FBI could sometimes use ruses, it was legitimate for LASD to do so here.

Second, the district court did not exclude all evidence regarding LASD's use of ruses; in fact, Craig testified about that topic. We see no abuse of discretion, under the circumstances, in the district court's sustaining objections to six individual questions about that topic asked of four witnesses. Even if there were error, because Craig and Long failed to explain the nature of the alleged errors in their opening brief, we would decline to reverse. *See Greenwood*, 28 F.3d at 977.

(3) Limits on Craig's testimony

Craig claims that the district court violated his Sixth Amendment right to testify on his own behalf regarding his intent and the danger of cell phones in custodial settings,[15] but the court did not impose a per se bar to the admission of either type of evidence.[16] With respect to intent, Craig was allowed to testify, although the district court appropriately refused to permit his attorney to use improper questions. *See Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973); *United States v. Gallagher*, 99 F.3d 329, 332 (9th Cir. 1996). The rulings were not

---

[15] *See Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 2709, 97 L. Ed. 2d 37 (1987).

[16] *Cf. United States v. Pineda-Doval*, 614 F.3d 1019, 1032-33 (9th Cir. 2010).

erroneous and did not constitute constitutional error, plain or otherwise. *See Stever*, 603 F.3d at 755-56 & n.3; *see also* Fed. R. Crim P. 52(b); *Henderson v. United States*, ___ U.S. ___, ___, 133 S. Ct. 1121, 1126-27, 185 L. Ed. 2d 85 (2013). With respect to the dangers of cell phones in the jail, the record does not support Craig's claim that he was precluded from offering that kind of evidence, through his testimony or otherwise. And even if the court's ruling prevented him from testifying on that topic, it would not be a constitutional violation. *See Stever*, 603 F.3d at 756. The excluded evidence was not extensive or broad, and was not the only evidence presented on the topic. *Cf. id.*; *Greene v. Lambert*, 288 F.3d 1081, 1091-92 (9th Cir. 2002).

(4) Challenges by Sexton

First, we reject Sexton's claim that the district court erred by failing to suppress all of his grand jury testimony because the United States Attorney's Office purportedly violated its internal procedures by failing to warn him that he was a target of the investigation before he testified. As a factual matter, the district court's finding that the Government did not consider him to be a target at the time of his grand jury testimony is supported by the record. *See United States v. Todhunter*, 297 F.3d 886, 889 (9th Cir. 2002). Even assuming that he was a target at that time, there was no due process violation because Sexton was advised of his Fifth Amendment rights. *See United States v. Goodwin*, 57 F.3d 815, 818-19 (9th Cir. 1995); *see also United States v. Washington*, 431 U.S. 181, 189, 97 S. Ct. 1814,

1820, 52 L. Ed. 2d 238 (1977). We decline Sexton's request to exercise any supervisory authority we have to impose sanctions on the Government by suppressing his testimony. *See United States v. Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980); *see also United States v. Williams*, 504 U.S. 36, 46, 112 S. Ct. 1735, 1741, 118 L. Ed. 2d 352 (1992); *Goodwin*, 57 F.3d at 818.

Second, the district court did not abuse its discretion by denying Sexton's request to require the Government to introduce portions of his grand jury testimony in addition to those excerpts that the Government offered. *See* Fed. R. Evid. 106. Sexton never identified how the excerpts the Government sought to introduce were "misleadingly-tailored snippet[s]" taken out of context;[15] instead he claimed that the Government excerpts were misleading as a whole. Apparently that was because the Government excluded several somewhat-exculpatory statements. But those statements were inadmissible hearsay[16] and Rule 106 did not require their admission.[17]

---

[15] *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *see also United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014).

[16] *See United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000); *cf. United States v. Swacker*, 628 F.2d 1250, 1253 & n.3 (9th Cir. 1980). We reject Sexton's conclusory statement in his reply brief that the statements were not hearsay pursuant to Federal Rule of Evidence 803(3). *Cf. United States v. Faust*, 850 F.2d 575, 585-86 (9th Cir. 1988).

[17] *Collicott*, 92 F.3d at 983

Third, the district court did not abuse its discretion by prohibiting Sexton from eliciting testimony from FBI Agent Narro that he understood that the writ for Brown's testimony had been withdrawn.[18] Contrary to Sexton's claims, the evidence was not that the writ had, in fact, been withdrawn; instead, it was evidence that Narro had that understanding. Narro's impressions were irrelevant in the absence of evidence that they had been communicated to Sexton or others at LASD. And even assuming that Narro's understanding was some evidence that the writ had actually been withdrawn, that did not tend to show that the grand jury had no further interest in Brown. Moreover, the fact remains that Sexton's obstructive actions commenced before the so-called withdrawal. It was irrelevant whether the writ was withdrawn after Sexton had committed those acts. *See United States v. Rasheed*, 663 F.2d 843, 853 (9th Cir. 1981); *see also United States v. Aguilar*, 515 U.S. 593, 602, 115 S. Ct. 2357, 2363, 132 L. Ed. 2d 520 (1995); *United States v. Ladum*, 141 F.3d 1328, 1339 (9th Cir. 1998).

B. Insufficiency of the evidence

(1) False statement convictions

Craig and Long claim that there was insufficient evidence to show that their respective statements to Agents Marx and Narro were material to the FBI as

[18] In fact, AUSA Middleton had decided not to pursue execution of the writ at that time, but never sought to withdraw it or decided that LASD need not comply with it.

required for their false statement convictions. *See* 18 U.S.C. § 1001(a)(2).

Reviewing the evidence in the light most favorable to the verdict,[19] a rational juror could find that the statements could have affected the FBI's investigation for the grand jury[20] by intimidating Agent Marx and her colleagues. And although it was not required for the Government to prove this count, there was evidence that the statements had that intended effect because the FBI postponed returning to the jail to interview inmates and gather information as a result. The Government was not required to show that the statements caused the entire investigation for the grand jury to shut down. *See King*, 735 F.3d at 1108.

(2) Long's obstruction of justice conviction

Likewise, we reject Long's claim that the evidence was insufficient to prove that her actions were material to the grand jury investigation, as required for her obstruction of justice conviction. *See* 18 U.S.C. § 1503; *United States v. Thomas*, 612 F.3d 1107, 1129 (9th Cir. 2010). There was sufficient evidence that Long endeavored to obstruct justice through her efforts directed at the FBI agents and through her efforts to convince witnesses not to cooperate with the federal investigation.

---

[19] *See United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc).

[20] *See United States v. Stewart*, 420 F.3d 1007, 1019 (9th Cir. 2005); *United States v. King*, 735 F.3d 1098, 1107-08 (9th Cir. 2013).

Those efforts would "have the natural and probable effect of interfering" with the grand jury investigation. *Aguilar*, 515 U.S. at 599, 115 S. Ct. at 2362 (internal quotation marks omitted) (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)); *see also Thomas*, 612 F.3d at 1129. We therefore affirm her obstruction of justice conviction.

Long's argument is largely premised on her assertion that there was no evidence that she knew of the writ for Brown, or that she knew that Deputies Michel or Courson were potential grand jury witnesses. But there was sufficient circumstantial evidence from which the jury could rationally infer Long's knowledge. *See United States v. Bennett*, 621 F.3d 1131, 1139 (9th Cir. 2010); *see also Nevils*, 598 F.3d at 1161.

In light of those justifiable inferences, there was ample evidence from which the jury could also rationally infer that Long's actions would have the natural and probable effect of interfering with the grand jury investigation. In fact, the actions by her and others appear to have been successful because Brown ultimately assured Long and others that he would not testify for the FBI. Similarly, the jury could have inferred that Long's presence at, and statements she made during, the interviews of Deputies Courson and Michel were designed to pressure them not to cooperate with the federal investigation. We therefore reject Long's claim that there was insufficient evidence that her

endeavors to obstruct justice were material to the grand jury.[21]

(3) Long's conspiracy conviction

Long argues that the evidence was insufficient to sustain her conviction for conspiracy to obstruct justice. We disagree. *See United States v. Hart*, 963 F.2d 1278, 1282 (9th Cir. 1992); *see also United States v. Mincoff*, 574 F.3d 1186, 1198 (9th Cir. 2009); *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008).

There was a great deal of evidence that Long knowingly participated[22] in the conspiracy and acted to further its objectives.[23] For example, she went to the jail where Brown was hidden in order to interfere with the grand jury investigation by pressuring him. She was not merely physically present while her

---

[21] Long has waived the argument that there was insufficient evidence the FBI was acting as an "arm of the grand jury" by raising it too late. *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006). In any event, the evidence here was sufficient to establish that the FBI was operating on behalf of the grand jury. *See Hopper*, 177 F.3d at 830; *cf. Aguilar*, 515 U.S. at 600, 115 S. Ct. at 2362.

[22] *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1228 (9th Cir. 2007); *see also United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001); *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000).

[23] *United States v. Esparza*, 876 F.2d 1390, 1392 (9th Cir. 1989).

co-conspirators committed crimes,[24] but actively participated to further the conspiracy's obstructive purposes.[25] Even if she did not know precisely what each of her co-conspirators was doing, that does not undermine her connection to the conspiracy. *See Herrera-Gonzalez*, 263 F.3d at 1095.

C. Fair notice

The Joint Appellants and Sexton all claim that 18 U.S.C. § 1503(a) did not provide fair notice because it is vague, was novelly interpreted, and should have been interpreted in accordance with the rule of lenity. *See United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432 (1997); *Webster v. Woodford*, 369 F.3d 1062, 1069 (9th Cir. 2004); *see also Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010). Appellants' arguments are largely premised on their assertion that they were prosecuted and convicted for innocuous conduct – investigating the FBI or following orders. But they were prosecuted and convicted for obstructing a grand jury investigation; the fact that the jury did not believe their mens rea defenses "does not make the statute . . . constitutionally infirm." *United States v. Lee*, 183 F.3d 1029, 1033 (9th Cir. 1999).

---

[24] *Cf. Herrera-Gonzalez*, 263 F.3d at 1095.

[25] *Cf. Esparza*, 876 F.2d at 1392-93.

Cases addressing § 1503's potential vagueness in other factual circumstances[26] do not show that it is vague as applied to their conduct.[27] Nor was it novel to apply the obstruction statute to what they did: that is, to conduct intended to obstruct justice. We also reject their request to transplant the concept of qualified immunity from the civil to the criminal sphere. *See Lanier*, 520 U.S. at 270, 117 S. Ct. at 1227; *see also United States v. Gillock*, 445 U.S. 360, 372-73, 100 S. Ct. 1185, 1193, 63 L. Ed. 2d 454 (1980).[28] The obstruction statute provided the Joint Appellants and Sexton with ample fair notice that their obstructive conduct could give rise to criminal penalties.

D. Dismissal of a juror

We reject the Joint Appellants' argument that the district court violated their Sixth Amendment rights by dismissing Juror Five after deliberations had begun. *See United States v. Christensen*, Nos. 08-50531 et al., 2015 WL 11120665, at *31-33 (9th Cir. July 8,

[26] *See, e.g.*, *United States v. Bonds*, 784 F.3d 582, 584 (9th Cir. 2015) (en banc) (Kozinski, J., concurring).

[27] *See United States v. Jae Gab Kim*, 449 F.3d 933, 942 (9th Cir. 2006)

[28] Moreover, it was certainly clearly established that one could not intentionally obstruct justice. *See Aguilar*, 515 U.S. at 598-99, 115 S. Ct. at 2361-62.

2016). The district court did not abuse its discretion[29] by dismissing the juror for good cause.[30]

The record supports the district court's decision to dismiss Juror Five, who revealed, over the course of three colloquies with the district court, that her emotional state[31] prevented her from being able to deliberate,[32] and the district court noted that her demeanor underscored the problems that are apparent in the written record. The district court therefore was not required to credit her ultimate (and somewhat grudging) statement that she could deliberate. *See Christensen*, 2015 WL 11120665, at *36-37; *see also Beard*, 161 F.3d at 1194. The Joint Appellants' speculation that the juror may have asked to be excused because of conflicts with other jurors is belied by the record; indeed, the juror flatly denied that her concerns had anything to do with the other jurors, and she never referred to her views of the case or the guilt or innocence of the Joint Appellants. *Cf. Symington*, 195 F.3d at 1084, 1088. The district court did not abuse its discretion in dismissing the juror on account of her inability to deliberate. *See Christensen*, 2015 WL 11120665, at *31.

E. Sentencing

The district court increased Craig's base offense level by three points because he was a manager or

[29] *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999).

[30] *Christensen*, 2015 WL 11120665, at *31; *see also* Fed. R. Crim. P. 23(b)(3).

[31] *United States v. Beard*, 161 F.3d 1190, 1193-94 (9th Cir. 1998)

[32] *Symington*, 195 F.3d at 1085

supervisor and increased Leavins's base offense level by four points because he was an organizer or leader. *See* USSG § 3B1.1(a)-(b) (2013);[33] *see also United States v. Whitney*, 673 F.3d 965, 975 (9th Cir. 2012). Craig and Leavins each argue that the district court procedurally erred by miscalculating their Sentencing Guidelines ranges. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc); *see also Molina-Martinez v. United States*, ___ U.S. ___, ___, 136 S. Ct. 1338, 1345-46, 194 L. Ed. 2d 444 (2016). The district court did not commit clear error when it applied the enhancements to Craig and Leavins. *See United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008); *United States v. Jordan*, 291 F.3d 1091, 1097 (9th Cir. 2002); *see also United States v. Rosas*, 615 F.3d 1058, 1066 (9th Cir. 2010).

There was sufficient evidence that Craig was a manager of criminal activity, not merely innocuous activity. *See* USSG § 3B1.1(b); *cf. Whitney*, 673 F.3d at 975. The enhancement was not merely based on Craig's role as an LASD supervisor, but on his role as a supervisor in the group committing the charged offenses. *See* USSG § 3B1.1, comment. (n.2). He directed Long and other LASD personnel in interviewing Brown and other witnesses, he ordered the surveillance of FBI agents, and he advised Long as she lied to Agent Narro. That Craig has a contrary view of the evidence does not warrant reversal of "the district court's . . . reasonable interpretation of the facts." *See United*

---

[33] All references to the Sentencing Guidelines are to the Nov. 1, 2013, version.

States v. Awad, 371 F.3d 583, 592 (9th Cir. 2004). Moreover, the fact that Craig's behavior may not have qualified for the four-point enhancement does nothing to undermine the application of the three-point enhancement. *See* USSG § 3B1.1, comment. (n.4).

We reject Leavins's argument about his sentence for similar reasons. There was ample evidence showing Leavins's decision-making authority in the criminal conspiracy and justifying the application of the four-point enhancement. His own grand jury testimony indicated that he made the decision to move Brown to another jail, and the district court was not required to credit his exculpatory explanation for why he did so. *See Awad*, 371 F.3d at 592. Leavins directed the actions of other conspirators, such as by telling Craig and Long to confront Agent Marx. *Cf. Whitney*, 673 F.3d at 975. Also, while not controlling, other conspirators did refer to him as their superior. That Leavins may also have received orders from his own superiors does not undermine his leadership role for purposes of the enhancement. *See United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993); *see also* USSG §3B1.1, comment. (n.4). The district court did not clearly err by applying the four-point enhancement to Leavins's sentence.[34]

AFFIRMED.

---

[34] Because we affirm the convictions and sentences, we need not and do not consider the Joint Appellants' argument that these cases should be reassigned to a different district court judge on remand.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GERARD SMITH, AKA Gerard Robert Smith, Defendant-Appellant.	No. 14-50440 D.C. No. 2:13-cr-00819-PA-3 ORDER DENYING PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC (Filed Oct. 31, 2016)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARICELA LONG, Defendant-Appellant.	No. 14-50441 D.C. No. 2:13-cr-00819-PA-7
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY THOMPSON, Defendant-Appellant.	No. 14-50442 D.C. No. 2:13-cr-00819-PA-1

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICKEY MANZO, AKA Mickey Shane Manzo, Defendant-Appellant.	No. 14-50446 D.C. No. 2:13-cr-00819-PA-4
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT CRAIG, AKA Scott Alan Craig, Defendant-Appellant.	No. 14-50449 D.C. No. 2:13-cr-00819-PA-6
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEPHEN LEAVINS, Defendant-Appellant.	No. 14-50455 D.C. No. 2:13-cr-00819-PA-2

Before: FERNANDEZ, CLIFTON, and FRIEDLAND, Circuit Judges.

Appellants Gerard Smith, Maricela Long, Gregory Thompson, Mickey Manzo, and Scott Craig filed a

Petition for Rehearing and Rehearing En Banc. Appellant Stephen Leavins filed a Petition for Rehearing and En Banc Review and Joinder in Petition for Rehearing and En Banc Review.

The panel has unanimously voted to deny Appellants' petitions for rehearing. The petitions for rehearing en banc were circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petitions for rehearing and the petitions for rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PERCY ANDERSON,
JUDGE PRESIDING

UNITED STATES OF AMERICA, **Plaintiff,** **Vs.** **GREGORY THOMPSON, STEPHEN LEAVINS, GERARD SMITH, MICKEY MANZO, SCOTT CRAIG, and MARICELLA LONG,** **Defendants.**	**No. CR 13-819 PA** **PAGES 4022-4092**

REPORTER'S TRANSCRIPT OF
JURY TRIAL DAY XX

LOS ANGELES, CALIFORNIA

TUESDAY, JUNE 24, 2014; 7:43 A.M.

LEANDRA AMBER, CSR 12070, RPR
OFFICIAL U.S. DISTRICT COURT REPORTER
312 NORTH SPRING STREET, # 408
LOS ANGELES, CALIFORNIA 90012
www.leandraamber.com
(213) 894-6603

* * *

[4064] THE CLERK: In the presence of the flag, an emblem of our Constitution and remembering the principles for which it stands, this United States District Court is now in session.

The Honorable Percy Anderson presiding.

Please be seated and come to order.

THE COURT: Good morning, ladies and gentlemen.

THE JURY: Good morning.

THE COURT: Members of the jury, now that you've heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available to you in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and in that process to decide the facts.

It is also your duty to apply the law as I give it to you to the facts as you find them whether you agree with the law or not.

You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy.

You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others. They are all important.

[4065] Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return. That is a matter entirely up to you.

The indictment is not evidence. Each defendant has pleaded not guilty to the charges. Each defendant is presumed to be innocent unless and until you find that at the end of the trial, after deliberations, that the Government proved that the defendant – proved that defendant guilty beyond a reasonable doubt.

In addition no defendant has to testify or to present any evidence or prove he or she is not guilty. The Government has the burden of proving every element of the charges beyond a reasonable doubt.

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that a particular defendant did not testify.

You should treat the testimony of a defendant who testified just as you would the testimony of any other witness.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that a defendant is guilty. It is not required that the Government prove guilt beyond all possible doubt. A reasonable doubt is a doubt based upon [4066] reason and common sense. It is not

based purely on speculation. It may arise from a careful and impartial consideration of all the evidence or from lack of evidence. If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find the defendant not guilty.

On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find the defendant guilty.

You are here to determine whether the Government has proven the guilt of each defendant of the charges against him in an indictment beyond a reasonable doubt. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons.

If the Government has proven each element of a crime charged against the defendant beyond a reasonable doubt, you should find that defendant guilty even though you may believe that other persons not on trial are also guilty.

On the other hand if the Government has not proven each element of a crime charged against the defendant beyond a reasonable doubt, you should find that defendant not guilty even if you believe that other persons not on trial are guilty.

[4067] The evidence you are to consider in deciding what the facts are consist of the sworn testimony of

any witness, the exhibit received into evidence, and any facts to which the parties have agreed.

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are.

Questions, statements, objections, and arguments by the lawyers are not evidence.

The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence.

If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

Any testimony that I've excluded stricken or instructed you to disregard is not evidence.

In addition some evidence was received only for a limited purpose. When I instructed you to consider certain evidence in a limited way, you must do so.

Anything you may have seen or heard when court was not in session is not evidence. You are to decide the case [4068] solely on the evidence received at the trial.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact such as testimony by

a witness about what that witness personally saw or heard or did.

Circumstantial evidence is indirect evidence. That is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence.

It is for you to decide how much weight to give any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness said or part of it or none of it.

In considering the testimony of any witness, you may take into account the witness's opportunity and ability to see or hear or know the things testified to.

The witness's memory. The witness's manner while testifying. The witness's interest in the outcome of the case, if any, the witness's bias or prejudice, if any, whether other evidence contradicted the witness's testimony, [4069] the reasonableness of the witness's testimony in light of all the evidence, and any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who

testify. What is important is how believable the witnesses were and how much weight you think their testimony deserves.

You are here only to determine whether each defendant is guilty or not guilty of the charges in the indictment. The defendants are not on trial for any conduct or offense not charged in the indictment.

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All the instructions apply to each defendant and to each count unless a specific instructions statements that it only applies to a specific defendant or count.

You have heard evidence that witnesses Gilbert Michel, Paul Tanaka, Mark Lillenfeld and Tom Carey previously provided statements that may be inconsistent with their testimony here in court.

You may consider this evidence in deciding whether [4070] or not to believe each witness and how much weight to give the testimony of the witness.

Additionally if the earlier statement was made under oath, such as before a grand jury, then you may consider the earlier statement as evidence of the truth of whatever the witness said in the earlier statement.

You also heard evidence that defendant Stephen Leavins and Scott Craig made statements that may be inconsistent with their testimony here in court. You may consider these statements whether or not they were previously made under oath in deciding whether or not to believe each defendants' testimony and how much weight to give to the testimony of each defendant.

You may consider these statements as evidence of the truth of whatever the defendant said in the earlier statements.

You heard excerpts of testimony that was given before a grand jury. The grand jury testimony is only admissible as to the defendant appearing before the grand jury. You are not to consider the grand jury testimony as to any other defendant.

First, as I previously – or first as I've advised you previously, attorneys' statements and questions are not evidence. And you must not consider them as evidence in deciding the facts of this case. The same holds true for the [4071] attorneys' statements and questions of witnesses in the grand jury.

Second, you must not consider statements the attorneys make about the law in questioning the witnesses to be accurate statement of the law. Only I will instruct you on the law.

Third, any statements about the law that the defendant makes in the course of his or her grand jury

testimony must not be considered as accurate statements of the law. You may – you may only consider the witness's statement about the law for the limited purpose of determining whether the defendant had the intent to commit the charged crimes.

You have heard testimony from Gilbert Michel, a witness who received a promise of favorable treatment at sentencing from the Government in connection with this case. For this reason, in evaluating the testimony of Gilbert Michel, you should consider the extent to which or whether his testimony may have been influenced by this factor. In addition you should examine the testimony of Gilbert Michel with greater caution than that of other witnesses.

You've heard evidence about a federal informant who was involved in the Government's investigation in this case. You have also heard that a federal – that the federal government used an undercover FBI Agent in its investigation. [4072] Law enforcement officials may use informants and undercover agents in order to investigate criminal activities.

Further as a matter of law, when an undercover investigation involves the use of informants an undercover agents neither the law enforcement officer conducting the operation nor the informants assisting in the investigation become co-conspirators with the target of the undercover activity.

As applied to this case, neither Special Agent Leah Marx, the undercover agent CJ nor Anthony Brown became co-conspirators with Gilbert Michel by virtue of

conducting an undercover operation to see if Gilbert Michel would accept a bribe in exchange for smuggling in a cellular phone inside of Men's Central Jail.

A local officer has the authority to investigate potential violations of state law. This includes the authority to investigate potential violations of state law by federal agents.

A local officer may not use this authority to investigate for the purpose of obstructing justice. A local officer has the authority to make arrests for violations of state law where an officer has probable cause to believe that a crime has been committed and that the suspect committed it.

A witness's testimony or statement about the law or probable cause must not be considered as accurate statements [4073] of the law.

You've heard testimony about whether or not federal agents violated California Penal Code sections involving the possession of narcotics or a cellular phone in a custody facility. These California Penal Code sections require the possession or introduction of contraband to be unauthorized in order for crimes to occur.

If Anthony Brown possessed any contraband including a cellular phone at the direction of the FBI, such possession or introduction of contraband would be authorized and no violation of these California Penal codes would have occurred.

You've heard testimony from persons who because of education or experience were permitted to state

opinions and the reasons for their opinions. Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the reasons given for the opinion, and all other evidence in the case.

During the trial certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted into evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts.

[4074] If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Certain charts and summaries have been admitted into evidence. Charts and summaries are only as good as the underlying supporting material.

You should therefore give them only such weight as you think the underlying material deserves.

Each defendant is charged in Count One of the indictment with conspiring to obstruct justice. In order for a defendant to be found guilty of that charge, the Government must prove each of the elements beyond a reasonable doubt with respect to that particular defendant.

First, beginning on or about August 18, 2011, and ending on or about October 3rd, 2011, there was an

agreement between two or more persons to commit the crime of obstruction of justice.

Second, the defendant became a men of the conspiracy knowing its object and intending to help accomplish it.

And third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy with all of you agreeing on a particular overt act that you find was committed.

[4075] A conspiracy is a kind of criminal partnership an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful. It does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways or perhaps helped one another.

You must find that there was a plan to commit the crime of obstruction of justice.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. Even though the person does not have full knowledge of all the details of the conspiracy.

Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy but happens to act in a way that – which furthers the purpose of the conspiracy, does not thereby become a conspirator.

Similarly a person does not become a conspirator merely by associating with one or more persons who are [4076] conspirators nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful.

A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy.

The Government is not required to prove that the defendant personally one of the overt acts.

The Government does not need to prove that actual obstruction of a – the pending grand jury investigation occurred so long as you find that the defendant acted with the purpose of obstructing the pending grand jury investigation and that the defendants were the natural – had – I'll start over.

And that the defendants' actions had the natural and probable effect of interfering with the pending grand jury investigation and the Government proves the elements of the offense beyond a reasonable doubt.

Defendants Thompson Smith and Manzo are charged in Count Two. Defendant Leavins is charged

in Count Three. And Defendants Craig and Long are charged in Count Four of the indictment with obstruction of justice in violation of Section 1503 of Title 18 of the United States Code.

In order for each defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt.

First, the defendant influenced obstructed or [4077] impeded or tried to influence, obstruct, or impede a federal grand jury investigation;

And second, the defendant acted corruptly with knowledge of a pending federal grand jury investigation and with the intent to obstruct the federal grand jury investigation.

As used in Section 1503 "corruptly" means that the act must be done with the purpose of obstructing justice. The government does not need to prove that defendants' conduct had the actual effect of obstruction. However, the Government must prove that the defendants' actions would have had the natural and probable effect of interfering with the grand jury investigation.

Defendant Craig is charged in Count Five and Defendant Long is charged in Count Six of the indictment with knowingly and willfully making a false statement in a matter within the jurisdiction of the Federal Bureau of Investigation in violation of Section 1001 of Title 18 of the United States Code.

In order for the defendant to be guilty – to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First the defendant made a false statement in a matter within the jurisdiction of the Federal Bureau of Investigation.

[4078] Second, the defendant knew the statement was false. Third, the defendant acted willfully.

And fourth, the statement was material to the activities or decisions of the Federal Bureau of Investigation. That is, it had a natural tendency to influence or was capable of influencing the agency's decisions or activities.

The word "willfully" means that the defendant made the statement voluntarily and purposely with the purpose – I'm sorry. Let me start over.

The word "willfully" means that the defendant made the statement voluntarily and purposely and with knowledge that the defendants' making of the statement was unlawful. That is, the defendant must have made the statement with a purpose to disobey or disregard the law.

The Government need not prove that the defendant was aware of the specific provision of the law that the defendant is charged with violating.

One element the Government must prove beyond a reasonable doubt with respect to the obstruction of

justice charges is that the defendant had the unlawful intent to obstruct a grand jury investigation.

Evidence that a defendant relied in good faith on the orders the defendant received from the defendants' superior officers and that the defendant reasonably and [4079] objectively believed those orders to be lawful is inconsistent with an unlawful intent and is evidence you may consider in determining if the Government has proven beyond a reasonable doubt that a defendant had the required unlawful intent.

If you find, however, that a defendant carried out those orders with an unlawful intent to obstruct a grand jury investigation or that a defendant did not reasonably and objectively believe the superiors' orders to be lawful, the defendants' conduct is not excused by a claim or evidence that the defendant might have been following orders of his or her superiors.

The Government need not prove that the defendants' sole or even primary purpose was to obstruct justice so long as the Government proves beyond a reasonable doubt that one of the defendants' purposes was to obstruct justice. The defendants' purpose of obstructing justice must be more than merely incidental.

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself but [4080] you should do so only after you've considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should.

But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision.

Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations, do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anyone to do with it.

This includes discussing the case in person, in writing, by phone or electronic means via e-mail, text messages or any internet chat room, blog, web site social media or other feature.

This applies to communicating with your family [4081] members, your employer, the media, or press, and the people involved from the trial.

If you're asked or approached in any way about your jury service or anything about the case, you must respond that you've been ordered not to discuss the matter and to report the contact to the Court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it.

Do not do any research such as consulting dictionaries, searching the internet, or using other reference materials, and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address.

A juror who violates these restrictions jeopardizes the fairness of these proceedings. If any juror is exposed to any outside information, please notify the Court immediately.

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your feel low jurors.

[4082] The punishment provided by law for these crimes is for the Court to decide. You may not consider

punishment in deciding whether the Government has proved its case against the defendants beyond a reasonable doubt.

A verdict form has been prepared for you. After you've reached unanimous agreement on a verdict, the foreperson should complete the verdict form according to your deliberations, sign and date it and advise the Court security officer that you are ready to return to the courtroom.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Court security officer signed by anyone or more of you.

No member of the jury should ever attempt to communicate with me except by a signed writing. And I will respond to the jury concerning the case only in writing or here in open court.

If you send out a question, I will consult with the lawyers before answering it, which may take some is time.

You may continue your deliberations while waiting for the answer to any question.

Remember that you are not to tell anyone, including me, how the jury stands numerically or otherwise on any question submitted to you. Including the question of the guilt of the defendant until after you've reached a unanimous verdict or had been discharged.