No. 18-30228

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WINSTON SHROUT,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Portland Division
No. 3:15-cr-00438-JO
The Honorable Robert E. Jones

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the district court in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231. On October 22, 2018, the district court entered its original judgment imposing a term of 120 months' imprisonment and five years' supervised release. CR 161.[1] Mr. Shrout filed his timely Notice of Appeal on October 26, 2018, pursuant to Fed. R. App. P. 4(b)(1)(A). ER 183. This Court's jurisdiction rests on 18 U.S.C. § 3742(a) and 28 U.S.C. §§ 1291 and 1294(1).

STATEMENT OF ISSUES

1. Whether the district court erred in denying Mr. Shrout's motion to dismiss the fictitious obligation charges for vindictive prosecution without affording him discovery or conducting an evidentiary hearing.

2. Whether the district court's failure to satisfy the requirements for a valid *Faretta* waiver constituted *per se* prejudicial error and requires reversal.

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[1] Page references preceded by "CR" refer to the numbered entries in the Record of the Clerk of the District Court. Those preceded by "ER" refer to the Appellant's Excerpts of Record filed with this brief. Page references preceded by "PSR" refers to sentencing materials filed under seal pursuant to Circuit Rule 27-13(d), including the Presentence Investigation Report. Those preceded by "SER" refer to the Appellant's Sealed Excerpts of Record.

3. Whether the district court's application of the wrong sentencing guideline provision requires remand for resentencing.

4. Whether the district court's failure to require the government to prove the purported amount of "intended loss" by clear and convincing evidence constituted plain error and requires remand for resentencing.

5. Whether the district court's failure to address Mr. Shrout's objection to using the purported face value of the fictitious obligations as "intended loss" requires remand for resentencing.

6. Whether the district court's failure to address Mr. Shrout's objection to the application of the "sophisticated means" enhancement requires remand for resentencing.

7. Whether the district court's failure to conduct a competency hearing before trial constituted plain error and requires reversal.

8. Whether the district court erred in finding Mr. Shrout competent to proceed to sentencing.

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal from both the convictions and 10-year sentence imposed on Mr. Shrout for failing to file income tax returns and producing,

presenting, and shipping fictitious financial instruments. The judgment was entered on October 22, 2018, by the Honorable Robert E. Jones, Senior United States District Court Judge for the District of Oregon. CR 161; ER 1.

Course of Proceedings

On December 8, 2015, the government filed an Indictment charging Mr. Shrout with six misdemeanor counts of failure to file tax returns. CR 1. He made his first appearance on January 7, 2016, pursuant to a summons. CR 8.

On March 15, 2016, the government filed a Superseding Indictment. ER 76. In addition to the six misdemeanors alleged in the original Indictment, the Superseding Indictment charged 13 felony counts of fictitious obligations. *Id*. Mr. Shrout appeared for arraignment on the Superseding Indictment on March 31, 2016, pursuant to a summons. CR 26.

A four-day jury trial commenced on April 18, 2017. CR 102-105. Mr. Shrout was found guilty on each of the 19 counts set forth in the Superseding Indictment. CR 105.

On September 27, 2018, the district court held a hearing to determine whether Mr. Shrout was competent to proceed to sentencing. SER 275. The court found him competent and scheduled a sentencing hearing. *Id*.

On October 22, 2018, the district court sentenced Mr. Shrout to 10 years' imprisonment and five years' supervised release. CR 161; ER 1; ER 181. Mr. Shrout filed a timely notice of appeal on October 26, 2018. ER 183.

Custody Status

On March 1, 2019, this Court denied Mr. Shrout's motion for release pending appeal. The district court's previous order directed him to "surrender to FCI Sheridan on the first Monday following the denial." CR 183. The Federal Bureau of Prisons' website currently indicates that Mr. Shrout is "not in BOP custody."

SUMMARY OF ARGUMENT

Before trial, Mr. Shrout moved to dismiss the 13 fictitious obligation counts alleged in the Superseding Indictment for vindictive prosecution. He presented evidence demonstrating a reasonable likelihood that the prosecutor only changed his decision not to pursue the felony charges *after* Mr. Shrout exercised his constitutional right to waive counsel and to defend himself, twice attempted to plead guilty to the original misdemeanor Indictment, and exercised his procedural right to file *pro se* pleadings. Mr. Shrout satisfied his burden of making an initial showing of an appearance of vindictiveness, but the district court failed to shift the burden to the government to prove that the increase in the severity of the charges did not result

from any vindictive motive. The court erred in denying the motion without affording him discovery or conducting an evidentiary hearing.

When Mr. Shrout appeared for arraignment, he told the district court he was "confused by the nature of this situation." He unequivocally stated that he did not understand the charges or the potential penalties. The prosecutor expressed his "concern as that does not qualify as a knowing and intelligent response to those two questions." Despite telling Mr. Shrout he was "not competent to represent yourself," the district court accepted the purported *Faretta* waiver. Under these circumstances, the government cannot sustain its burden of establishing a valid waiver.

A bona fide doubt regarding Mr. Shrout's mental competence to proceed existed before trial, but the district court failed to conduct a competency hearing. Because a reasonable judge would have had a "genuine doubt" about his competency to stand trial, the court's failure to hold a hearing constituted plain error.

Although the district court later granted a motion for hearing to determine competency to proceed to sentencing, its finding that Mr. Shrout did not suffer from a mental disease or defect (*i.e.*, delusional disorder, grandiose type) was contradicted by two psychologists. Because the court's related finding that he was competent to proceed was contradicted by a third psychologist, the finding was erroneous.

Before sentencing, Mr. Shrout formally objected to several issues affecting the calculation of the advisory sentencing range, including which guideline provision applied, whether the government was required to prove by clear and convincing evidence a purported 30-level enhancement that caused the range to increase from 0-6 months to 210-262 months, a related issue of "intended loss," and whether an enhancement for "sophisticated means" applied. The district failed to address and rule on his objections or make findings. It decisions and procedures regarding sentencing require remand.

STATEMENT OF FACTS

Winston Shrout is 70 years old. PSR 7. He was born in Kentucky, earned his Bachelor of Science degree in psychology from Brigham Young University, and enjoyed a 20-year career as a journeyman carpenter. PSR 14, 16. He is a father, grandfather, and military veteran who served honorably in the U.S. Marine Corps. PSR 15, 16. He had no criminal history, juvenile or adult, prior to his conviction here. PSR 14. Two psychologists independently concluded that he suffers from a mental disease or defect, namely, delusional disorder, grandiose type. SER 213, 266. Although the district court ultimately found him competent to proceed to sentencing, one psychologist disagreed. SER 246.

None of the 13 documents that underlie Mr. Shrout's convictions for producing, presenting, and shipping fictitious obligations was honored by anyone. No person or entity accepted, negotiated, or transacted any of the more than 300 instruments that were purportedly worth more than $100 trillion. As a result, there was no actual loss—zero. The only actual loss stemmed from his failure to file income tax returns for six years. The total amount of the tax loss was $157,895. PSR 2, 19. Nevertheless, the district court based Mr. Shrout's sentence on the Guidelines for trillions of dollars of intended loss.

A. The Initial Indictment

On December 8, 2015, the government filed an Indictment charging Mr. Shrout with six misdemeanor counts of Willful Failure to File Return, in violation of 26 U.S.C. § 7603. CR 1. That same day, the government served a summons directing him to appear on January 7, 2016. CR 6. Mr. Shrout appeared in federal court on January 7, 2016, as directed by the summons. ER 15. The court appointed "standby counsel," ordered his release on conditions, and scheduled a status conference before the district court on February 3. ER 19, 22, 37-42.

Mr. Shrout appeared for arraignment before Senior U.S. District Court Judge Robert E. Jones on February 3, 2016. ER 48. The district court conducted a *Faretta* hearing, found him competent to waive his right to representation by counsel, and

authorized him to "proceed pro se with the Federal Defender present as advisory counsel." ER 187; CR 12. The district court entered Mr. Shrout's pleas of "not guilty" to the six misdemeanor charges, scheduled a jury trial, and continued his pretrial release. *Id*.

B. The Superseding Indictment

On March 15, 2016, the government filed a Superseding Indictment. ER 76. In addition to the six misdemeanors alleged in the original Indictment, the Superseding Indictment charged Mr. Shrout with 13 felony counts of Fictitious Obligations, in violation of 18 U.S.C. § 514(a). *Id*. The government later served a summons, directing him to appear for arraignment on March 31. CR 22.

Mr. Shrout appeared for arraignment on the Superseding Indictment, as directed. ER 88. The district court held another *Faretta* hearing. *Id*. It again found him competent to waive his right to representation by counsel and authorized him to "proceed Pro Se with Assistant Federal Public Defender Ruben L. Iniguez appointed as advisory counsel." ER 188-189; CR 26. The district court *sua sponte* declared the case "complex," entered pleas of "not guilty" to all 19 counts, and rescheduled the jury trial. ER 97, 189. The court continued Mr. Shrout's pretrial release, but added special conditions. CR 28.

C. Motion to Dismiss for Vindictive Prosecution

On March 6, 2017, Mr. Shrout moved to dismiss the 13 fictitious obligation counts alleged in the Superseding Indictment for vindictive prosecution. CR 73. He presented evidence of "a realistic or reasonable likelihood of vindictiveness" and urged the district court to require the government to show "independent reasons or intervening circumstances [to] dispel the appearance of vindictiveness and justify its decisions" to increase the severity of the alleged charges by re-indicting him in response to his exercise of constitutional, statutory, and procedural rights. CR 73 at 1-2.

The government filed a response to the dismissal motion. CR 74. Later, after Mr. Shrout had submitted a reply memorandum in support of his motion (CR 76), the government moved to correct certain misrepresentations it had made in its response. CR 77. On April 3, 2017, the district court denied the motion to dismiss for vindictive prosecution. ER 9. It denied the motion without affording Mr. Shrout discovery or holding an evidentiary hearing.

D. Jury Trial

On April 13, 2017, the district court held a pretrial conference. CR 89. Four days later, it held an in chambers conference. CR 101. The four-day jury trial commenced the next day, April 18. CR 102. On April 21, the jury returned guilty

verdicts as to all 19 counts. CR 105, 109. The district court ordered the preparation of a Presentence Investigation Report, scheduled a sentencing hearing, and continued Mr. Shrout's release on modified conditions. CR 105-106. On May 1, the district court entered an order appointing the Federal Public Defender as counsel. CR 112.

E. Competency to Proceed to Sentencing

On April 16, 2018, defense counsel filed a Motion for Hearing to Determine Mental Competency pursuant to 18 U.S.C. § 4241(a). CR 129. In support of the motion, counsel filed under seal a Declaration that attached a redacted copy of an Evaluation for Fitness to Proceed by a clinical and forensic psychologist, C. Chyrelle Martin. SER 203. Among other things, Dr. Martin expressed her "professional opinion that Mr. Shrout suffers from a severe mental illness, delusional disorder, and that this illness renders him unable to understand the consequences of the proceedings against him or to assist properly in his defense." SER 220.

On April 19, 2018, the government filed its response to the motion under seal. CR 134-135. On April 25, the defense filed a reply memorandum in support of the motion under seal. CR 137-138.

On May 7, 2018, the district court held a hearing on the Motion for Hearing to Determine Mental Competency. SER 275. It granted the motion, ordered a

further evaluation by Dr. Stephanie Lopez, directed defense counsel to "submit an un-redacted copy of Dr. Martin's report to the Court," and struck the sentencing hearing date. CR 141.

On July 17, 2018, the district court granted the government's motion for leave to file Dr. Lopez's report under seal. CR 147-148. Dr. Lopez agreed that Mr. Shrout was not malingering. SER 252-253, 332. However, she believed he was not suffering from a mental disease or defect, and he was competent to proceed to sentencing. SER 253. The district court then scheduled a competency hearing. CR 149.

On September 17, 2018, the district court granted the defense's motion for leave to file the Fitness to Proceed Evaluation prepared by another licensed psychologist, Alexander M. Millkey, under seal. CR 150-151. Dr. Millkey also agreed that Mr. Shrout was not malingering. SER 266, 300. Like Dr. Martin, he expressed his opinion that Mr. Shrout suffers from delusional disorder. SER 266. However, he believed Mr. Shrout was nonetheless competent to proceed. SER 272-273.

The district court held the competency hearing on September 27, 2018. SER 275. Both Dr. Millkey and Dr. Lopez testified. SER 284, 317. At the conclusion of the hearing, the court ruled as follows:

> My ruling is clear that he is competent to proceed to sentencing. He may have delusional beliefs. He may not be medically diagnosed as such, but as far as I'm concerned, he is fully competent to address any matters pertaining to sentencing….

SER 355. The district court then scheduled sentencing for October 22. *Id*.

F. Sentencing

The parties filed their respective sentencing memoranda before sentencing. CR 155, 158. Mr. Shrout also filed a confidential sentencing letter under seal. PSR 34. He formally objected to several issues affecting the calculation of the advisory guidelines range. PSR 37-41. The next day, October 18, the Probation Office submitted the final PSR and Addendum. PSR 1.

On October 22, 2018, the district court imposed sentence. ER 120. It failed to address or rule on any of the objections that Mr. Shrout raised. ER 174-181. The court ultimately sentenced him to 10 years' imprisonment and five years' supervised release. ER 181. Mr. Shrout filed a timely notice of appeal. ER 183.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING MR. SHROUT'S MOTION TO DISMISS THE FICTITIOUS OBLIGATION CHARGES FOR VINDICTIVE PROSECUTION WITHOUT AFFORDING HIM DISCOVERY OR AN EVIDENTIARY HEARING.

A district court's decision whether to dismiss an indictment for vindictive prosecution is reviewed de novo because the issue presents a mixed question of law and fact. *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007).

Before trial, Mr. Shrout moved to dismiss the 13 fictitious financial instrument counts alleged in the Superseding Indictment for vindictive prosecution. CR 73. He submitted three exhibits—an email from the prosecutor and two hearing transcripts—as evidence in support of his motion. ER 15, 48, 109. He expressly requested an evidentiary hearing. CR 73.

The government opposed the motion. ER 110. But it submitted no evidence—documentary or testimonial—to support its opposition. *Comstock v. Humphries*, 786 F.3d 701, 709 (9th Cir. 2015) ("arguments in briefs are not evidence").[2] Notably, the government admitted it had been "investigating [Mr.

[2] Without directly addressing vindictive prosecution, the government referenced an Affidavit in Support of Application for Search Warrant that IRS Special Agent Casey Hill submitted almost five years earlier, on June 21, 2012. This did not constitute evidence as the government only offered to "provide[] [a copy] to the Court for review … upon request." ER 116, n.2. The district court did not request a copy. The Affidavit supports retaliation because it confirms that the

Shrout] for potential violations of 18 U.S.C. § 514 *since at least June 2012*." ER 116 (emphasis added). The government also admitted it already had "establishe[d] probable cause that [Mr. Shrout] acted in violation of … § 514" at that time, namely, at least 3½ years before it filed the initial Indictment. *Id*. In other words, the government conceded that, despite having investigated Mr. Shout for approximately 80 months, and despite having established probable cause for the fictitious instrument violations at least 42 months earlier, it did not pursue a single § 514 charge when it first presented its case to the grand jury for Indictment in December 2015.

Without providing any evidence to support its claim, the government asserted it was the "discovery of an important piece of evidence at around the time of the initial indictment [that] prompted [it] to revisit" its charging decision and file the Superseding Indictment charging Mr. Shrout with 13 felony counts less than 100 days after it filed the original misdemeanor Indictment. ER 116. The obvious flaw in its unsupported assertion was its admission that Mr. Shrout "mailed the document well in advance of the initial indictment" (*i.e.*, six months earlier) and, more importantly, its concession that the document formed the basis for *only two of the 13*

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government's "investigation [of Mr. Shrout] began on or about April 21, 2009," that is, more than 6½ years before it filed the original misdemeanor indictment. ER 14.

counts. *Id*. In other words, the supposedly "new" document—referenced only in argument in a brief—was wholly unrelated to the 11 remaining § 514 counts that the prosecutor suddenly saw fit to charge. The prosecutor offered no justification for his decision to charge Mr. Shrout with those 11 counts, despite his own admission that sufficient evidence to bring those particular charges had existed for years before the initial Indictment was filed.

But that is not all. Confronted with documentary evidence indicating that the prosecutor's charging decision was vindictive, the government offered inconsistent explanations. It claimed the prosecutor "does not specifically recall what subpoenas [he] was referring to in [his] conversation and subsequent email with [standby] counsel." ER 117.[3] At the same time, the government represented that "records indicate two subpoenas were issued by the Grand Jury in this matter in late-February/early March, *2015*." *Id*. (emphasis added). The government further represented that "[b]oth of the subpoenas … proved unresponsive: neither party possessed any material relevant to the investigation." *Id*.

[3] In his email to standby counsel on February 3, 2016, the prosecutor, Stuart A. Wexler, asserted that "[t]he timing of the superseding indictment is uncertain, as *the government is waiting on the return of subpoenas*." ER 109 (emphasis added).

Mr. Shrout filed a reply memorandum. CR 76. He noted that the government had produced no evidence and, therefore, had failed to sustain its burden to show intervening circumstances to dispel the appearance of vindictiveness. CR 76 at 11-13. He specifically requested both discovery and an evidentiary hearing. CR 76 at 14.

The next day, the government filed a motion to correct a critical misrepresentation it had made to the district court. CR 77. It admitted its representation that it possessed "records" showing the grand jury had issued two subpoenas in "late-February/early-March, 2015" was "factually incorrect." CR 77 at 1-2 (citing CR 74 at 8). Instead, the government now claimed the subpoenas were issued one year later—in *2016*. CR 77 at 2. The difference is crucial. When the prosecutor claimed in early February 2016 that he was "waiting on the return of subpoenas" before deciding whether to file the superseding charges, no subpoenas were outstanding or awaiting return because no subpoenas had been issued yet. Accordingly, the "correction" not only cast serious doubt on the veracity of the prosecutor's written representation, but it also added considerable strength to the appearance of vindictiveness.

Three days later, the district court issued an Order denying the motion to dismiss for vindictive prosecution. ER 9. It denied the motion without addressing

Mr. Shrout's request for discovery or conducting an evidentiary hearing. *Id*. Despite the fact that the government had presented no evidence, the court found it "unlikely the prosecutor would have a punitive animus toward [Mr. Shrout] for exercising the rights he asserted." ER 11. The court also found "the timing of the superseding indictment suggests that a presumption of vindictiveness is not warranted." *Id*.

The district court erred in denying the motion to dismiss without affording Mr. Shrout discovery or conducting an evidentiary hearing. A hearing is required when "a material issue of fact [is] raised 'which if resolved in accordance with [the defendant's] contentions would entitle him to relief.'" *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980) (quoting *Wright v. Dickson*, 336 F.32d 878, 888 (9th Cir. 1964)); *see also United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000) (evidentiary hearing required "when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist"); *United States v. Packwood*, 848 F.2d 1009, 1010 (9th Cir. 1988) (same); *United States v. Carrion*, 463 F.2d 704, 706 (9th Cir. 1972) (same).

In *Irwin*, both the defendant and the government introduced affidavits in connection with a motion to dismiss the indictment for prosecutorial misconduct. In deciding whether to conduct an evidentiary hearing, the district court considered not

only the affidavits, but also "the tape [recording of several] telephone conversations, legal memorandum and oral argument." *Irwin*, 612 F.2d at 1184. While it ultimately denied the motion without an evidentiary hearing, the court did so "[o]n the basis of [the evidence]." *Id.; see also* 612 F.2d at 1189 ("the court referred specifically to the affidavits" in finding no evidentiary hearing was required).

On appeal, this Court in *Irwin* first held it "must assume that the factual allegations in [Irwin's] affidavits are true" in determining whether they "show as a matter of law that [he] was or was not entitled to relief." 612 F.2d at 1187. The Court then "examine[d] in some detail the affidavits … to determine whether they raised factual issues requiring a hearing." *Id*. at 1190. Only because "[t]he moving papers failed to allege facts sufficient to enable the trial court to conclude that relief must be granted if the facts alleged were proved" did the Court conclude that "the trial court did not err in denying the motion to dismiss without an evidentiary hearing." *Id*. at 1191 (citing *Carrion*, 463 F.2d at 706); *see also United States v. Mazzarella*, 784 F.3d 532, 537-541 (9th Cir. 2015) (trial court abused its discretion by not allowing discovery or holding an evidentiary hearing to resolve disputed issues of fact relative to *Brady* claim).

It is well established that "[v]indictive prosecution violates due process." *Rushdan v. Schriro*, No. CV 05–114–TUC–FRZ (JM), 2010 WL 7508269, at *8 (D.

Ariz. 2010) (citing *Moran v. Burbine*, 475 U.S. 412, 466 (1986)). "[T]he mere filing of an indictment can support a charge of vindictive prosecution." *United States v. Hooton*, 662 F.2d 628, 634 (9th Cir. 1981). In most cases, a "claim of vindictive prosecution usually arises when the government increases the severity of alleged charges—for example, by re-indicting a defendant—in response to the exercise of constitutional or statutory rights." *Id*. at 633; *see also United States v. Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995) ("most vindictive prosecution cases involve re-indictment of a defendant.").

"To establish a prima facie case of vindictive prosecution, [a defendant] 'must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such.'" *United States v. Edmonds*, 103 F.3d 822, 826 (9th Cir. 1996) (quoting *Montoya*, 45 F.3d at 1299). "Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of vindictiveness on the government's part." *United States v. Garza-Juarez*, 992 F.2d 896, 906 (9th Cir. 1993); *see also Hooton*, 662 F.2d at 633 ("the mere appearance of vindictiveness gives rise to a presumption of vindictive motive"). "Upon such a showing, the prosecution has the burden of proving that 'independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its [prosecutorial] decisions.'" *Edmonds*, 103 F.3d at 826 (quoting *Montoya*, 45 F.3d at 1299); *accord*

Hooton, 662 F.2d at 633. "Thus, whether the facts give rise to the appearance of vindictiveness is dependent upon the totality of the circumstances surrounding the prosecutorial decision at issue." *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980).

Although "it is not dispositive of the inquiry," the Ninth Circuit has long held that "[t]he chronology of events is, of course, entitled to *great weight*." *Griffin*, 617 F.2d at 1347 (emphasis added); *see also United States v. Spiesz*, 689 F.2d 1326, 1328 (9th Cir. 1982) (evidentiary hearing held where prosecutor filed superseding indictments seven weeks after initial indictment and, therefore, appearance of vindictiveness arose from "the sequence of events"). Here, Mr. Shrout relied on much more than "the timing of the superseding indictment" to support his contention of a realistic or reasonable likelihood of vindictiveness. ER 11. He not only observed that the prosecutor filed the Superseding Indictment less than 100 days after the initial Indictment, but he also submitted uncontested evidence that was strongly suggestive of animus on the part of the prosecutor.

Mr. Shrout provided evidentiary support of an appearance of vindictiveness by exposing the faulty premise for the prosecutor's initial claim that his decision whether to pursue § 514 charges depended on the return of subpoenas that were still outstanding. As the government itself later acknowledged, the prosecutor's claim

that he was "waiting on the return of subpoenas" issued one year earlier was not accurate. By providing an inaccurate explanation, the prosecutor created a strong inference that the real reason was vindictive. *See Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) ("The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny."); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) ("Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised.").

Mr. Shrout provided further evidence of vindictiveness when he similarly undermined the prosecutor's claim that his decision to file the 13 fictitious instrument charges resulted from the belated receipt of a single document. Again, by its own admission, the government agreed that the solitary document received six months before the prosecutor filed the Indictment only related to *two* fictitious instrument charges. The obvious implication of that admission is that as early as 2012, the government's multi-year investigation already had produced sufficient evidence to charge Mr. Shrout with the 11 other § 514 charges. Indeed, as early as June 2012, the case agent affirmed exactly that. ER 13 ("there is probable cause that

evidence of … Fictitious Obligations in violation of 18 U.S.C. § 514 … will be found."). And yet the prosecutor chose not to file a single § 514 charge when he filed the original Indictment in December 2015—quite reasonably since the documents, at the very least, do not fit within the core of the statute.[4] As Mr. Shrout demonstrated, it was only *after* he exercised his constitutional and procedural rights (*i.e.*, to represent himself, plead guilty to the initial misdemeanor charges, and file *pro se* pleadings) that the prosecutor filed the § 514 charges.

Mr. Shrout's moving papers and evidence established facts with sufficient definiteness, clarity, and specificity to enable the district court to conclude there were contested issues of fact. He demonstrated a reasonable likelihood that the prosecutor only changed his decision not to pursue the § 514 charges *after* Mr. Shrout exercised his constitutional right to waive counsel and to defend himself, twice attempted to plead guilty to the original misdemeanor Indictment, and exercised his procedural right to file *pro se* pleadings. He satisfied his burden of making an initial showing of an appearance of vindictiveness, and, therefore, the

[4] The § 514 charges depended on the dubious premise that documents purportedly worth $1 trillion dollar had a real effect (*i.e.*, that anyone would take them at face value).

burden shifted to the government to prove that the increase in the severity of the charges did not result from any vindictive motive.

The district court erred by not placing the burden of overcoming the presumption of vindictiveness on the government, affording discovery to Mr. Shrout, holding an evidentiary hearing, or otherwise requiring the prosecutor to introduce objective evidence justifying his decision to file the fictitious instrument charges. *See Jenkins*, 504 F.3d at 700 (prosecutor testified at hearing on motion to dismiss); *Spiesz*, 689 F.2d at 1328 (evidentiary hearing where prosecutor testified). As in *Jenkins*, the prosecutor here "had more than enough evidence to proceed with the [§ 514] charges prior to [Mr. Shrout's] decision to [represent himself, plead guilty, and file pleadings]." *Id*. Unlike *Jenkins*, however, the district court did not "place the burden on the government to justify its course of conduct." *Id*. And, unlike *Jenkins*, the prosecutor who filed the § 514 charges was not required to testify at a hearing or introduce objective evidence justifying his decision to increase the severity of the charges. *Id*. at 698; *see also Spiesz*, 689 F.2d at 1326.

II. THE DISTRICT COURT'S FAILURE TO SATISFY THE REQUIREMENTS FOR A VALID *FARETTA* WAIVER CONSTITUTED *PER SE* PREJUDICIAL ERROR AND REQUIRES REVERSAL.

The validity of a *Faretta* waiver, a mixed question of law and fact, is reviewed de novo. *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004).

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court recognized a defendant's right to waive his Sixth Amendment right to counsel and conduct his own defense. "A defendant's decision to forgo counsel and instead to defend himself—known as a '*Faretta* waiver'—is valid if the request is timely, not for the purpose of delay, unequivocal, and knowing and intelligent." *Erskine*, 355 F.3d at 1167. "In order to deem a defendant's *Faretta* waiver knowing and intelligent, the district court must insure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the 'dangers and disadvantages of self-representation.'" *Id*. (citation omitted).

The Ninth Circuit has "consistently emphasized the primacy of the district court's role in protecting a defendant's twin Fifth and Sixth Amendment rights by insuring that a *Faretta* waiver is knowing and intelligent." *Erskine*, 355 F.3d at 1167; s*ee United States v. Hernandez*, 203 F.3d 614, 625 n. 16 (9th Cir. 2000) (discussing this "fundamental obligation"). "[W]e cannot overstate the importance of the court's responsibility in this respect." *Erskine*, 355 F.3d at 1167. Failure to meet the requirements for a valid *Faretta* waiver constitutes *per se* prejudicial error. *United States v. Arlt*, 41 F.3d 516, 524 (9th Cir.1994). The determination that a *Faretta* error occurred requires reversal of the conviction. *Erskine*, 355 F.3d at 1167.

The government bears the burden of establishing the legality of a *Faretta* waiver on appeal. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994). The Ninth Circuit "evaluates this question with great care, indulging 'every reasonable presumption against waiver.'" *Arlt*, 41 F.3d at 520 (quoting *Brewer v. Williams*, 430 US. 387, 404 (1977)).

When Mr. Shrout appeared for arraignment on the initial Indictment, he admitted he was "kind of confused by the nature of this situation." ER 53. Later, when the district court asked whether he understood the charges, he unequivocally stated: "No, sir." ER 56. He subsequently reiterated that he did not "understand them." *Id*. Similarly, when the district court asked whether he understood the potential penalties, Mr. Shrout stated: "no, I do not understand them." ER 57. The prosecutor subsequently acknowledged that "the government has some concern as *that does not qualify as a knowing and intelligent response* to those two questions." ER 68 (emphasis added). Despite his concern, the prosecutor did not ask the district court to confirm Mr. Shrout's understanding of the nature of the charges and potential penalties.

Approximately two months later, Mr. Shrout appeared before the district court for arraignment on the Superseding Indictment. ER 88. As the court advised him of the new felony charges and related penalties, it suddenly stopped and stated:

"Let's put it bluntly. *You're not competent to represent yourself*, but you have a right to do that." ER 93 (emphasis added). The district court nonetheless accepted Mr. Shrout's choice "to be my own attorney without representation from [the Public Defender], but as standby counsel." ER 95. The court told him: "That's your choice. I'll accept that as a full and knowing decision, complying with the *Faretta* decision." ER 95-96. Despite its contradictory pronouncement one minute earlier, the district court concluded: "I find, without doubt, he's totally competent, and if he chooses to represent himself after advisement, that's his legal right." ER 96.

The government cannot sustain its burden of establishing the validity of the purported *Faretta* waiver given (1) the unequivocal statements that Mr. Shrout did "not understand" the nature of the charges or potential penalties, and (2) the district court's determination that he was "not competent" to represent himself.

III. THE DISTRICT COURT'S DECISIONS AND PROCEDURES REGARDING SENTENCING REQUIRE REMAND.

A district court's calculation of the sentencing guidelines is reviewed de novo. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc).

Before sentencing, Mr. Shrout formally objected in writing to several issues that affected the calculation of the sentencing guidelines range. PSR 37-41. The district court failed to address and rule on his objections or make findings. ER 174-181. The Court's sentencing decisions and procedures require remand.

A. The District Court's Application of the Wrong Sentencing Guideline Provision Requires Remand.

Mr. Shrout formally objected to the offense level calculations set forth in the Presentence Investigation Report. PSR at 37-41. He objected to the use of U.S.S.G. § 2B1.1 because the only actual loss resulted from his failure to file income tax returns. The evidence at trial established that the total amount of tax loss for the six years he did not file returns was $157,895. PSR 2, 19 ("the actual losses resulting from all of the conduct charged in the Superseding Indictment is limited to less than $160,000 in unpaid taxes."). Accordingly, Mr. Shrout maintained that a base offense level of 16 applied under § 2T1.1(a)(1) and § 2T4.1(F) (Tax Table) (tax loss more than $100,000, but less than $250,000). Because no loss—actual or intended—resulted from his production, presentation, or shipping of fictitious financial instruments, he argued that the district court was required to use the tax guideline—U.S.S.G. § 2T1.1—to calculate the advisory guidelines range. The district court failed to address or rule on his objection at sentencing. ER 174-181.[5]

[5] Mr. Shrout's general objection to the proposed use of § 2B1.1 encompassed his specific objection to both the application of a 30-level increase under § 2B1.1(b)(1)(P) because the purported amount of "intended loss" was more than $550,000,000 and the application of a 2-level increase under § 2B1.1(b)(10) because the offense supposedly involved "sophisticated means." PSR 38, n.5.

B. The District Court's Failure to Require the Government to Prove the Amount of "Intended Loss" by Clear and Convincing Evidence Constituted Plain Error and Requires Remand.

Whether the district court applied the correct burden of proof is reviewed de novo. *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003). When a sentencing factor has an extremely disproportionate impact on the sentence relative to the offense of conviction, a district court must apply the clear and convincing standard. *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001). The application of an incorrect standard of proof to enhancements with disproportionate impact constitutes plain error. *Id*.

The district court not only applied the wrong guideline—§ 2B1.1 instead of § 2T1.1—but it also applied a 30-level increase under § 2B1.1(b)(1)(P). Its application of the enhancement was apparently based on a finding that the amount of "intended loss" was more than $550,000,000. PSR 13. Mr. Shrout objected to the use of the purported "face value" of the fictitious financial instruments as the measure for intended loss given the fact that no less than eight of the 10 instruments were purportedly worth more than $550,000,000 each—the minimal amount necessary to apply a 30-level increase under the Guidelines. Two fictitious instruments (Counts 8 and 9) had purported face values of $1 trillion dollars each;

one instrument (Count 5) had a purported face value of $500 billion dollars; and six instruments (Counts 1, 2, 3, 4, 6, and 10) had purported face values of $1 billion, $1.9 billion, $10 billion, and $25 billion dollars. PSR 10-11. Those figures were so outrageous, there was no real possibility that any person or entity would accept the "Monopoly money." In fact, the purported face value of only three of the 10 instruments (Counts 2, 3, and 7) was less than $5,102,981 million: the gross domestic product (GDP) of the world's leading economy—the United States—in the second quarter of 2018. It was hardly surprising that no instrument was in fact negotiated by any person or entity.

While the district court seems to have implicitly overruled Mr. Shrout's objections, it made no finding on the issue of the standard of proof that applied. ER 174-181. Before sentencing, Mr. Shrout argued that the government was required to prove the amount of loss by clear and convincing evidence. PSR 38-40. He observed that the base offense level would increase from 7 (for loss of $6,500 or less) to 37 (for loss of more than $550,000,000) under U.S.S.G. §§ 2B1.1(b)(1)(A) & (P). Because the increase catapulted the resulting guideline range from 0-6 months to 210-262 months, he argued that the government was required to prove the loss amount by clear and convincing evidence. PSR 39. He cited both *United States v. Treadwell*, 593 F.3d 990 (9th Cir. 2010), and *United States v. Pollock*, 3:14–cr–

00186–BR, 2016 WL 1718192 (D. Or. 2016), as support for his position that the disproportionate effect of the factor on his sentence required its proof by clear and convincing evidence. PSR 39.

As this Court has observed, "the application of the correct burden of proof at a criminal sentencing hearing is critically important." *Jordan*, 256 F.3d at 930. *See also Fox v. Vice*, 563 U.S. 826, 839 (2011) ("A trial court has wide discretion when, but only when, it calls the game by the right rules."). Here, the district court failed to address the issue of the appropriate standard of proof at sentencing. ER 174-181. It is impossible to discern, therefore, whether it correctly applied the clear-and-convincing standard of proof or the less demanding preponderance-of-the-evidence standard. Mr. Shrout's sentence must be vacated and his case remanded for resentencing so that the district court may determine in the first instance whether the evidence is clear and convincing that the amount of intended loss exceeded $550 million. *See United States v. Hymas*, 780 F.3d 1285, 1293 (9th Cir. 2015); *Jordan*, 256 F.3d at 933.[6]

[6] It may be unnecessary for this Court to reach the issue of the correct standard of proof for determining intended loss if it agrees with Mr. Shrout's related argument that the district court should have used the tax guideline—U.S.S.G. § 2T1.1—to calculate the advisory guidelines range.

C. The District Court's Failure to Address Mr. Shrout's Objection to Using the Purported Face Value of the Fictitious Financial Instruments as "Intended Loss" Requires Remand.

A district court's interpretation of the sentencing guidelines is reviewed de novo. *United States v. Dixon*, 201 F.3d 1223, 1233 (9th Cir. 2000). The factual findings underlying its sentencing decision are reviewed for clear error. *United States v. Barnes*, 125 F.3d 1287, 1290 (9th Cir. 1997).

Mr. Shrout objected in writing to the calculation of the advisory guidelines range based on the amount of "intended loss" under § 2B1.1(b)(1)(P) (more than $550,000,000). PSR 38. He argued that the definition of "intended loss" did not apply because he had not intended or "purposely sought to inflict" the claimed pecuniary harm. U.S.S.G. § 2B1.1, comment. (n. 3(A)(ii)). Citing evidence that he suffers from a mental disease or defect (*i.e.*, delusional disorder, grandiose type), and that the defect contributed substantially to his commission of the offenses, he argued that the purported face value of the fictitious instruments did not qualify as "intended loss," as that term is specifically defined by the Guidelines, because the disease prevented him from purposely or intentionally seeking to inflict pecuniary harm. PSR 39-40.

The district court failed to address Mr. Shrout's objection at sentencing. ER 174-181. Accordingly, his sentence must be vacated and his case remanded for

resentencing because the evidence offered to support the 30-level enhancement was factually and legally inadequate to qualify as "intended loss" and, therefore, the district court erred in its calculation of the advisory range.

D. The District Court's Failure to Rule on Mr. Shrout's Objection to the Two-Level "Sophisticated Means" Enhancement Requires Remand.

Mr. Shrout formally objected to the application of a two-level increase for "sophisticated means" under U.S.S.G. § 2B1.1(b)(10)(C). PSR 40-41. The district court failed to address or rule on the objection. ER 174-181.

The Commentary to the Guidelines provides a specific and narrow definition of the term "sophisticated means." U.S.S.G. § 2B1.1, comment. (n.9(B)). The term means "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." *Id*. Two examples are provided. First, "in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means." *Id*. Second, "[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." *Id*.

There was no evidence that Mr. Shrout located offices in multiple jurisdictions in an effort to avoid detection; hid assets or transactions; or used fictitious entities,

corporate shells, or offshore financial accounts. To the contrary, the fictitious instruments listed both his true name and an account number "which matched [his] Social Security number." PSR 13. The instruments also contained his fingerprint and signature. PSR 11. He shipped the instruments via the U.S. Postal Service and Federal Express. Related invoices bore not only his name and signature, but also his address and phone number. These undisputed facts demonstrate that he made no effort to conceal the offenses. Nor was the "offense conduct pertaining to the execution" of the offenses "especially complex or especially intricate." To the contrary, it is difficult to conceive of a less complex or intricate scheme than this.

Most of the facts that the government cited as support for its argument that the "sophisticated means" enhancement applied did not pertain to "the execution or concealment of [the] offense," as the Commentary expressly requires. For example, while it is true that Mr. Shrout "operated a business" under his true and correct name (*i.e.*, Winston Shrout Solutions in Commerce) and "received payments for services as a presenter at seminars," those business activities did not pertain to "the execution or concealment" of the offense. The execution of the offenses bore no direct relationship to his operation of the business. His conduct pertaining to the execution of the offenses simply involved the production, presentation, and shipping of the instruments. Nor was there evidence of any effort to conceal the offenses. The fact

that Mr. Shrout used his true name, signature, fingerprint, Social Security number, and mailing address to execute the offenses demonstrates that he made no attempt to conceal his conduct. Accordingly, the enhancement did not apply.

Mr. Shrout's sentence must be vacated and his case remanded for resentencing for at least three alternative reasons. First, so that the district court may determine in the first instance whether the evidence is clear and convincing that "the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means." U.S.S.G. § 2B1.1(b)(10)(B); *see Jordan*, 256 F.3d at 922. Second, because the evidence the government offered was inadequate to support the enhancement and, therefore, the district court miscalculated the advisory range. *Id*. at 926. Third, because the district court provided insufficient reasoning to allow for meaningful appellate review. *See Gall v. United States*, 552 U.S. 38, 50 (2007); *Carty*, 520 F.3d at 992.

IV. THE DISTRICT COURT'S FAILURE TO CONDUCT A COMPETENCY HEARING BEFORE TRIAL CONSTITUTED PLAIN ERROR.

A district court's failure to conduct a competency hearing on its own motion is subject to plain error review. *United States v. Dreyer*, 705 F.3d 951, 960 (9th Cir. 2013).

There is an independent obligation upon the defense, the prosecution, and the district court to inquire into a defendant's mental competence if a good faith basis to question competency arises during the criminal proceedings. *See* 18 U.S.C. § 4241(a) (obligation to raise issue "if there is reasonable cause to believe" that the defendant might not be competent); *see also Pate v. Robinson*, 383 U.S. 375, 385 (1966) ("Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion" must hold a competency hearing). If a bona fide doubt regarding a defendant's mental competence is raised, the district court must hold a competency hearing, which begins with an evaluation of the defendant's mental competence performed by a court-appointed mental health professional. *Pate*, 383 U.S. at 385. If a reasonable judge would have a "genuine doubt" about the defendant's competency to stand trial, failure to hold a hearing is plain error. *Dreyer*, 705 F.3d at 960.

When Mr. Shrout appeared for arraignment on the initial Indictment, he admitted he was "kind of confused by the nature of this situation." ER 53. He told the district court, "what's confusing to me is that obviously this is not a tort case." ER 53-54. He asked whether "[t]here has to be a commercial crime?" ER 54. He then asked what the proceeding was "based upon" and whether the "procedures of statutes of the United States" applied "to citizens or what?" *Id*. When the district

court asked whether he understood the charges, Mr. Shrout stated unequivocally: "No, sir." ER 56. He subsequently repeated that he did not "understand them." *Id*. Later, when the district court asked whether he understood the potential penalties, he again stated: "no, I do not understand them." ER 57.

The district court subsequently commented on the *pro se* pleadings that Mr. Shrout had filed before the hearing. It told him:

> Based on the documents you have submitted so far in this case, it is clear you do not know how to present a viable defense to the charges against you. The documents you have submitted purporting to be a lien and invoice and liquidation are null and void. They have no legal consequence at all. If these documents are intended to be the basis of your defense, you're going to lose this case.

ER 58. When Mr. Shrout informed the district court that he was "confused about the terms being used here" (*i.e.*, assistance of counsel, standby counsel, and advisory counsel), the court stated:

> Here's what I mean: You've got some theories … about admiralty courts and all that stuff. It's hogwash. It doesn't exist in the law, but you have a right to make a record of it, as I've done for other tax protestors. A lawyer can't assert that right for you. They just can't do that. They can't present to the Court spurious matters. You can if that's your choice. But at the same time … you can go ahead and assert your positions, even though I feel that they are without merit, but you have a right to put them on the record.

ER 60. Still confused, Mr. Shrout then said, "One more question: On the – at this advisory position, would an attorney be able to sign my name or any other documents

that would pertain to me?" ER 61. He acknowledged he was having trouble "trying to understand what the advisory counsel would be." *Id*. In the end, he posed the issue to the district court in a different fashion, asking "could he [standby counsel] create a liability in me?" *Id*. It was only after the court agreed that Mr. Shrout would "sign all the documents" that he stated: "Okay. Would that – with that being the case, then I agree to the terms of the…." ER 62. Later, after Mr. Shrout had pleaded guilty, the district court noted its own confusion over the situation: "Well, in respect to this matter, he's pleading guilty to the facts and if – do you have any basis of – I've – I still am confused as to what you want because you could go to trial before a judge or a jury." ER 66.

Approximately two months later, Mr. Shrout appeared before the district court for arraignment on the Superseding Indictment. ER 88. As the court advised him of the charges and related penalties, it stopped and stated: "Let's put it bluntly. You're *not competent* to represent yourself, but you have a right to do that." ER 93 (emphasis added). The district court also stated: "You don't have the competency to know the first thing about cross-examining a witness, but…." ER 94. Finally, the court noted: "I've said this before to people like you. You're well meaning. You -- *you are bizarre*, however…." *Id.* (emphasis added).

Despite its observations and statements to the contrary, the district court ultimately accepted Mr. Shrout's choice "to be my own attorney without representation from [the public defender], but as standby counsel." ER 95. The court told him: "That's your choice. I'll accept that as a full and knowing decision, complying with the *Faretta* decision." ER 95-96. The district court concluded: "I find, without doubt, he's totally competent, and if he chooses to represent himself after advisement, that's his legal right." ER 96.

This case presented unique, complex, and overlapping issues involving the right to self-representation under *Faretta*, the role of standby counsel under *McKaskle v. Wiggins*, 465 U.S. 168 (1984), and client autonomy under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Here, Mr. Shrout's conduct both in and out of the courtroom created a genuine doubt as to his competency to stand trial. Secondarily, the doubt also related to whether *Faretta* required the district court to decide whether mental illness impacted the exercise of that right. *See United States v. Read*, No. 17-10439, 2019 WL 1196654, *6-*7 (9th Cir. Mar. 14, 2019) (affirming district court's denial of self-representation based on mental illness under *Indiana v. Edwards*, 554 U.S. 164 (2008)). But the district court failed to order a competency hearing *sua sponte*.

The evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting Mr. Shrout's competence to proceed to trial. The district court's failure to order a competency hearing *sua sponte* constitutes plain error. The fact that two psychologists subsequently found that Mr. Shrout suffers from a mental disease or defect (*i.e.*, delusional disorder, grandiose type) supports a finding that the district court plainly erred in failing to conduct a competency hearing before trial.

V. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT MR. SHROUT WAS COMPETENT TO PROCEED TO SENTENCING.

When a district court has made a competency determination, the clearly erroneous standard of review applies. *Chavez v. United States*, 656 F.2d 512, 517 (9th Cir. 1981).

Mr. Shrout was convicted after trial of all 19 counts set forth in the Superseding Indictment. CR 110. A few days later, he asked the district court to appoint counsel to represent him in all subsequent proceedings. The court granted his request and appointed counsel. CR 112.

Defense counsel subsequently filed a motion for a hearing to determine mental competency. CR 129. Counsel submitted a psychological evaluation by a mental health expert, Dr. Chyrelle Martin, in support of the motion. SER 203. Dr. Martin found that Mr. Shrout was not malingering, he was suffering from a mental disease

or defect, namely, delusional disorder, and he was not competent to proceed to sentencing. SER 208-209, 220-221. Based on her report, the district court granted the motion for a competency hearing and ordered a further evaluation by another court-appointed expert, Dr. Stephanie Lopez. CR 141.

Dr. Lopez submitted her report to the district court before the hearing. SER 223. She opined that Mr. Shrout was not malingering, he was not suffering from a mental disease or defect, and he was competent to proceed. SER 250-253.

The defense submitted a report from a third psychologist, Dr. Alexander Millkey. SER 254. He too agreed that Mr. Shrout was not malingering. SER 266. He found that Mr. Shrout was suffering from delusional disorder, but he was nonetheless competent to proceed to sentencing. SER 266, 272

The district court held a competency hearing. SER 275. Dr. Millkey and Dr. Lopez both testified. SER 284, 317. Dr. Martin did not testify. At the conclusion of the hearing, the court ruled as follows:

> My ruling is clear that he is competent to proceed to sentencing. He may have delusional beliefs. He may not be medically diagnosed as such, but as far as I'm concerned, he is fully competent to address any matters pertaining to sentencing….

SER 355.

Mr. Shrout raises two related arguments with respect to the contested issue of his competency to proceed to sentencing. First, because the test of his competency

is whether he has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him, the record does not sufficiently support the district court's cursory finding of competency. *Dusky v. United States*, 362 U.S. 402 (1960). Second, the district court clearly erred by finding him competent because "a preponderance of the evidence [established that Mr. Shrout was] presently suffering from a mental disease or defect rendering him mentally incompetent." 18 U.S.C. § 4241(d); *see United States v. Benson*, No. 12-CR-00480-YGR-1, 2015 WL 1064738, at *5 (N.D. Cal. 2015) ("In federal court, the government, not the defendant, bears the burden.").

CONCLUSION

For each of the foregoing reasons, this Court should reverse Mr. Shrout's convictions or, in the alternative, remand for resentencing.

RESPECTFULLY SUBMITTED this 18th day of March, 2019.

/s/ Ruben L. Iñiguez
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