No. 13504-67

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD A. BAILEY,	)
	)
Defendant-Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee.	)
	)

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the Central District of California

STANLEY I. GREENBERG (SBN 053649)
A LAW CORPORATION
11845 West Olympic Boulevard, Suite 1000
Los Angeles, California 90064-5024
Telephone: (424) 248-6600
Facsimile: (424) 248-6601
E-mail: stanmanlaw@aol.com

Attorney for Defendant-Appellant
RICHARD A. BAILEY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

I.

ISSUES PRESENTED

1. Whether the trial court erred in admitting evidence of uncharged misconduct; and further failed to clarify whether it was received under Rule 404(b) (which would require a limiting instruction) or as direct evidence of the crimes charged?[1]

2. Whether the trial court erred in giving an erroneous definition of the word "willfully."

II.

STATEMENT OF THE CASE

Defendant Richard Bailey appeals the judgment of conviction entered by the District Court (Hon. Otis D. Wright) following a jury trial ("Bailey II"). This was a retrial of an earlier conviction that was reversed by this Court in *U.S v. Bailey*, 696 F.3d 794 (9th Cir. 2012) ("*Bailey I*"). To understand the errors alleged in *Bailey II* it is important to view it in the context of what happened in *Bailey I*.

Defendant Bailey, along with co-Defendant Florian Ternes, were indicted on two counts of illegal sale of distribution of unregistered securities (15 U.S.C. § 77 e and x; and 18 U.S.C. § 2 (Aiding and abetting). The two counts were very specific. Count One alleged the sale of 150,000,000 shares of stock on April 15, 2004. Count Two alleged the sale

---

[1] "CR" refers to the Clerk's Record and is followed by the applicable document number. "RT" refers to the Reporter's Transcript of Proceedings and is followed by the applicable date and page references.

"TEX" refers to the trial exhibits and is followed by the applicable exhibit number and page references. "DER" refers to the Defendant's Excerpts of Record and is followed by the applicable page reference.

of 100,000,000 shares on May 19, 2004. The gist of the charges was that Defendant Bailey violated SEC Rule S-8. That rule allows stock sales, without need to go through the cumbersome registration process, if the sale is in exchange for bona fide services, and not for raising capital. The Government's claim was that Bailey received no bona fide services, as required under Rule S-8, in exchange for the stock sold to co-schemer Stephen Owens.

In *Bailey I*, the Government moved, in *limine*, to receive other acts of uncharged misconduct under Fed.R.Ev. 404 (b). The evidence was that the year before these 2004 transactions the SEC had filed a civil lawsuit against Mr. Bailey (and others) alleging the same conduct in another case. It was an unverified Complaint, never proven in court, and was eventually settled with no admission of liability. Although purportedly received to show "knowledge and intent," the Government improperly used this evidence to argue propensity. That evidence and the way it was used was the error upon which this Court reversed Bailey's first conviction. *Bailey, id*.

In *Bailey II*, the Government once again moved to receive, *in limine*, uncharged acts of misconduct. CR 176; DER 42-52. Having been burned by its erroneous offer and use of "uncharged misconduct" in *Bailey I*, the Government tried to disguise this uncharged misconduct by calling it "additional transactions." These "additional transactions" were once again offered as bearing on "knowledge and intent." The evidence was additional stock transactions between Bailey and co-schemer Stephen Owens between July 2002 and March, 2005. The Government sought to rely upon TEX 39, DER 5-3-507; CR 176; DER 46. This was an itemized list of stock transactions, prepared in anticipation of litigation by Bailey's bookkeeper, and obtained by the government at an SEC deposition of Mr. Bailey during

2006. RT 6/12/13: 168-170, 172, 180; DER 361-363, 365, 373. It purported to show, as the Government asserted, that Bailey paid Owens $2 million of stock between July 2002 and March 2005, most of which was uncharged misconduct. (TEX 39 was Exhibit 122 in Bailey's SEC deposition).

However, in *Bailey II* the Government offered the evidence under alternate theories. The uncharged misconduct was offered either as direct evidence of intent; or, in the alternative, as uncharged misconduct under Rule 404 (b). If it is the latter, it is subject to scrutiny under Rules 404 (b) and 403, and a limiting instruction would be required. Of course, these two theories are mutually exclusive. It can be one or the other, but it cannot be both. As Defendant argued below, the Government was once again seeking to use the uncharged misconduct to improperly show "propensity," albeit it was trying to disguise it better than during *Bailey I*.

Defendant opposed receipt of this evidence under both theories. CR 180; DER 53-61. More importantly, Defendant fully briefed the Court on the fact that this Court has previously condemned conflating these two theories of admissibility, holding that receiving the evidence under both theories is "clearly prejudicial." *U.S. v. Mayans*, 17 F.3d 1174, 1183-1184 (9th Cir. 1994).

The Court was briefed and heard argument and then allowed the evidence in. It did not even require an evidentiary foundation for Exhibit 39. We submit the record shows the trial court failed to conduct the required balancing analysis under Rules 401, 403 and 404 (b), Fed. R. Ev. *Mayans, supra*; *U.S. v. Bibo-Rodriguez*, 922 F.2d 1398 (9th Cir. 1991). Worse, the trial court failed to articulate under which prosecution theory it was receiving the uncharged misconduct. Instead, after expressing concerns the Government was inviting error, the Court simply ruled, "But I am going to

let it in." (RT 6/3/13: 23; DER 89). (*See* further discussion and transcript references in discussion below).

By failing to conduct the requisite balancing before receiving this uncharged misconduct, the trial court committed the same error it committed in *Bailey I*. And by allowing the Government to conflate two irreconcilable theories of admissibility, it committed the same error as in *Mayans, supra*.

The erroneous receipt of this evidence was exacerbated by the Court's jury instruction on the critical evidence in the case. This was not a *malum in se crime*, but *malum prohibitum*. Thus, the definition of the required mental state was important. The trial court used a definition of the word "willfully" that allowed Bailey to be convicted without knowledge his conduct was unlawful. Also, the instruction was confusing and contradictory. (*See* further discussion below).

III.

JURISDICTION, TIMELINESS AND BAIL STATUS

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291. The district court entered its final judgment of conviction on September 23, 2013. Mr. Bailey filed a timely notice of appeal on September 27, 2013. Mr. Bailey was denied bail on appeal by the trial court following both convictions. Thus, he has served the entirety of the 30-month sentence imposed, and is currently on supervised release. Co-defendant Ternes abandoned the appeal of his conviction in *Bailey I* as part of a plea agreement in an unrelated case.

IV.

STATEMENT OF FACTS

The facts elicited at trial are essentially the same as those brought forth in *Bailey I*. They are summarized and detailed in this Court's decision in *Bailey*, 694 F.3d 794, at 796-798. The stock and financial transactions on which the charges are based are not in dispute. They are well documented through various SEC filings and business and financial records. The Indictment alleges two violations of SEC Rule S-8, use of interstate transportation to sell stock that was not registered. The defendant contends the very same transactions, and the surrounding facts, reflect his belief that he was in compliance with the rules, although the business ventures in issue did not turn out as well as hoped.

Bailey was the founder and CEO of Gateway Distributors ("Gateway"), a Nevada corporation. Its business included the multi-level marketing of primarily health and nutritional products through its primary subsidiary, The Right Solution Gateway ("RSG"). Gateway's stock was at all times a "penny stock," valued at less than a penny a share, and traded on the over-the-counter bulletin board.

During April and May, 2004, Bailey issued stock to Owens in exchange for consulting services, both present and anticipated in the future. Owens promptly sold the stock and invested some (not all) of the proceeds in real estate with Bailey (Aspen Cove and Pepper Lane). The Government claimed he was simply a conduit, a "straw man" who immediately returned part of the funds in that manner.

However, the facts show otherwise. Upon receipt, the stock was income reportable on Owen's taxes. It was his property. As such, he was

free to spend it however he wanted, including investing some of it in real estate with Bailey, which is what he chose to do. In fact, Owens later pled guilty, and was convicted, of failing to report stock from Gateway as income on his federal tax returns; and he was prosecuted by the very same office that prosecuted this case. RT 6/12/13:114-115; DER 307-308. Thus, he clearly was not simply a straw man or conduit as the Government claims.

During the summer of 2004, the Bailey/Owens relationship worsened for a variety of reasons, and by the end of the year, the two men decided to unravel their financial relationship. Owens was given a small residential property in Las Vegas in exchange of his ownership interests in Aspen Cove and Pepper Lane. TEX 110; DER 502.

V.

ARGUMENT

A. Standards of Review

1. This Court reviews *de novo* the issue of whether evidence relates to "other crimes" under Fed. R. Ev. 404 (b). *U.S. v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994). The decision to admit evidence under Rule 404 (b) is reviewed for abuse of discretion. *U.S. v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993), as is the issue of whether evidence is supported by a proper foundation. *U.S. v. Christophe*, 833 F.2d 1296, 1300 (9th Cir. 1987).

2. The correctness of an instruction on the definition of legal terms is reviewed *de novo*. *U.S. v. Arvin*, 900 F.2d 1385, 1390-92 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 672 (1991). Since they are questions of law, the same is true as to whether a particular charge or an instruction is

required. *U.S. v. Sotelo-Murillo*, 887 F.2d 176 (9th Cir. 1989); *U.S. v. Anguiano*, 873 F.2d 1314, 1317 (9th Cir. 1999).

B. The Trial Court Erroneously Received Evidence of Uncharged Misconduct, Allowed the Government to Conflate Mutually Exclusive Theories of Admissibility; and Failed to Properly Instruct the Jury Under Rule 404 (b), Fed. R. Ev.

The evidence from both trials shows clearly that the prosecution was determined to use evidence of uncharged misconduct to convict Mr. Bailey. The prosecution was so determined that when it argued the admissibility in *Bailey II*, it completely contradicted its own position from *Bailey I*. The reason the prosecution was so desperate to have the jury hear of uncharged misconduct is also clear. Bailey was charged with a violation of one of the SEC's technical rules; and the evidence against him was not strong. As this Court said in *Bailey I*:

> " . . . the Government's case against Bailey was weak. . . The record reveals this was a close case. There was considerable evidence supporting Bailey's defense. The Government's case turned entirely on [co-schemer] Owen's testimony; he had obvious credibility issues. Improperly admitted evidence, intended to show Bailey had broken the law before and knew it, could have tipped the jury in the government's favor." *Bailey*, *supra*, at 805.

This was the same situation the prosecution faced as it approached trial in *Bailey II*. It could no longer use the SEC civil Complaint it had used so effectively (and prejudicially) in *Bailey I*. So it resorted to a different strategy. It filed an *in limine* motion offering evidence of "additional

transactions" either under Rule 404 (b) or as direct evidence of the crime charged. CR 176; DER 42-51. The Government sought to rely on TEX: 39: DER 503-507. This is a spreadsheet prepared by Bailey's bookkeeper in anticipation of his SEC deposition. He testified in an SEC deposition, portions of which were received in evidence, that he believed it contained inaccuracies. The Government claimed TEX 39 proved Owens received over $2 million worth of Gateway stock, as purported, but phony, consulting fees, from July 2002 through March 2005. This included some of the stock alleged in Counts One and Two.

At oral argument on the government's motion *in limine* to receive evidence of uncharged misconduct, the Government insisted that it needed to prove that Bailey paid Owens $280,000 worth of stock in August of 2002. This was two years before the charged transactions, and clearly outside of the time period alleged in the Indictment. The Government said it was not going to prove up the $2 million paid to Gateway, as evidenced by Exhibit 39. It only wanted to prove the payment of $280,000 in August 2002:

> "[The prosecutor]: Your Honor, just to be clear about something, during the period that this was going on, which was roughly late 2002, 2005, Gateway paid Mr. Owens over $2 million worth of stock. We are not getting into this, but we do need to show the 280,000. And the reason and it is not remotely comparable to introducing an SEC regulatory complaint. It is not remotely comparable." RT 6/3/13: 20, lines 13-19; DER 86. (Underscoring added).

The Government claimed this was "very important" to its case. (*See* further quotes below). The Court granted the motion *in limine*, and agreed to receive Exhibit 39. So the jury was fully aware of the $2 million in stock

(from 2002-2005) that the Government promised *in limine* it was "not getting into."

As proof that irony is not dead, the 2002 transactions (so "very important") in *Bailey II* is the identical evidence the Government in *Bailey I* insisted was irrelevant. It came about when Bailey offered a consulting agreement between Owens and Bailey in August of 2002 (the agreement under which the questioned $280,000 was paid). It was offered through the testimony of an FBI agent as impeachment of Owens, who had previously claimed to the FBI he had no consulting agreement with Bailey. Here is what the AUSA had to say in *Bailey I* about the relation between the events of 2002 and the two transactions in 2004 that are Counts One and Two:

> "It has nothing to do with the conduct in 2004, either in terms of time. This contract [the 2002 consulting agreement] was done. And it has nothing to do with the specific alleged consulting at issue here which had to do with the two properties here."[referring to Aspen Cove and Pepper Lane in 2004].
>
> RT 10/26/10:119, lines 10-13; DER 510. (Underscoring added)

Clearly, the 2002 evidence in Bailey I that had "nothing to do" with the charged offenses in 2004 became "very important" in *Bailey II*. We submit it is because the conviction in *Bailey I* was reversed. Facing retrial with a still weak and closely contested case, the prosecutor once again turned to uncharged misconduct to persuade the jury to convict.

The trial court appeared to see the Government was inviting error. It initially resisted the Government's motion to receive uncharged acts of misconduct:

> "This looks like this is attempting to open up the door to what got us in trouble with the Ninth Circuit to begin with. (RT

> 6/3/13: 9, lines 17-19; DER 75) . . . Aside from the fact that this is kind of an ambush, all right, in my opinion, you are not streamlining it." (RT 6/5/14: 13, lines 9-11; DER 79). . . Don't you feel – aren't there little lights going off in the back of your head when you start venturing to time periods outside the indictment? Don't you see this heading back to Pasadena again?" (RT 6/3/13: 13, lines 16-19; DER 79).

However, once the prosecutor explained how this evidence – which the AUSA argued was irrelevant in *Bailey I* – was so "very important" to prove its case and gain a conviction in *Bailey II* – the Court suddenly changed its mind; and held simply, "But, I am going to let it in." (RT 6/3/14: 23; DER 89). The Court made this ruling although the trial record reflects no apparent effort to conduct the requisite balancing analysis under Rules 401, 403 and 404 (b).

In *Bailey I*, the prosecution misled the trial court as to the reasons – and the use it would make – of the uncharged conduct the Court received. That resulted in a reversal. The prosecutor in *Bailey II* did the same thing. She convinced the trial court, in spite of his initial skepticism, that she needed to connect an uncharged $280,000 transaction in August 2002 with the two charged transactions in April and May of 2004. She persuaded the Court with vigorous argument how "very important" this was to gain a conviction:

> "The reason we need to show that Mr. Owens was paid. The $280,000 [in 2002] in stock is that during the time period. When Mr. Owen's company and Gateway are on title to the property, Mr. Owens, surprise, pays Gateway $280,000. Gateway papered it over with invoices adding up to amounts

> that Mr. Owens was paying him to make it look like that $280,000 was payment for their joint ownership of the property, reimbursing him for mortgage and operating costs and whatnot. We absolutely – I mean I feel this is very important." (RT 6/3/13: 20-21; DER 86-87). (Emphasis added).
>
> "I just want to be able to show that the 280 that Mr. Owens paid to Gateway purportedly for joint ownership expenses is actually the proceeds of other Gateway stocks . . . ." RT 6/3/13: 21, lines 11-14; DER 87.

Apparently forgotten – or perhaps ignored – was the prosecution position in *Bailey I* that the 2002 transactions had nothing to do with those in 2004.

The prosecution convinced the trial court to receive this uncharged misconduct because it was "very important" to its case to connect the dots between the uncharged $280,000 transaction in 2002, and payments made by Owens in 2004. Thus, we think this Court would probably assume that the trial record would reflect some questioning and argument about that subject. But the Court would be wrong. The record is void of any such questions and answers that were so "very important" before trial, when urging admission of uncharged misconduct outside the period of the indictment.

The Government's key witness, Stephen Owens was the obvious person to connect the dots and explain the connection (if there was one). He was not asked a single question about connecting those two events. RT 6/12/13: 64-84; DER 257-277. The investigating case agent, FBI SA Schofield, who testified as a quasi-expert summary witness, was asked not a single question about it. RT 6/11/13: 43-71, DER 144-172 and RT 6/12.13: 4-43; DER 197-236.

We assume this Court would think the trial record would reflect some argument from Government counsel about something so "very important" to her case. Once again, the Court would be wrong. The prosecution's closing argument, as well as its rebuttal, reflects not a single word about the supposed connection between those two transactions. Once the Court was persuaded to receive evidence of uncharged acts of misconduct, with no limiting instruction, it was no longer necessary to tell the jury why it was so "very important." RT 6/13/13: 58-70; 89-94; DER 457-469, 488-493.

Instead, the prosecution was content to show the jury TEX 39 (the document the Court ruled it would allow in pre-trial), reflecting the $2 million in transactions between 2002 and 2005. And to argue to the jury that Bailey's payments of stock to Owens was like a "printing press," turning stock into money. RT 6/13/13: 58-59; 61, 62; DER 458-459,461, 491. The essence of the prosecutor's argument was to overwhelm the jury with the volume of evidence, completely blurring that which was charged and that which was uncharged. This was simply a different version of what happened in *Bailey I.*

And this is the crux of the problem. The prosecutor said it only wanted to show the connection between 2002 ($280,000) and the 2004 charges, but all it did was emphasize the large amount of transactions between Owens and Bailey from 2002-2005. This is the propensity argument, not so thinly disguised, to the jury. The $280,000 from 2002 and 2004 were never "connected," as was promised *in limine.* This was the false premise used to convince the Court to receive the uncharged misconduct.

We submit, therefore, that this prosecutor did the same thing as the prosecutor in *Bailey I.* She persuaded the Court to receive uncharged evidence of similar conduct so the jury would be aware of it, and draw the

obvious conclusion that the prosecutor could not say without violating the law: it was propensity evidence. Since Mr. Bailey did it so many other times, it is more likely he did it again. And to accomplish that, she had to show a large volume of transactions, even if uncharged, between the two men.

However, by conflating its theory of admissibility, the Government (and the Court) violated the teaching of *Mayans, supra*. There, the Court received uncharged similar evidence under alternative theories: either direct evidence of the crime or as uncharged misconduct under Rule 404 (b). Like this court, the *Mayans* court received it without identifying which theory justified its admission. RT 6/3/13, p. 23. Here is what the *Mayans* court had to say:

> "The fact that the prior acts evidence was admitted under a faulty overt act theory and a Rule 404 (b) theory was clearly prejudicial to appellant. Because the disputed testimony was offered under the overt act theory as direct evidence of wrong-doing, appellant was unable to request the limiting instruction to which he would have otherwise been entitled – that is, an instruction that the testimony was to be considered only to prove knowledge or intent [the same rationale the prosecutor used here]. In other words, the effect of the government's conflation of evidentiary theories was that the jury was allowed to use the Rule 404 (b) evidence in precisely the way in which such evidence should never be used: to convict appellant of the uncharged acts themselves." *Mayans*, at 1183-1184.

C. The Trial Court Erred When it Instructed the Jury as to the Meaning of the Word "Willfully;" That is, That the Defendant Did Not Have to Know His Conduct was Unlawful, but Merely Had to Know it Was "Wrongful."

The prohibited conduct charged in the indictment is that the defendant "willfully" used the means and instruments of transportation and communication in interstate commerce and the mails to sell Gateway securities when no registration statement was filed and in effect with the SEC. Indictment: 4-5, DER 4-5. The case turned on the issue of intent; more specifically, the word "willfully."

The financial, real estate and banking transactions were all very well documented. Everyone agreed they happened. The Government claimed it was fraud from the outset. Bailey's defense was that the stock sales were legitimately in exchange for bona fide services (past and future). The case turned on the issue of intent. So it was critical for the jury to have a clear understanding of the meaning of the word "willfully."

The Supreme Court has held that the word "willfully" is a word of many meanings, and its construction is often influenced by its context. *Ratzlaf v. U.S.*, 510 U.S. 135, 141 (1994). At the risk of over-simplifying, the more remote the crime is from *malum in se*, the more knowledge must be proven as to the unlawful nature of the act. *Ratzlaf, supra*.

1. The Definition of "Willfully" Was Incorrect and Prejudicial.

This is the instruction given to the jury:

"A person acts willfully under the federal securities laws by intentionally undertaking an act that one knows to be wrongful.

> Willfully does not require that the person know specifically that the conduct was unlawful." (RT, 6/13/13: 54, lines 11-15; DER 453.

This instruction was based on *U.S v. Tarallo*, 380 F.3d 1174 (9th Cir. 2004). But that case is inapposite. That was a prosecution under the books and records statute, which involved making false entries, a crime that is *malum in se*. 15 U.S.C. § 78j (B) and 78ff. To the same effect is *U.S. v. Reyes*, 577 F.3d 1069 (9th Cir. 2009). *Reyes*, too, was a *malum in se* prosecution for falsifying books and records and making false statements to auditors. The inherent illegality of a false statement is the rationale for a lesser *mens rea* standard.

By contrast, there is no inherent illegality in this case; rather, it is *malum prohibitum*. The gravamen of this charge is the use of the means of interstate transportation to distribute stock when no registration statement was in effect. *See* Indictment, DER 1-5. There is nothing *malum* in se about that charge. Thus, the charge here should be dictated by the Supreme Court decision in *Ratzlaf v. U.S.*, 510 U.S. 135 (1994). That case requires the jury be instructed that the defendant must be proven to know he was violating the law. We proposed that the Court give the jury the following instruction that would require the defendant know he was violating the law. It is taken from *U.S. v. Pompiano*, 429 U.S. 10 (1976); and *Cheek v. U.S.*, 498 U.S. 192, 201 (1991):

> "An act is done "willfully" if done voluntarily and intentionally with the purpose of avoiding a known legal duty."

This was important to Bailey's defense and his theory of defense; that is, he was familiar with Rule S-8 but believed he was in compliance with it. This request was denied. RT 6/13/13: 39-40; DER 438-439.

The objection was preserved for the record under Rule 30, FRCrP. RT 6/13/13:43-44; DER 442-443.

2. The Definition of "Willfully" is Contradictory and Confusing

On its face, the definition of "willfully" given by the Court is circular, contradictory and confusing. That is because it says the defendant only needs to know his conduct was "wrongful;" he need not know it was "unlawful." What is a juror to make of the word "wrongful," without some further definition? Appellant asked for a further definition but the request was denied. RT 6/13/13: 40; CR 192; DER 62-66.

One dictionary definition of the word "wrongful" is the word "unlawful," or "illegal." *See* Webster's Dictionary of the English Language, Unabridged, Encyclopedic Edition (1977); Random House Dictionary of the English Language, Unabridged Edition; Oxford Dictionary and Thesaurus; Roget's International Thesaurus, 4th Edition, Complete and Unabridged; and the WorldWeb Dictionary (on line).

Thus, the instruction circles back on itself. What the instruction really says is that the defendant need not know his conduct was unlawful. He only needs to know it is "wrongful;" that is, "unlawful." How can this be? The jury was given a definition that is completely contradictory. But what surely stuck in the jury's mind was the statement that the defendant need not know his conduct is unlawful. This is both wrong and unfair. An instruction that contradicts itself, by definition, is hopelessly confusing and should not be given. This issue was fully briefed and argued to the Court to no avail. CR192; DER 62-66.

3. The Trial Court declined to Give two Instructions that Might have Clarified and Cured the Faulty Jury Instruction

Appellant argued to the trial court that the definition of "wrongful" is the word "unlawful." We believed this would necessarily cause confusion in the jury. Thus, we asked the Court – at a minimum – to provide the jury with an alternate definition of the word "wrongful." CR 192; DER 63. Since the Court's view was that the defendant need only know his conduct was wrongful, then it was essential to tell the jury what the word "wrongful" meant. It was critical for the jury to focus on the defendant's lack of criminal intent. The trial Court declined the request. RT 6/13/13: 39-40; DER 438-439. As an alternative, we urged the Court to give the jury a "good faith" instruction, taken from the Ninth Circuit Model Jury Instruction 9.42:

> "A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that he was complying with the law." CR 192; DER 64, 66.

This would have addressed the Defendant's right to have his theory of the defense included in the jury instructions. The Court also declined to give this instruction. This could have only left the jury confused given the circular nature of the definition of "willfully" given by the Court, all to the prejudice of the defendant.

VI.

CONCLUSION

In both trials, the prosecution was presented with a weak and closely contested case. In *Bailey I* the prosecution misrepresented its purpose in offering "other acts" evidence, and then used it to argue "propensity." Not wanting to commit the same error in *Bailey II*, the prosecution again offered "other acts" evidence, poorly disguised as "additional transactions." The trial court at first appeared to see the problem, and even called it an "ambush." However, after the prosecution explained it was "very important" to the Government case, the Court again received the uncharged conduct. As in *Bailey I*, the prosecutor again unduly emphasized to the jury the other acts evidence as showing the defendant did it multiple times, i.e., "propensity," to the great prejudice of the defendant. As in *Bailey I*, this easily could have tipped the scales unfairly. We believe it did.

The trial court compounded its error by defining the key mental element as not requiring proof the defendant knew he violated a known legal duty; rather, the jury could convict so long as the defendant knew his conduct was "wrongful." Wrongful to whom? Wrongful in what sense? The dictionary definition of "wrongful" is "unlawful." But the Court refused to provide a definition of "wrongful." It could have alleviated the prejudice to the defendant if it had given the good faith instruction requested, which was critical to Appellant's theory of defense. But the Court denied that request as well. Thus, the instructions given by the court were erroneous and could not cure the prejudice to the defendant.

Wherefore, for the foregoing reasons, this court should reverse the judgment of conviction.

Dated: February 25, 2014

Law Offices of Stanley I. Greenberg

By: /s/ Stanley I. Greenberg

Stanley I. Greenberg, Esq.
Attorney for Appellant
Richard Bailey

STATEMENT OF RELATED CASES

This case is related to *U.S. v. Bailey*, 696 F.3d 794 (9th Cir. 2012).

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 5,067 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* _____ *(state font size and name of type style)* _____, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____.

Signature /s/ Stanley I. Greenberg

Attorney for Richard A. Bailey

Date February 25, 2014

9th Circuit Case Number(s) 13504-67

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) February 25, 2014 .

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

Signature (use "s/" format) /s/ Stanley I. Greenberg

****

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

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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

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

Signature (use "s/" format)