IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MONTEZ SALAMASINA OTTLEY, Defendant-Appellant.	))))))))))	C.A. NO. 04-10151 D.C. NO. 00-00126-MLR (District of Hawai'i) DEFENDANT-APPELLANT'S OPENING BRIEF; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE.

DEFENDANT-APPELLANT
MONTEZ SALAMASINA OTTLEY'S OPENING BRIEF;
CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

The Honorable Manuel L. Real,
United States District Judge

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JURISDICTIONAL STATEMENT

This appeal stems from the retrial in the United States District Court Hawai'i ("district court" or "court") on reversal and remand from this Court of a case involving an alleged fraudulent investment scheme. [*See*, ER, 490; United States District Court Docket ("USDC") No. 553]. The district court had jurisdiction of this matter under 18 United States Code ("U.S.C.") § 3231. The United States Court of Appeals for the Ninth Circuit has jurisdiction on appeal pursuant to 28 U.S.C. § 1291 because this is an appeal from a final judgment. That final judgment, the "Judgment in a Criminal Case", was imposed on February 23, 2004, and filed on March 8, 2004, in the district court on March 8, 2004, against the defendant-appellant Montez Salamasina Ottley ("Ottley") after a 4-day bench trial. [Excerpts of Record, ("ER") 361].

This appeal is timely. On February 23, 2004, the district court imposed judgment and sentence. [ER II[1] 335 - 356]. On March 8, 2004, the court entered the Judgment in a Criminal Case. [ER II 361]. On March 10, 2004, Ottley's standby counsel filed the Notice of Appeal on her behalf. [ER II 357].

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[1] The Excerpts of Record have been filed in two volumes. References in this Opening Brief to "ER I" refer to Volume I of II of the Excerpts of Record. References to "ER II" refer to Volume II of II.

STATEMENT OF ISSUES PRESENTED

A. Whether the District Court Violated Ottley's Due Process Right under the 14th Amendment by Failing to Conduct a Competency Hearing in the Face of Overwhelming Evidence Showing That She Lacked the Competence to Stand Trial?

B. Whether the District Court Violated Ottley's Rights under the Sixth Amendment by Permitting her to Waive the Right to Counsel and to Waive the Right to a Jury Trial, While the Record Clearly Showed That Ottley Was Not Competent to Stand Trial?

C. Whether the Trial Judge Should Have Recused Himself Inasmuch as the Record Demonstrates the Court's Pervasive Bias Against Ottley as to Make Fair Judgment Impossible?

D. Whether the Upward Adjustments to Ottley's Sentence under the Sentencing Guidelines Absent Any Support in the Court's Findings of Fact and Conclusions of Law Violate Ottley's Rights as Set Forth under the Holdings of Apprendi v. New Jersey and Blakely v. Washington?

STATEMENT OF THE CASE

On March 29, 2000, the plaintiff- appellee, the United States of America ("Government") filed a 100-count Indictment in district court against Ottley and co-defendant Helen Schlapak concerning an alleged fraudulent investment scheme. [ER II 412; USDC No. 1]. On June 13, 2001, the Government filed a 95-count Superceding Indictment against Ottley and co-defendant Helen Schlapak. [ER I 1 - 35]. Helen Schlapak is a fugitive. [Presentence Investigation Report ("PSR")[2], p. 4]. On August 9, 2001, the court (the Honorable Helen Gillmor, presiding) ordered a psychiatric examination to determine Ottley's mental competency to stand trial. [ER II 455; USDC No. 318]. Based upon a doctor's report, on October 1, 2001, Judge Gillmor deemed Ottley competent to stand trial and to make the decision to represent herself. [ER II 459-461; USDC No. 346, 382].

On November 2, 2001, the court reassigned the case to the Honorable Manuel L. Real. [ER II 463; USDC No. 360]. November 16, 2001, the court directed the Government to 'sever' the Superseding Indictment and choose 15 counts on which to proceed to trial. [ER II 464; USDC No. 376]. On December

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[2] Pursuant to Ninth Circuit Rule 30-1.9, the Presentence Investigation Report has been filed separately and under seal with this Court.

27, 2001, the court (the Honorable Manuel L. Real, now presiding) determined that Ottley was not competent to represent herself at trial and appointed trial counsel to represent her. [ER II 467; USDC No. 399].

On February 22, 2002, a jury found Ottley guilty of Counts 1 to 14, and read a special forfeiture verdict as to Count 15. [ER II 473; USDC No. 440, 441]. On June 18, 2002, the court imposed punishment which included 323 months' imprisonment, and restitution in the amount of $66,356,127. [ER II 479-480; USDC No. 492].

On May 12, 2003, this Court reversed and remanded the judgment and sentence for a new trial on the ground that the district court violated Ottley's Sixth Amendment rights under Faretta v. California, 422 U.S. 806 (1975), to represent herself. [ER I 36 - 39]. This Court specifically noted that it was not addressing Ottley's additional contention on appeal that her sentence violated the Double Jeopardy Clause because it constituted multiple punishments for the same offense. "However, should the same charges be brought on retrial, we refer the parties to our decision in United States v. Montgomery, 150 F.3d 983, 989-91 (9th Cir. 1998), concerning the issue of whether a single conspiracy has been improperly charged as multiple conspiracies." [ER I 38].

On reversal and remand, on June 20, 2003, the district court held a hearing

for the purpose of spreading and filing the Ninth Circuit's judgment and to set a new trial date. [ER I 40 -54]. At this hearing, and as described in detail below in the Argument section, Ottley behaved in a highly irrational manner. [See, ER I 42, 46, 50]. On June 25, 2003, the Government filed a motion requesting the appointment of standby counsel on behalf of Ottley. [ER I 55 - 61]. In an order dated July 2, 2003, the district court stated:

> "This Court has experienced the tirades that defendant can engage in during hearings in court and has noted defendant's total disregard for proper decorum and adherence to the rules of court. **It is under the mandate of the Court of Appeals that this Court will permit defendant to represent herself.** [[3]] However to assure that Defendant will properly demean herself at trial and to help her properly prepare and conduct trial the Court appoints LYNN E. PANAGAKOS as standby counsel." [ER I 70 - 71].

On July 23, 2003, the Government file a motion to dismiss and modify counts in the Superceding Indictment, with the proposed Amended Superseding Indictment attached thereto. [ER I 72 - 104]. At the hearing on July 28, 2003, the district court granted the Government's motion to dismiss three counts and to amend one count - all against Ottley's objections. [ER I 109]. As a result of the court's ruling, the Government dismissed from the Superceding Indictment Counts 10, 11 and 14 [ER I 91 - 104] and modified Count 7. [ER I 85 - 89].

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[3] Unless otherwise stated, all **bolded text** in quotations has been added and are not a part of the original text.

The case proceeded on the amended Superceding Indictment as follows:

- Counts 1 to 3: Mail Fraud, in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2;
- Count 4 to 6, Wire Fraud, in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 2;
- Count 7, Conspiracy to Launder Monetary Instruments, in violation of 18 U.S.C. § 1956(h);
- Count 8, Money Laundering Promote, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 2;
- Count 9, Money Laundering Conceal and Disguise, in violation of 18 U.S.C. § 1956(a)(1)(B)(i), and 18 U.S.C. § 2;
- Count 10, Engaging in Monetary Transactions, in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2;
- Count 11, Structuring, in violation of 31 U.S.C. § 5324(a)(3) and (c)(2), 31 Code of Federal Regulations § 103.11, 18 U.S.C. § 2;
- Count 12, Forfeiture, in violation of 18 U.S.C. § 982(b), 18 U.S.C. § 982 and 18 U.S.C. § 1341 and § 1343. [ER I 76 - 104].

At the hearing on July 28, 2003, Ottley continued to behave in an irrational manner: she disputed the court's jurisdiction over the case and her person [ER I 116 - 117]; she stated that she had fired her standby counsel, and, otherwise, refused to take advice from the standby counsel [ER I 117]; despite having previously stated that she intended to represent herself, she now wanted to hire private legal counsel [ER I 119 - 122]. At a status conference on August 28, 2003,

Ottley claimed that she was not the defendant ("Montez Ottley appearing for the defendant Montez Ottley, the corporation" [ER I 127], and that the case was an admiralty case [ER I 128]. The court permitted Ottley to represent herself, and set September 29, 2003, as the new trial date. [ER I 129].

On September 10, 2003, the Government filed a Motion on Waiver of Counsel, whereby the Government requested:

> "notification to Ottley on the dangers of self-representation, as outlined in United States v. Hayes, 2000 WL 1638540 (9th Cir. Hawaii). In United States v. Hayes, . . . the court held that, 'We generally find that a proper waiver has occurred only when the defendant has been made aware of the three elements of self-representation: he must be made aware of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation." [ER I 130.4].

The district court failed to schedule a hearing on the Government's motion. Rather, on the first day of trial, September 29, 2003, the court briefly lectured Ottley as to the nature of the proceedings: "This is not a civil action. This is a criminal action in which you are accused and which you have chosen to represent yourself." [ER I 134]. Ottley responded, *inter alia*, by telling the court that God was the only judge in the courtroom. [ER I 137].

Thereafter, the court shifted its focus to Ottley's waiver of her right to a trial by jury. [ER I 130.9; 137 - 155]. After signing the Waiver of Trial by Jury [ER I 130.9], the trial commenced with the Government's first witness, and with Ottley

defending herself. The trial continued on September 30, October 1, and October 2, 2003. On October 1, 2003, the Government rested. [ER I 198]. When the court asked Ottley if she would be calling any witnesses, she responded, "there's only one witness, and, as you said, he can't be called because he resides up in the heavens, who is God. He's my only witness." [ER I 198]. Thereafter she rested the defense case. [ER I 199].

On October 2, 2003, Ottley permitted her standby counsel to move for a judgment of acquittal, which motion the court denied. [ER I 202 - 203]. Ottley waived her right to testify in her own defense. [ER I 211]. The case was submitted to the court. [ER I 234].

At a hearing on December 15, 2003, and in accordance with the Findings of Fact and Conclusions of Law filed on the same date [ER I 237 - 288; ER II 289 - 314], the court found Ottley guilty of all counts in the amended Superceding Indictment, and that Ottley forfeited to the Government all proceeds listed in Count 12. [ER I 237 - ER II 314; ER II 315 - 327; ER II 328 - 329].

On January 20, 2004, the United States Department of Probation ("Probation") submitted a draft PSR which it revised on February 6, 2004. (*See*, PSR). Pursuant to the United States Sentencing Guidelines ("U.S.S.G.") and specifically, the 'grouping guidelines' under U.S.S.G. § 3D1.2(b), § 3D1.3(a), §

3D1.2(c) and § 3D1.3(a), Probation used Count 7, Conspiracy to Launder Monetary Instruments, for the guideline computations. [PSR ¶ 53, ¶ 54, ¶ 55, ¶ 56].

For offenses involving violations of 18 U.S.C. § 1956(a)(1)(A), Probation found a base offense level of 23 pursuant to U.S.S.G. § 2S1.1(a)(1). [PSR ¶ 57]. To the base offense level of 23, Probation applied the offense characteristic adjustments, adding nine (9) levels pursuant to U.S.S.G. § 2S1.1(b)(2)(J), which guideline applied if the laundered funds were more than $10 million but not more than $20 million. [PSR ¶ 58].

As to upward adjustments based on other behavior, Probation added four (4) levels pursuant to U.S.S.G. § 3B1.1(a) on the ground that the evidence showed that Ottley was an organizer or leader of the alleged criminal activity [PSR ¶ 60]; and it added another two (2) levels pursuant to U.S.S.G. § 3C1.1 on the ground that Ottley obstructed or impeded the administration of justice. [PSR ¶ 61]. The total offense level was calculated at 38. [PSR ¶ 64]. Ottley's criminal history points were 0, establishing a criminal history category of I. [PSR ¶ 69].

Based on the total offense level of 38 and a criminal history category of I, the guideline range for imprisonment was 235 to 293 months, pursuant to U.S.S.G. Chapter Five, Part A. [PSR ¶ 95]. The guideline range for supervised release was

at least two years and no more than three years, pursuant to U.S.S.G. § 5D1.2. [PSR ¶ 99]. As to restitution, Probation determined that the same was required pursuant to 18 U.S.C. § 3663A, in the amount of $66,356,127. [PSR ¶109].

The Addendum to the PSR noted that Ottley refused delivery of the draft copy of the PSR at the Federal Detention Center, Honolulu, where she was incarcerated at the time. [PSR, p. 1A, Addendum]. The Government did not object to the PSR draft. [PSR, p. 1A]. On or about February 6, 2004, Probation submitted the revised PSR. On February 18, 2004, Ottley filed a "Verified Non-Negotiable Objection/Memorandum to Presentence Investigation Report . . . " [ER II 330 - 334]. In this filing, Ottley maintained " . . . nor am I the Defendant", but that the defendant was a "non-domestic corporate entity". [ER II 331]. Ottley sought, among other things, to order the court to terminate the proceedings against her and release her from incarceration, on the authority that the court had no jurisdiction over her: "A Sovereign cannot be sued in her court." [ER II 332].

At a hearing on February 23, 2004, the court imposed punishment in accordance with the revised PSR. [ER II 352 - 355]. On March 3, 2004, Lynn Panagakos, Ottley's standby counsel, filed a notice of appeal on Ottley's behalf. [ER II 357 - 360]. On March 8, 2004, the court entered the Judgment in a Criminal Case against Ottley. [ER II 361 - 367]. By order of this Court dated

March 25, 2004, this opening brief and excerpts of record are due on or before July 12, 2004. [ER II 510].

BAIL STATUS

Ottley is currently serving the custodial portion of her sentence at Dublin, FCI, located at 5701 8th Street, Camp Parks, Dublin, California, 94568. According to the Federal Bureau of Prisons' website (www.bop.gov) her projected date of release is October 18, 2018.

STATEMENT OF RELEVANT FACTS

This appeal focuses on the district court's failure to follow criminal procedural safeguards required under the U.S. Constitution during the remand proceedings, and the application of Blakely v. Washington, 2004 WL 1402697, to Ottley's sentence. A detailed description of the underlying facts is, therefore, not necessary to present these issues to the Court. Ottley provides the following synopsis of the underlying facts drawn from the PSR, ¶¶ 26 - 44.

The case involved an alleged ponzi scheme from 1997 to 1998 in which investors' money was used to pay the promised return. The scheme existed between the originators, sales representatives, group leaders and escrow company

manager. The investors were solicited to invest in a fictitious program called the Cayman Island Investment Program ("CIIP"). Investors were promised an eight percent per week return on a minimum investment of $1,000 which they were required to leave in the program for 13 weeks. For each additional investor brought into the program, the sponsor would receive three percent of the new money invested as a referral fee.

The alleged scheme originated in Hawaii with Ottley and Paul Lazzaro, who was convicted and sentenced in a different case. (*See*, supra, Statement of Related Cases). The alleged scheme was run out of Ottley's Honolulu business, Pacific Travel Systems. Initially, investment and interest payments were made in cash. Eventually group leaders were designated to collect investment money and make interest payments. Sales representatives serviced the group leaders, coordinated money and interest payment distributions. The alleged scheme had investors in Hawai'i, American Samoa and the mainland United States. Given the geographic scope, the alleged scheme could no longer operate on a cash basis; wire transfers, money orders and cashier's checks were utilized to invest and make interest payments.

The alleged scheme operated on the premise that money invested by Friday would yield an interest payment the following Monday. The money invested on

Friday was used to make interest payments on Monday. Eventually local banks became suspicious of Ottley's financial transactions and closed her Pacific Travel Systems account. Steven Marn was brought into the alleged scheme to expedite the conversion of wire transfers and cashier's checks to cash, utilizing this escrow company, Fidelity Escrow. The Government alleged that Ottley, Lazzaro and others established numerous bank accounts and escrow accounts wherein investment monies could be concealed and utilized to promote the alleged scheme.

In July 1998 the alleged scheme began to unravel in Hawaii: newly invested funds were insufficient to make interest payments to investors. In August 1998 the Hawaii program closed; in October 1998 the U.S. and American Samoa programs closed.

SUMMARY OF THE ARGUMENT

A. The District Court Violated Ottley's Due Process Right under the 14th Amendment by Failing to Conduct a Competency Hearing in the Face of Overwhelming Evidence Showing That She Lacked the Mental Competence to Stand Trial.

The Due Process Clause of the Fourteenth Amendment [4] prohibits the criminal prosecution of a defendant who is not competent to stand trial, and the

[4] "... nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV.

state must provide procedures for determining the defendant's competence. Medina v. California, 505 U.S. 437, 449 (1992) (*citing* Drope v. Missouri, 420 U.S. 162, 172-73 (1975), *and* Pate v. Robinson, 383 U.S. 375, 386 (1966)). As argued fully below, Ottley submits that the district court erred in failing to provide a mental competency hearing, in the face of overwhelming pre-trial evidence demonstrating 'bona fide doubt' as to a defendant's competence to stand trial. De Kaplany v. Enomoto, 540 F.2d 975, 979 (9th Cir. 1976) (en banc) Excerpts from the three pre-trial hearings and from the trial proceedings show that Ottley lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam).

B. The District Court Violated Ottley's Rights under the Sixth Amendment by Permitting Her to Waive the Right to Counsel and to Waive the Right to a Jury Trial, While the Record Clearly Showed That Ottley Was Not Mentally Competent to Stand Trial.

Ottley submits that should the Court find that she was not mentally competent to stand trial, then her waiver of her right to counsel was necessarily invalid. A waiver of the right to counsel must be knowing, intelligent, and

unequivocal. *See* United States v. Arlt, 41 F.3d 516, 519-20 (9th Cir. 1994); United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987). Excerpts from the record show that Ottley's waiver of her right to counsel could not have been knowing and intelligent given her behavior in court which revealed an inability to understand (1) the nature of the charges against her; (2) the possible penalties she faced if convicted; and (3) the dangers and disadvantages of self-representation. Balough, 820 F.2d at 1487.

Likewise, she argues that should the Court find that she was not competent to stand trial, then her waiver of her right to a trial by a jury was, as well, necessarily invalid. Criminal defendants may waive their constitutional right to a jury trial if the waiver is made in writing and has the approval of the government and of the court. Fed. R. Crim. P. 23(a). But the defendant must be competent to waive the jury right, and the waiver must in fact be voluntary, knowing, and intelligent. Patton v. United States, 281 U.S. 276, 312-13 (1930). Excerpts from pretrial and trial record demonstrate that Ottley's mental state was such as to eliminate the possibility that she could possibly have waived the right to a jury trial in a knowing or intelligent manner.

C. The Trial Judge Should Have Recused Himself Inasmuch as the Record Demonstrates the Court's Pervasive Bias Against Ottley as to Make Fair Judgment Impossible.

The standard for recusal is, "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (quotation omitted). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 554 (1994).

Ottley submits - as set forth fully below - that excerpts from pre-trial, trial and post-trial transcripts demonstrate Judge Real's deep-seated antagonism against her as to make fair judgment impossible.

D. The Upward Adjustments to Ottley's Sentence under the Sentencing Guidelines Absent Any Support in the Court's Findings of Fact and Conclusions of Law Violate Ottley's Rights as Set Forth under the Holdings of Apprendi v. New Jersey and Blakely v. Washington.

In Blakely v. Washington the Supreme Court recently wrote that:

> "Our precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may imposed *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . In

> other words, the relevant 'statutory maximum' is not the maximum sentence a judge may imposed after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment . . . and the judge exceeds his proper authority." 2004 WL 1402697, at *4 (italics in original).

As argued fully below, Ottley submits that Blakely, which concerned sentencing under the state of Washington's sentencing guidelines, applies to the federal sentencing guidelines. Further, where a case was tried before the bench, Blakely and Apprendi require that the maximum sentence the judge may impose must be reflected in the court's Findings of Fact and Conclusions of Law.

Here the PSR set forth three upward adjustments which took Ottley's base offense level from 23 to 38. The district court adopted and imposed these upward adjustments without any factual support in its Findings of Fact and Conclusions of Law. Ottley submits that these upward adjustments are contrary to the teachings of Apprendi and Blakely and must be reversed.

ARGUMENT

A. The District Court Violated Ottley's Due Process Right under the 14th Amendment by Failing to Conduct a Competency Hearing in the Face of Overwhelming Evidence Showing That She Lacked the Mental Competence to Stand Trial.

1. Standard of Review.

A district court's determination that a defendant is competent to stand trial is reviewed for clear error. *See* United States v. Timbana, 222 F.3d 688, 700 (9th Cir.), *cert. denied*, 531 U.S. 1028 (2000). On defendant's appeal the evidence relating to his competency must be considered in the light most favorable to the Government. United States v. Frank, 956 F.2d 872, 874 (9th Cir. 1991), *cert. denied,* 506 U.S. 932 (1992).

Here, Ottley did not request a competency hearing in the district court. Normally, non-preserved issues are reviewed under the plain error standard. Ottley submits that the district court's failure to conduct a competency hearing amounted to structural error which is per se prejudicial. Structural errors are:

> "'structural defects in the constitution of the trial mechanism, which defy analysis by `harmless-error' standards,' because they 'affect[ ] the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' [Citation and internal quotations and citation omitted]. Structural errors require automatic reversal, because 'the impact of the error

on the jury's performance of its duties cannot be reviewed."

United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996) (quotations and citation omitted), *amended by* 140 F.3d 1244 (9th Cir. 1998).

2. Discussion.

The Due Process Clause of the Fourteenth Amendment [5] prohibits the criminal prosecution of a defendant who is not competent to stand trial, and the state must provide procedures for determining the defendant's competence. Medina, 505 U.S. at 449. The due process issue here is not whether Ottley was competent, but whether she was entitled to a hearing to determine her competence. "[W]here the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the trial judge on his own motion must . . . conduct a hearing to determine competency to stand trial." De Kaplany, 540 F.2d at 979; (en banc); *see* Drope, 420 U.S. at 172-73; Pate, 383 U.S. at 385 (establishing right to hearing).

A bona fide doubt exists if there is "'substantial evidence of incompetence,'" AmayaRuiz v. Stewart, 121 F.3d 486, 489 (9th Cir. 1997) (*quoting* United States v. Lewis, 991 F.2d 524, 527 (9th Cir. 1993)), or substantial evidence that the defendant lacks "sufficient present ability to consult with his

[5] "... nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV.

lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402; *see also* Torres v. Prunty, 223 F.3d 1103, 1106 (9th Cir. 2000).

"Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence." Miles v. Stainer, 108 F.3d 1109, 1112 (9th Cir. 1997). While capacity for rational communication once mattered because it meant the ability to defend oneself, *see* Faretta, 422 U.S. at 823-26, it now means the ability to assist counsel in one's defense. *See* Cooper v. Oklahoma, 517 U.S. 348, 354 (1996). But whatever the rationale for the requirement, capacity to communicate remains a cornerstone of due process at trial. Rohan ex rel Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003). Section 4241(a), Title 18 of the U.S.C., [6] sets out a two-pronged approach to evaluating competency: Defendant must be able both (1) "to

[6] "At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a).

understand the nature and consequences of the proceedings against him" and (2) "to assist properly in his defense."

From her first appearance in court on remand, Ottley engaged in behavior clearly demonstrating to the court that she lacked a rational and factual understanding of the proceedings against her. At the June 20, 2003, hearing to spread and file the Ninth Circuit decision reversing and remanding the case, Ottley refused to acknowledge that she was the defendant facing serious criminal charges:

> "For the record, I am me, myself and I, Montez Salamasina Ottley, the creditor, the third-party intervenor on behalf of the defendant, the debtor, Montez Salamasina Ottley, appearing specially and not generally.
>
> THE COURT: Well, you're appearing generally because you've been –
>
> THE DEFENDANT: Objection, Your Honor. I'm appearing specially. **I am not the defendant, I am not the accused**." [ER I 41 - 42].

She spoke of the defendant/accused as a third-person, and insisted that she didn't need a lawyer - not because she would represent herself, but because divine intervention would provide legal counsel: "I have the power of attorney in fact for the defendant. . . . **I already have an attorney and that's my heavenly father**." [ER I 43].

When the court tried to explain that the Ninth Circuit had reversed and remanded the case for a new trial, and not to set Ottley free, she stated:

THE DEFENDANT: No, the Court of Appeals did not send me back, **my heavenly father sent me back here to face my accusers**, those who have borne false witness against me, those who have charged me and have not distinguished that **I am the live human being, I am the creditor, I am not the defendant**. And if you dare to go to trial, if you even dare to bring forth an indictment, then I hope you have everything mandated by the Constitution. I hope you have everything under penalty of perjury, because the second time around is not going to happen like the first time. **The Lord is going to end this -- this case real soon**. **You have violated me. You have raped me mentally. And do you think that the Lord is going to allow you to violate me again?** You've taken months away from me. You've made me a prisoner in your hell hole where you -- where you promote nothing but inequity and immorality and homosexuality. And you expect me to let you violate me again? Excuse me." [ER I 44- 46].

In an extended tirade, Ottley also stated:

"These are the laws, sir, these are the laws (indicating). You promote nothing but rules, regulations, statutes and color of laws. They look like laws, they sound like laws, but they are not laws. **These are the laws right here in the scriptures . . .**

THE COURT: Are you through?

THE DEFENDANT: No, I'm not through. . . . The Constitution is for all of you to obey. **I do not claim constitutional rights because the Constitution is not for me**, it's for you who have sworn an oath to the Constitution. And the Lord said in latter day scriptures, anything more or less than the constitutional laws of this land cometh of evil. And do you think he's going to allow you to move forward? **Do you even suspect that you're going to have a new trial? That you're going to reviolate me and rerape me? Please, no.** * * * Remember I told you, I wasn't going to spend 26 years in prison and I knew that from the day you sentenced me, **because you weren't sentencing me, you were sentencing the defendant, but you're making me pay for it. I am not the accused** . . .

THE COURT: You all through?

THE DEFENDANT: No, I'm not through, . . . I am firing Mr. Gronna [trial counsel appearing with Ottley on 6/20/03] and I will continue to fire anybody else that you want to put to represent the accused. **I am not here to contract with you. I am not here to negotiate.**

I am not here to plea bargain with you. I'm here to tell you that I'm going to walk out of here. The Ninth Circuit destroyed your jurisdiction. You have nothing, kaput." [ER I 46 - 50].

By the end of the hearing the court ordered officers to remove Ottley from the courtroom. [ER I 52]. These excerpts from the June 20, 2003 transcript, demonstrate that the district court should have had serious doubts as to Ottley's mental competence to stand trial. Her comments show an inability to understand that she was accused of serious offenses and that the case was criminal in nature. They show that she believed the case was civil and that she was a creditor of the Government. She failed to understand what laws would govern, believing that religious text - "[t]hese are the laws right here in the Scriptures" - was controlling. [ER I 46]. Moreover, she believed that divine providence would govern the outcome of the matter: "The Lord is going to end this . . . "; and, "Do you think that the Lord is going to let you violate me?" [ER I 45].

Back on October 1, 2001, the previous presiding judge, Helen Gillmor, found that Ottley was mentally competent to stand trial based upon a medical report. (ER II 461; USDC No. 346, 382). Judge Manuel Real made no

independent findings concerning Ottley's competence on remand to stand trial. Assuming for the sake of argument that he relied on Judge Gillmor's competency finding, this was an error. The trial judge must satisfy **himself** that the defendant is able to understand the proceedings against him and assist counsel in preparing his defense. *See* Drope, 420 U.S. at 172 (*citing* Dusky, 362 U.S. at 402). Every utterance Ottley made at the hearing on June 20, 2003 - (from her self-identification, "I am me, I, Montez Salamasina Ottley, the creditor, the third-intervenor on behalf of the defendant . . . " to her last exchange with the court, " . . . I filed a copyright on my name, Montez Salamasina Ottley. Will somebody please inform the district court . . . that he uses that name, there's a million dollar invoice being invoiced right at this very minute" [ER I 41; 49]) - begged the district court to order a competency hearing - but to no avail.

At the hearing on July 28, 2003, Ottley continued to maintain that she was not the defendant, and, therefore, she needn't defend herself in the case:

> "I showed up for that [first] trial, although that trial **wasn't about me** . . . And if you decide to go foreword with this case, **then I'm afraid I am just going to sit back, and I am going to let this court and the prosecution self-destruct,** because my faith and my religion is bigger than all of this." [ER I 121].

Like the June 20 hearing, Ottley again expressed her belief that divine providence, not the judiciary and the law, had governed the past proceedings and

would govern the new trial against her: "...that's what has brought me back here, sir * * * not the Ninth Circuit, not you. My Heavenly Father brought me back from Dublin." [ER I 121]. And, "I have no alternative to let the Lord take this case over, because this is no longer about Montez Ottley; this is about the United States versus God." [ER I 120].

Otherwise, Ottley stated that she would act as her own counsel and was ready to proceed to trial that very day. [ER I 107]. Later, however, she indicated that her family would hire a private attorney - even though the court had already appointed stand-by counsel, Lynn Panagakos, who was present during that hearing. [ER I 122 - 124].

At the status conference on August 28, 2003, Ottley informed the court that she had not secured a private attorney and blamed the court for refusing to release her from jail: "I guess I'll just stay with the Lord, and the Lord and I will be in court on September 29th." [ER I 127]. She insisted that the case was in "admiralty", and that, "I'm looking for an admiralty lawyer, someone who's an expert in admiralty because as you know, this is all about the claim. It has nothing to do about your laws or your codes and rules and regulations." [ER I 128].

Then the following exchange occurred, again confirming Ottley's inability to understand the nature of the charges and the proceeding against her:

> "THE COURT: Well, let me get something clear to you, Ms. Ottley. This is not an admiralty case, this is a criminal case in which you are charged with crimes having to do with a fraudulent scheme about the Cayman Islands. That's what this case is about. It is not an admiralty case. So don't – so stop looking at admiralty law because admiralty does not apply to this case at all.
>
> THE DEFENDANT: ... you may tell me that it's not an admiralty case, but **my heavenly father has told me that it's an admiralty case** and as you know, I fear him more than I fear you. So I'll be ready with whatever is necessary for September 29th. I'm prepared, Your Honor. You come with your case or the prosecution come with their case and I'll come with mine.
>
> THE COURT: All right, Ms. Ottley, on the 29th then we will see you...." [ER I 128 - 129].

These excerpts from the June 20, July 28 and August 28, 2003, pre-trial hearings presented the district court with overwhelming evidence that Ottley lacked, "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402. Her behavior raised a bone fide doubt as to her competence to stand trial. The court's failure to order a competency hearing violated Ottley's due process right to the same. De Kaplany, 540 F.2d at 979.

B. The District Court Violated Ottley's Rights under the Sixth Amendment by Permitting her to Waive the Right to Counsel and to Waive the Right to a Jury Trial, While the Record Clearly Showed That Ottley Was Not Competent to Stand Trial.

1. Standard of Review.

Whether a waiver of the right to counsel was made knowingly, intelligently, and voluntarily is a mixed question of law and fact, which we review de novo. United States v. Lopez-Osuna, 232 F.3d 657, 242 F.3d 1191 (9th Cir. 2000), *citing*, United States v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990).

As to waiver of the right to a trial by jury, the standard of review is harmful per se. United States v. Duarte-Higareda, 113 F.3d 1000, 1003 (9th Cir. 1997). An invalid waiver of the right to a jury trial warrants reversal because the district court's failure to ensure the adequacy of a defendant's jury waiver affects the basic framework of the defendant's trial, and on review the Court cannot determine whether this effect was harmless. *See* United States v. Annigoni, 96 F.3d 1132, 1143 (9th Cir. 1996) (explaining that reversal is required for "structural" errors which affect the framework of a trial and defy analysis by harmless-error standards); United States v. Cochran, 770 F.2d 850, 852 (9th Cir. 1985) (warning that "retrospective inquiries to determine the validity of waivers are likely to be futile"); United States v. Christensen, 18 F.3d 822, 826 (9th Cir. 1994)("The

district court's failure to conduct an adequate colloquy . . . constitutes reversible error.").

2. Discussion.

Should the Court find that Ottley was not competent to stand trial, then she submits on appeal that her waiver of the right to counsel was necessarily invalid. In Godinez, the Supreme Court rejected "the notion that competence . . . to waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard." Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 2686, 125 L. Ed. 2d 321 (1993). The Dusky standard for measuring a defendant's competency to stand trial focuses upon whether "the defendant has a 'rational understanding' of the proceedings." Id. at 2686; *see also* Dusky, 362 U.S. 402.

Likewise, should the Court find that Ottley was not competent to stand trial, then her waiver of her right to a trial by a jury was, as well, necessarily invalid. Criminal defendants may waive their constitutional right to a jury trial if the waiver is made in writing and has the approval of the government and of the court. Fed. R. Crim. P. 23(a). But the defendant must be competent to waive the jury right, and the waiver must in fact be voluntary, knowing, and intelligent. Patton,

281 U.S. at 312-13; Cochran, 770 F.2d at 851; see Godinez, 113 S. Ct. at 2687 (requirements for waiver of constitutional rights generally).

a. The Waiver of Right to Counsel.

A criminal defendant is entitled to waive his Sixth Amendment [7] right to counsel. *See* Faretta, 422 U.S. at 807. A waiver of the right to counsel must be knowing, intelligent, and unequivocal. *See* Arlt, 41 F.3d at 519-20; Balough, 820 F.2d at 1487. The Supreme Court has identified two instances in which an accused's right to self-representation may be overridden by other concerns. First, the defendant must "knowingly and intelligently forgo[ ] his right to counsel." McKaskle v. Wiggins, 465 U.S. 168, 173 (1984). Second, he must be "able and willing to abide by rules of procedure and courtroom protocol." Id. If a defendant cannot satisfy these two requirements, the district court may deny him the right of self-representation. The burden of proving the legality of the waiver is on the government. *See* United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994). Courts should approach this question cautiously, indulging "every reasonable presumption against waiver." Arlt, 41 F.3d at 520 (*quoting* Brewer v. Williams, 430 U.S. 387, 404 (1977)).

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[7] "In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

A waiver of counsel will be considered knowing and intelligent only if the defendant is made aware of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Balough, 820 F.2d at 1487 (*citing* Faretta, 422 U.S. at 835); United States v. Van Krieken, 39 F.3d 227, 229 (9th Cir. 1994); United States v. Hernandez, 203 F.3d 614, 623-24 (9th Cir. 2000). In this circuit, the "preferred procedure" to ensure the validity of a waiver is for the district court to discuss each of the three elements with the defendant on the record in open court. *See* Balough, 820 F.2d at 1487; Van Krieken, 39 F.3d at 229. Furthermore, "throughout this inquiry, we must focus on what the defendant understood, rather than on what the court said or understood." Balough, 820 F.2d at 1487-88. In this regard, it is Ottley's "'state of mind at the time [she] opted for self-representation'" which is crucial. Mohawk, 20 F.3d at 1485 (*quoting* United States v. Aponte, 591 F.2d 1247, 1250 (9th Cir. 1978)).

On May 19, 2004, this Court reversed and remanded the case to the district court for a new trial, on the ground that "the district court erred by denying Ottley her right to represent herself." [ER I 37]. The Court wrote - and Ottley quotes the Memorandum at length because it is clear the district court subsequently

misunderstood the same:

> "...the record demonstrates that the district court relied on an improper reason for denying Ottley the right to represent herself. *See United States v. Arlt*, 41 F.3d 516, 518 (9th Cir. 1994)("[The Supreme Court's decision in *Godinez [v. Moran*, 509 U.S. 389 (1993)] explicitly forbids any attempt to measure a defendant's competency to waive the right to counsel by evaluating [her] ability to represent [herself]."). Because the district court found Ottley competent to waive her right to counsel and the record shows that Ottley unequivocally stated her wish to represent herself following extensive discussions and advisements occurring months before trial, we conclude the district court erred by denying Ottley her right to represent herself. *See id.* at 519 (stating that where the defendant is competent to waive the right to counsel, the decision to waive counsel is valid if the request was timely, not for the purposes of delay, unequivocal, and knowing and intelligent)." [ER I 37]. (Italics in original).

On July 3, 2003, the district court issued an order based on this Court's Memorandum Decision, stating in relevant part:

> "The Court has set the retrial for October 27, 2003. This Court has experienced the tirades that Defendant can engage in during hearings in court and has noted defendant's total disregard for proper decorum and adherence to the rules of court.
>
> **It is under the mandate of the Court of Appeals that this Court will permit defendant to represent herself**. However to assure that defendant will properly demean herself at trial and to help her properly prepare and conduct trial the Court appoints Lynn E. Panagakos as standby counsel.
>
> Standby counsel shall aid defendant (if defendant accepts counsel's help) to prepare her defense to the indictment and to be available for conference when necessary to properly prepare and present her defense at trial by jury.
>
> Defendant may on or before July 10, 2003, in writing not to exceed three pages, advise the Court of her acceptance of MS. PANAGAKOS as standby counsel." [ER I 71].

The district court misinterprets this Court's decision. This Court's Memorandum Decision issued no mandate requiring that the lower court permit Ottley to represent herself on remand. Rather, the Court of Appeals reversed and remanded because, "the district court **relied on an improper reason** for denying Ottley the right to represent herself". This misunderstanding, Ottley submits, is one of the reasons why the district court never provided Ottley with a hearing to determine whether or not she understood the nature of the proceedings against her, the penalties she faced if convicted, and the dangers of self-representation. Balough, 820 F.2d at 1487 (*citing* Faretta, 422 U.S. at 835); Van Krieken, 39 F.3d at 229; Hernandez, 203 F.3d at 623-24. It would appear that the district court simply believed that on remand it was required, no matter the evidence of mental defect before it, to permit Ottley to represent herself.

Otherwise, at a hearing on August 28, 2003, the court advised Ottley:

> "You're not going to employ counsel, but I do want to advise you that we have stand-by counsel for you to help you in the preparation of that case if you so desire to have her bring you things that the government is providing to her to bring to you. And that you should receive those things and talk to her about it, it would be helpful to you, I urge you to do that. Whether you want to or not, I urge you to do that because that will help you in the trial of this case because you do have to, you do have to obey the rulings of the court and you do have to obey the – the rules of procedure in a criminal case. The fact that you're representing yourself does not free you from theat obligation. You understand that, don't you?

THE DEFENDANT: Yes, Your Honor, I do." [ER I 129].

This colloquy shows that the district court made none of the three requisite inquiries concerning waiver of right to counsel (*see* Balough, 820 F.2d at 1487; Van Krieken, 39 F.3d at 229); rather the court merely advised Ottley of the presence of her standby counsel.

On September 10, 2003, the Government filed a motion "on Waiver of Counsel", seeking a hearing on Ottley's determination to represent herself. [ER I 130.1]. The court set no hearing on the Government's motion. Rather, on the first day of the trial, September 29, 2003, just prior to the Government putting on its case, the court acknowledged Ottley's continuing failure to understand the nature of the proceedings against her:

> "THE COURT: And we do want to again take up some matters with you, Miss Ottley, because **I think you still have some lack of understanding what this proceeding is all about.** It's not about the commercial code that you cited this morning in the motions that were given to the clerk this morning. * * * And the commercial code or admiralty is not to be mentioned during this trial. You understand that, don't you.
>
> MS. OTTLEY: So you say. Okay.
>
> * * *
>
> THE COURT: This is not a civil action. This is a criminal action in which you are accused and which you have chosen to represent yourself. Now, I want to go over that again with you because it's important. As you know, you face very serious charges here, very serious charges. And I felt at one time that you needed counsel, and I got you counsel, but the Court of

> Appeals didn't agree with me on that. **But I want to know now as to whether or not you continue to want to proceed as your own counsel.**
>
> MS. OTTLEY: Your Honor, you have taken a look at my verified objections, the motions that I filed. You now know that I know about rule 33. You dare call me into this courtroom to proceed to a trial that is fraudulent." [ER I 133 - 134].

There was no further inquiry into the validity of Ottley's waiver of right to counsel. [*See*, ER I 134 - 155]. The district court merely attempted to explain to Ottley the nature of the proceedings (a criminal prosecution), rather than engage in an inquiry designed to test the validity of her waiver of right to counsel - with the focus on what the defendant understood, rather than on what the court said or understood. *See* United States v. Kimmel, 672 F.2d 720, 722 (9th Cir. 1982).

This circuit has written: "the failure to meet the requirements for a valid Faretta waiver constitutes per se prejudicial error, and the harmless error standard is inapplicable. *See* Balough, 820 F.2d at 1489-90; McKaskle, 465 U.S. at 177 n.8 ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis."); Arlt, 41 F.3d at 524 (stating that a denial of the right to self-representation is "'per se prejudicial error'").

These transcript excerpts show that Ottley comprehended neither the nature of the proceedings, nor the extent of penalties she faced if convicted, nor the

disadvantages of self-representation. Thus, the record fails to reflect that Ottley understood what she was going and that her , "choice [was] made with eyes open." Balough, 820 F.2d at 1487.

Indeed, shortly after this initial exchange Ottley launched into a tirade against the court, only confirming her mental instability:

> "So you go ahead, Mr. Real. You go ahead with your trial, and you will see the Lord condemn to your third and fourth generation, just as he's going to bless me and my family to my third and fourth generation. **This is no longer about me.** You go right ahead because, as my father said to me and to my brothers and my sister, when you have the truth, you fight for it. And, if you come home and you have not stood up for the truth, then I'm going to finish it. Well, I'm telling you now **I have stood up to the truth for three and a half years and that's why my Heavenly father is going to step in and end this case** because I have the truth.
>
> ... I've been locked up for three and a half years. How dare you. How dare all of you take my liberty away. ... This country is bankrupt and has been since 1933. And Bush verified that and Traficant verified that, and that's what this is all about. It's adjusting the account, sir. And **you are supposed to adjust the account and pay back the investors the money because I made a tender of payment**. There's no way in this country that you can pay off a debt with money because the money is not money. It's debt notes owned by the Federal Reserve Bank, an organization that is no more federal than Federal Express. It's owned by money changers, and that's what Christ chased out of his temple. And you allow it, and you allow it. Shame on you. ... **I know who I serve. I serve God. And that's why you're not going to win. That's right. I'm warning you, all of you, you are not going to win because you cross that fine line when you violate God.** He's the law giver. He's the judge. He's the judge in this courtroom, sir. Not you. He allows the evil, but controls the results. When we learn obedience. " [ER I 141 - 143].

Three important aspects of Ottley's mental state are revealed in these comments. First, Ottley continued to believe that she was not the defendant on trial for serious federal criminal offenses which carried severe penalties. She stated: "This is no longer about me." [ER I 141]. Second, she expressed the related and equally irrational belief that the court (or the Government) should remedy the investors' losses, for which she had already paid: "you are supposed to adjust the account and pay back the investors the money because I made a tender of payment." [ER I 142].

Third, she again expressed the delusional belief that divine intervention would defend her against the charges, and thus, by implication, that she need not defend herself during the trial. She stated, "I have stood up to the truth for three and a half years and that's why my Heavenly father is going to step in and end this case ..." [ER I 141]. In a similar vain, she expressed the belief that because she was God's servant, the Government would lose and she would win: "I serve God. And that's why you're not going to win. That's right. I'm warning you, all of you, you are not going to win because you cross that fine line when you violate God." [ER I 143]. Shortly thereafter, Ottley told the court: "I have an attorney: God." [ER I 149].

On October 1, 2003, the Government rested its case. [ER I 198]. This was a

logical juncture in the proceedings for the district court to attempt to conduct another waiver-of-counsel hearing - just prior to the trial going to the defense. However, the court failed to see the opportunity. Rather, the following exchange took place only confirming Ottley's inability to grasp the proceedings and the dangers she faced representing herself:

> "MR. BUTRICK: Government rests, Your Honor.
>
> THE COURT: Call your first witness, Miss Ottley.
>
> MS. OTTLEY: Just a moment. Your Honor, I'd like to ask for a recess until tomorrow. As you know, **there's only one witness, and, as you said, he can't be called because he resides up in the heavens, who is God. He's my only witness.** But I'd like to have a recess until tomorrow so I can prepare for my closing.
>
> THE COURT: Well, you're not going to have any witnesses, then.
>
> MS. OTTLEY: No.
>
> THE COURT: Then defense rests; is that right?
>
> MS. OTTLEY: Yes." [ER I 198 - 199].

From the beginning of the proceedings to retry this case, the district court had ample evidence before it that Ottley failed to appreciate the proceedings and the charges against her. Her tirades against the court revealed a criminal defendant unable to, "'to consult with his lawyer with a reasonable degree of rational understanding' [or that he then lacked] 'a rational [or] factual

understanding of the proceedings against him.'" Godinez, 113 S. Ct. at 2685 (*quoting* Dusky, 362 U.S. at 402). While capacity for rational communication once mattered because it meant the ability to defend oneself, *see* Faretta, 422 U.S. at 823-26, it now means the ability to assist counsel in one's defense. *See* Cooper, 517 U.S. at 354. But whatever the rationale for the requirement, capacity to communicate remains a cornerstone of due process at trial. Rohan, 334 F.3d at 803.

As to Ottley's assistance by standby counsel, this circuit has noted that the presence of advisory counsel is not itself a determinative element in our assessment of whether a defendant understood the charges pending against him, but is one factor we consider in our analysis. Lopez-Osuna, 232 F.3d 657, 242 F.3d 1191. Here, standby counsel's participation was limited by Ottley's assertion of her right to represent herself. *See* McKaskle, 465 U.S. at 177 ("[i]f standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded").

The Government may argue that standby's presence and assistance supports the conclusion that Ottley understood the charges pending against her. *See, e.g.*,

Locks v. G.W. Sumner, 703 F.2d 403, 407 (9th Cir. 1983) ("The Supreme Court and this circuit have recognized the efficacy of hybrid representation to aid pro se defendants and protect the integrity of the trial process."). However, the excerpts from the pre-trial and trial transcripts above show that whatever assistance standby may have provided, Ottley displayed behavior clearly demonstrating that she did not appreciate the nature of the proceedings, the penalties she faced, and the perils of self-representation. Ottley was not competent to represent herself, let alone competent to stand trial.

Moreover, these excerpts demonstrate that Ottley was, "not able and willing to abide by rules of procedure and courtroom protocol." Savage v. Estelle, 924 F.2d 1459, 1463 (9th Cir. 1991); United States v. Flewitt, 874 F.2d 669, 674 (9th Cir. 1989) (defendant's right to self-representation does not allow him to engage in uncontrollable and disruptive behavior in the courtroom). True, Ottley expressed a timely desire to represent herself. *See* Hernandez, 203 F.3d at 620 (stating that a defendant's assertion of his right to self-representation must be timely, unequivocal, knowing and intelligent, and not for purposes of delay). The record shows that she equivocated, however, first seeking self-representation at the June 20 hearing [ER 52]; but later at the July 28 hearing stating that she wanted to hire a private attorney. [ER I 122].

Furthermore, as argued above, the record clearly shows that Ottley did not have the ability to comprehend the charges against her, the nature of the proceedings, the punishment if convicted of the charges, and, in general the perils of self-representation. As to the latter, she repeatedly expressed the delusional belief that divine intervention would defend her against the charges and, moreover, punish the court and Government and eventually set her free. The presence of standby counsel provided no protection for such a defendant crippled by her delusional beliefs, and appearing in a district court which mistakenly believed it had been ordered to permit Ottley to represent herself.

b. Waiver of the Right to a Jury Trial

A criminal defendant's right to a jury trial is a fundamental right guaranteed by the Sixth Amendment.[8] Cochran, 770 F.2d at 851. The right to a jury trial may only be waived if the following four conditions are met: (1) the waiver is in writing; (2) the government consents; (3) the court accepts the waiver; and (4) the waiver is made voluntarily, knowingly, and intelligently. Cochran, 770 F.2d at 851; *see also* Fed. R. Crim. P. 23(a) ("Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the

[8] "In all criminal Prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." U.S. Const., amend. VI.

court and the consent of the government.").

With regard to the fourth requirement, this Court has previously set forth guidelines for a district court to follow in determining whether a defendant's jury waiver is voluntary, knowing, and intelligent. The district court should inform the defendant that (1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial. Cochran, 770 F.2d at 853. Furthermore, the district court should question the defendant to ascertain whether the defendant understands the benefits and burdens of a jury trial and freely chooses to waive a jury. Id. at 852-53. Such a colloquy will ensure that the waiver is made voluntarily, knowingly, and intelligently. Id. at 852. A colloquy will also emphasize to the defendant the seriousness of the decision; and reduce the likelihood of a later challenge to the validity of the waiver on appeal or in habeas proceedings. Id. As this circuit stated in Cochran, "[t]here is, thus, every reason for district courts to conduct a colloquy before accepting a waiver of the right to trial by jury and no apparent reason for not doing so." Id.

This Court has declined, however, to impose an absolute requirement of such a colloquy in every case. Id. at 853. In Cochran, for example, we held that

the district court was not required to question the defendant about his understanding of the jury waiver where the defendant had signed a written waiver in accordance with Fed. R. Crim. P. 23(a). Id. at 851. The written waiver created a presumption that the waiver was voluntary, knowing, and intelligent. Id. This presumption was unrebutted because, "[t]here [were] no additional facts in the record bearing upon the question whether the waiver was voluntary, knowing, and intelligent." Id.

Yet the showing that a waiver is voluntary, knowing, and intelligent remains a "necessary precondition . . . distinct from the requirement that the waiver be written" United States v. Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987). In some cases, the fact of a written waiver will not create any presumption that the waiver is voluntary, knowing, and intelligent. For example, this Court has held that, "[t]he suspected presence of mental or emotional instability eliminates any presumption that a written waiver is voluntary, knowing, or intelligent." Christensen, 18 F.3d at 826. In Christensen, evidence of the defendant's manic-depressive disorder put the district court on notice that the defendant's waiver "might be less than knowing and intelligent." Id. at 825. Accordingly, the district court was obliged to conduct "an in-depth colloquy which reasonably assures the court that . . . the signed waiver was voluntarily, knowingly, and

intelligently made." Id. at 826.

On September 29, 2003, at the commencement of the trial, Ottley signed a Waiver of Trial by Jury. [ER I 130.9]. The language of the Wavier states, in relevant part, "The undersigned defendant hereby waives the right to a trial by jury and requests the court to try all charges against him in this case without a jury." [ER I 130.9]. Given the excerpts of transcript so far presented, this is clearly a case in which the existence of a written waiver does not create a presumption that the waiver was voluntary, knowing, and intelligent. Again, "[t]he suspected presence of mental or emotional instability eliminates any presumption that a written waiver is voluntary, knowing, or intelligent." Christensen, 18 F.3d at 826. For all the reasons set forth above in relation to the quoted excerpts from the transcripts, Ottley submits that the record clearly demonstrates that her mental state was such as to eliminate the possibility that she could possibly waive the right to a jury trial in a knowing or intelligent manner.

C. The Trial Judge Should Have Recused Himself Inasmuch as the Record Demonstrates the Court's Pervasive Bias Against Ottley as to Make Fair Judgment Impossible.

1. Standard of Review.

We review a judge's decision not to recuse himself for abuse of discretion. Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 714 (9th Cir. 1990). If a party fails to bring specific facts allegedly presenting grounds for recusal to the attention of the district court, the party will bear a greater burden on appeal. United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980).

This issue was not raised below. Normally the standard of review for unpreserved issues is plain error. Ottley submits that the failure of a biased judge to recuse himself represents a structural error which is per se prejudicial. Structural errors consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible. *See*, Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L.Ed. 749 (1927); Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

2. Discussion.

Ottley contends that the district judge erred in failing to recuse himself

under 28 U.S.C. § 144[9] and 28 U.S.C. § 455.[10] Judge Real demonstrated bias against Ottley in exchanges with her during pre-trial, trial and post trial proceedings.

The substantive standard for recusal under 28 U.S.C.§ 144 and 28 U.S.C. § 455 is the same: "[W]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Studley, 783 F.2d at 939 (quotation omitted). Ordinarily, the alleged bias must stem from an "extrajudicial source." Liteky, 510 U.S. at 554. "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion." Id. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion **unless they display a**

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[9] "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144.

[10] "Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

He shall also disqualify himself in the following circumstances: where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a)-(b)(1).

deep-seated favoritism or antagonism that would make fair judgment impossible." Id.

Ottley does not allege any "extrajudicial source" for Judge Real's bias against her. Rather, excerpts from pre-trial, trial and post-trial transcripts demonstrate Judge Real's deep-seated antagonism against her as to make fair judgment impossible. At the hearing on July 28, 2003, the court made several comments which brought into question the court's objectivity and suggested negative bias. When Ottley insisted that the case was an admiralty matter, the court stated: "you are offending me now. You are offending me now." [ER I 118]. In response to Ottley's request to be released from custody to hire a private attorney, the court suggested that she was a flight risk and said, "[t]here's $800,000 somewhere that only you know about." [ER I 121].

And later, the following exchange took place :

> "THE COURT: But there's still $800,000 out there which we know nothing about. Only you know about that."
>
> MS OTTLEY: I'm sorry, that's not true.
>
> THE COURT: Well, I am telling you what I learned at the [first] trial of this case. And, under those circumstances, and your statements at the last hearing, make you a flight risk." [ER I 123].

These comments indicate that Judge Real, who will soon conduct the bench trial,

should have recused himself. He believed Ottley knowledgeable as to the whereabouts of proceeds from the alleged investment fraud, and, by implication, that she was criminally liable for the same. Further, Judge Real states that he is applying findings from the previous trial - notwithstanding this Court's reversal and remand.

As to the trial on remand, after two days of the Government's case and Ottley's claim that her only defense witness was God [ER I 198], the parties delivered closing arguments. During Ottley's closing argument she stated, "Judge Real, God gives men rights, not government, not man." [ER I 213]. Judge Real replied, "Did he give rights to man to defraud and cheat each other?" [ER I 213].

Then the following exchange occurred, with Ottley stating:

> "Therefore, the only way to discharge a debt in the United States is to make a tender of payment per the Uniform Commercial Code 3-603, which controls all banking instruments. And in this case I filed such a motion, but the government never responded. They refuse and dishonored my tender for adjustment and, therefore, are in default. If the government had complied, the investors would be getting back their money immediately. So now –
>
> THE COURT: If we knew where the $67 million that came into accounts **in which you had control** and the cash that came into your possession is, they would get it back.
>
> MS. OTTLEY: No. No. No. No. Because you see, Your Honor, a lot of people got back their money. A lot of people." [ER I 225 - 226].

Once the court published its Findings of Fact and Conclusions of Law at the

December 15, 2003 hearing [ER II 317], the court's bias against Ottley shifted to a patronizing and dismissive stance. In learning of the court's guilty verdicts, Ottley made the following declarations: as to the identity of the accused, "This case was United States Versus God" [ER II 318]; as to the Ninth Circuit's reversal and remand of the first judgment, "[y]ou are in double jeopardy" [ER II 321]; as to the Government confiscation of money, she declared that it had stolen funds and goods from her family [ER II 322]; as to the Government's witnesses, she stated that they were, "thugs... because they lie, they cheat, they steal, they perjure testimonies and they get away with it because you allow them to[ ]" [ER II 323]; as to citizenship, she stated that she was not a U.S. citizen. [ER II 323].

To these declarations, the court told Ottley, "all right, Mrs. Ottley, we'll check those things." [ER II 323]. The record shows, of course, no follow-through on the court's part to Ottley's irrational statements. The problem is that Ottley believed her statements - delusional though they were. Thus, the court's promise to "check those things", was not merely dismissive, but manipulative and deceitful as well.

Finally, when the court denied Ottley's request for release pending appeal, the following exchange occurred, demonstrating Judge Real's refusal to answer a legitimate question:

"Tell me what rule denies me the bond to be released pending appeal when I've read in the papers these last few months people getting released on appeal. Now tell me what rule is that you are going to deny me my – my release.

THE COURT: Anything further?

MS OTTLEY: I'm sorry?

THE COURT: Anything further?

MS. OTTLEY: Well, I'm asking a question. I deserve an answer.

THE COURT: Any - anything further? MS. OTTLEY: Yes, I have lot's more to say.

THE COURT: Well, let's finish it up, Ms. Ottley.

MS. OTTLEY: You are a disgrace. ... I'm going to see to it that the Lord gives you your just punishment and these hoodlums over here... I'm finished.

THE COURT: All right. Well, Mrs. Ottley, I might just tell you the Fifth Commandment of the covenant that your made with your God, says, thou shalt not steal."

MS. OTTLEY: well –

THE COURT: The Court is adjourned.

MS OTTLEY: -- you should look at that –

THE CLERK: All rise.

MS. OTTLEY: -- yourself, sir. You're the biggest robber.

THE CLERK: This court now stand in recess." [ER II 325 - 326].

Taken together, these excerpts from the pre-trial, trial and post-trial transcripts show a bias against Ottley on the part of Judge Real that made a fair judgment impossible. Liteky, 510 U.S. 554.

D. The Upward Adjustments to Ottley's Sentence under the Sentencing Guidelines Absent Any Support in the Court's Findings of Fact and Conclusions of Law Violate Ottley's Rights as Set Forth under the Holdings of Apprendi v. New Jersey and Blakely v. Washington.

1. Standard of Review.

Ottley objected in general to the PSR. [ER II 330 - 334]. Whether the district court properly applied Apprendi is a questions of law that we review de novo. United States v. Gill, 280 F.3d 923, 930 (9th Cir. 2002).

2. Discussion.

In the case Apprendi v. New Jersey, the Supreme Court struck down a New Jersey sentencing statute that allowed a judge to enhance a defendant's sentence based on the judge's finding that the crime was committed with a biased purpose. 530 U. S. 466 (2000). The Supreme Court held in Apprendi that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., at 490. This holding was based on the Court's

understanding of the Fifth Amendment's Due Process Clause[11], and the Sixth Amendment's right to trial by jury. (See, infra, n. 8). "These rights," the Court reasoned, "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" Id., at 477 (citations omitted.) Further, the Court ruled that a legislature's labeling of something as a "sentencing factor" rather than an "element" of the crime was not dispositive. "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," and therefore must be submitted to the jury. Id., at 494 n. 19.

The Apprendi majority explicitly reserved the question of the impact of its ruling on the federal guidelines. Id. at 497 n. 21. However, Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, questioned the impact of the holding on guideline schemes, including the federal guideline. "[T]he Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not." Id. at 550-51 (O'Connor, J.,

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[11] "... nor shall any person ... be deprived of life, liberty, or property, without due process of law..." U.S. Const. amend. V.

dissenting}. O'Connor suggested that after Apprendi sentences based on guidelines schemes "will rest on shaky ground." Id. at 552.

The constitutionality of the federal sentencing guidelines was again questioned in Ring v. Arizona, 536 U.S. 584 (2002). There, a jury found the defendant guilty of first-degree murder. Under the Arizona law in question, the maximum punishment was life in prison unless the judge made a finding that an aggravating factor was involved, in which case the death penalty could be applied. In striking down the statute based on Apprendi, the Supreme Court wrote: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt ... A defendant may not be 'expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Id. at 602 (citation omitted). The Court held that, "[b]ecause Arizona's enumerated aggravating facts operate as the 'functional equivalent of an element of a greater offense,' ... the Sixth Amendment requires that they be found by a jury." Id. at 609 (citation omitted).

Recently, in the case Blakely v. Washington, the Supreme Court had before it a determinate sentencing scheme much like the federal sentencing guidelines. 2004 WL 1402697. In Blakely the defendant pled guilty to kidnaping, which,

standing alone, carried a maximum sentence of 53 months. However, under Washington's sentencing scheme, "[a] judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.'" Id. Before enhancing a sentence the judge is required to set forth findings of fact and conclusions of law. The Washington trial court determined that the defendant had acted with "'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases," Id., and enhanced his sentence to 90 months. The defendant appealed, arguing that this enhancement violated his right to trial by jury as set forth in Apprendi.

The Supreme Court agreed. In light of Apprendi and Ring, the Court in Blakely stated: "[i]n each case, we concluded that the defendant's constitutional rights had been violated because the judge has imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." Id., at *4.

The State objected on the ground that the case was distinguishable from Apprendi and Ring because the statutory maximum in Washington for Class B felonies is ten years and Blakely received only 90 months. But the Court rejected this argument:

"Our precedents make clear ... that the 'statutory maximum' for Apprendi

> purposes is the maximum sentence a judge may imposed *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* ... In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may imposed after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment ... and the judge exceeds his proper authority." Id. (Italics in original).

In a footnote, the Court noted that as *amicus curiae*, the United States was concerned that a ruling in favor of Blakely would call the federal guidelines into serious doubt. "The United States ... notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant.... The Federal Guidelines are not before us, and we express no opinion on them." Id. at *4, n. 9.

The four-Justice dissent, led by Justice O'Connor, predicted that the "practical consequences of today's decision may be disastrous... " Id., at *10 (O'Connor, J., dissenting). She explained that "Washington's sentencing system is by no means unique" since "[n]umerous other States have enacted guidelines, as has the Federal Government." Id., at *16 (O'Connor, J., dissenting) (citing 18 U.S.C. § 3553 and 28 U.S.C. § 991, *et seq*. in addition to statutes in nine states). She warned that "[t]oday's decision casts consitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments."

Ottley submits that the inescapable conclusion of Blakely is that the federal sentencing guidelines have been rendered unconstitutional in cases where a district court imposes upward adjustments to sentences based upon facts not reflected in the jury verdict, or admitted in a guilty plea. But further, Ottley submits that Blakely as well applies here, where the case on remand proceeded to a bench trial and the court's Findings of Fact and Conclusions of Law.

The holding of Blakely is that "[t]he statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Id. at *4. Ottley submits that where a case was tried before the bench, Blakely and Apprendi require that the maximum sentence the judge may impose must be reflected in the court's Findings of Fact and Conclusions of Law as drawn from the evidence presented at trial.

Here, the district court imposed three upward adjustments to Ottley's sentence, based on the PSR. In the PSR, Probation found a base offense level of 23 pursuant to U.S.S.G. § 2S1.1(a)(1). [PSR ¶ 57]. This correlated with a guideline range of 46 to 57 months prison time. *See*, Chapter 5, Part A, Sentencing Table. To the base offense level of 23, Probation added a total of 15 additional levels:

a) nine levels pursuant to U.S.S.G. § 2S1.1(b)(2)(J) which adds nine points if the laundered funds were more than $10 million but not more than $20 million [PSR ¶ 58]; and

b) four levels pursuant to U.S.S.G. § 3B1.1(a) on the ground that the evidence showed that Ottley was an organizer or leader of the criminal activity [PSR ¶ 60]; and

c) two levels pursuant to U.S.S.G. § 3C1.1, on the ground that Ottley obstructed or impeded the administration of justice. [PSR ¶ 61].

These upward adjustments raised Ottley's offense level from a base level of 23 to a total offense level of 38 [PSR ¶ 64], or more than 60 percent. Given Ottley's criminal history points of 0 [PSR ¶ 69], the total offense level of 38 led to a corresponding incarceration range of 235 to 293. [PSR ¶ 95].

There is a constitutional infirmity in the sentence under Blakely and Apprendi. Any facts supporting these upward adjustments are absent from the court's Statement of Facts and Conclusions of Law, and from the hearing on December 15, 2003 concerning the same. [*See*, ER I 237 - 288; ER II 289 - 311; ER II 315 - 327]. As to the nine-level increase under U.S.S.G. § 2S1.1(b)(2)(J) based upon Probation's conclusion that the alleged laundered funds amounted to more than $10 million and less than $20 million, nowhere in the Findings of Facts does the court identify the transactions and fund amounts allegedly totaling $17.8 million [see, PSR ¶ 58], and, according to Probation, triggering the nine-level

upward adjustment under this guideline.

Similarly as to the four-level upward adjustment pursuant to U.S.S.G. § 3B1.1(a) on the ground that Ottley was an organizer or leader of the criminal activity, the court does not identify in the Findings of Fact the alleged behavior on Ottley's part presented during the trial which demonstrated that her behavior was of the nature of an organizer or leader as those terms are used under this guideline.

As to the two-level upward adjustment pursuant to U.S.S.G. § 3C1.1, on the ground that Ottley obstructed or impeded the administration of justice, the Findings of Fact do not support this adjustment. In this regard, the PSR states:

> "On 4/7/2000, U.S. District Judge Helen Gillmor modified the Magistrate Judge's order by tightening the conditions of the defendant's release after finding that the defendant posed serious risks of obstruction of justice and flight. In its written order filed on 5/5/2000, the Court found that the defendant attempted to thwart the investigation of the events that were the subject of the charges against her and that she interfered and attempted to influence the testimony of witnesses." [PSR ¶ 61].

However, nothing in the court's Findings of Fact supports this upward adjustment. Further, the Supreme Court in Blakely specifically attacks upward adjustments on this basis:

> "Another example of conversion from separate crime to sentence enhancement that Justice O'Connor evidently does not consider going "too far" is the obstruction-of-justice enhancement ... Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury

beyond a reasonable doubt ... is unclear."

Blakely, 2004 WL 1402697 at *7, n. 11.

Ottley submits that the court did not satisfy the commands of Apprendi and Blakely when it imposed the upward enhancements to her offense level (from the base level of 23 to a total offense level of 38), because none of grounds for these enhancements based upon evidence from the trial are presented in the court's Findings of Fact and Conclusions of Law. The transcript for the hearing on December 15, 2003, at which time the court published its Findings of Fact and Conclusions of Law, provides no support as well. [*See*, ER II 315 - 327]. Therefore, under Apprendi and Blakely, her sentence must be reversed.

CONCLUSION

For all these reasons, Ottley respectfully requests that this court vacate her conviction and sentence, and remand for further proceedings not inconsistent with that decision.

DATED: Maui, Hawai'i, July 12, 2004

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. Appl. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14-points, Times New Roman, and contains 13,926 words, with an average of 232 words per page.

DATED: Maui, Hawai'i, July 12, 2004

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STATEMENT OF RELATED CASES

The following cases in the U.S. District Court Hawai'i are related to the matters discussed herein:

- Cr. No. 99-00544 DAE. United States v. Paul Lazzaro. On November 19, 1999, Lazzaro pled guilty to six counts relating to the fraudulent investment scheme. On February 25, 2004 the court imposed punishment which included a total imprisonment term of 210 months.

- Cr. No.00-00478 HG. United States v. Curtis Lai. On December 27, 2000, Lai pled guilty to mail fraud and wire fraud. On November 24, 2003, the court imposed punishment, which included a total of five years probation.

- Cr. No. 01-00180 HG. United States v. Phyllis K. Linogon. On June 4, 2001, Linogon pled guilty to the Information charging one count of Structuring Financial Transactions. On November 24, 2003, the court imposed punishment which included three years probation total.

- Cr. No. 01-00226 HG. United States v. Janice Webb. On October 1, 2001, Wallace pled guilty to the Information charging one count of Structuring Financial Transactions. On May 20, 2002, the court imposed punishment which included a total of three years probation.

- Cr. No. 01-00375 HG. United States v. John Hinkle. On November 8, 2001, Hinkle pled guilty to the Information charging one count of Structuring Financial Transactions. On May 28, 2002, the court imposed punishment, which included a total of three years probation.

- Cr. No. 02-00352 DAE -01. United States v. Gladys Hino. On November 25, 2002, Hino plead guilty to Count 3, Structuring Financial Transactions. On April 21, 2002, the court imposed punishment which included four years probation.

- Cr. No. 02-00352 DAE -02. United States v. Paula Pimental. On February 27, 2003, Pimental pled guilty to Count 1, Conspiracy to Structure Financial Transactions. Pimental is currently released on bail pending sentencing, set for November 15, 2004.

DATED: Maui, Hawai'i, July 12, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Defendant Appellant's Opening Brief, and one copy of the Excerpts of Record, Volumes I and II, were duly served on the following, by placing said copies in the U.S. mail, postage prepaid, addressed as set forth below:

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