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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SEAN DAVID MORTON, Defendant-Appellant.	No. 17-50351 D.C. No. 2:15-cr-00611-SVW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted June 1, 2020**

Before: SCHROEDER, CANBY, and TROTT, Circuit Judges.

Sean David Morton appeals his convictions for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, making false claims against the United States, in violation of 18 U.S.C. § 287, and presenting false financial instruments, in violation of 18 U.S.C. §§ 514(a) and 2(b). We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

under 28 U.S.C. § 1291, and we affirm.

Morton alleges that he was denied his Sixth Amendment right to counsel because the district court: (1) conducted a deficient colloquy under *Faretta v. California*, 422 U.S. 806 (1975), before granting his motion for self-representation, and (2) subsequently declined to appoint him counsel at sentencing. Reviewing de novo, *see United States v. Hantzis*, 625 F.3d 575, 579, 582 (9th Cir. 2010), we conclude that these arguments lack merit.

A district court is not required to follow a particular script in the course of a *Faretta* colloquy, but it "must insure that [the defendant] understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the dangers and disadvantages of self-representation." *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004) (citation and internal quotation marks omitted). Here, the record indicates that Morton was fully informed about the charges and possible penalties he faced. Morton's suggestion that the court was required to say more about the elements of each charge, and the government's burden of proof, is unavailing. *See Lopez v. Thompson*, 202 F.3d 1110, 1119 (9th Cir. 2000) ("In assessing waiver of counsel, the trial judge is required to focus on the defendant's understanding of the importance of counsel, not the defendant's understanding of the substantive law or the procedural details."); *United States v. Robinson*, 913 F.2d 712, 715 (9th Cir. 1990) ("[P]erfect comprehension of each element of a

criminal charge does not appear to be necessary to a finding of a knowing and intelligent waiver."). Moreover, the district court warned Morton that it would be "foolish" to proceed without counsel given the complexity of his case, the difficulty he was likely to have observing the Federal Rules of Evidence and presenting his defense, and the experience and skill required to perform effectively at trial.

Morton confirmed that he understood the court's warning, but nevertheless wished to represent himself at trial. On this record, we conclude that the district court's *Faretta* inquiry was constitutionally sufficient and that Morton knowingly, intelligently, and unequivocally waived his right to counsel. *See Erskine*, 355 F.3d at 1169 (waiver is valid when the record indicates that defendant "knew what he was doing, and his decision was made with eyes open.") (internal alterations and quotation marks omitted).

Similarly, the district court did not err by denying as untimely Morton's motion for appointment of counsel at sentencing. Although "a defendant who has waived his right to counsel may nonetheless re-assert that right for the purposes of a sentencing proceeding," *Robinson v. Ignacio*, 360 F.3d 1044, 1059 (9th Cir. 2004), there are "times when the criminal justice system would be poorly served by allowing the defendant to reverse his course at the last minute and insist upon representation by counsel," *McCormick v. Adams*, 621 F.3d 970, 980 (9th Cir.

2010) (quotation marks omitted). This request was one of those times. Morton did not make his request for counsel until the end of the sentencing hearing, and after the court had heard extensive argument from both parties. His request came just as the court was prepared to announce its sentence. Under these circumstances, we conclude that the district court correctly rejected as untimely Morton's request for appointment of counsel.

Morton also unpersuasively argues that the indictment did not properly charge a conspiracy under § 371 and that the evidence was insufficient to sustain his conspiracy conviction. The indictment adequately informed Morton of the elements of a § 371 offense and the facts underlying that charge. *See United States v. Lane*, 765 F.2d 1376, 1380 (9th Cir. 1985). Moreover, the evidence was sufficient to show that Morton entered into an agreement to defraud the United States by dishonest and deceitful means. *See United States v. Kaplan*, 836 F.3d 1199, 1211-12 (9th Cir. 2016) (evidence is sufficient if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt).

Likewise, Morton's arguments that the evidence was insufficient to sustain his convictions under §§ 287 and 514(a) have no merit. *See Kaplan*, 836 F.3d at 1211-12. Moreover, Morton is incorrect that the § 287 charges were brought outside the five-year statute of limitations. *See* 18 U.S.C. § 3282(a). To the extent this argument relies on the date the first superseding indictment was filed, it fails

because Counts 2 and 3 of the superseding indictment were identical to those in the original indictment, and therefore the statute was tolled as to those charges. *See United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990).

Contrary to Morton's assertion, the district court properly applied the Federal Rules of Evidence and Criminal Procedure, *see* Fed. R. Evid. 1001(a) & Fed. R. Crim. P. 1(a)(1), and it did not abuse its discretion in its evidentiary or discovery rulings, *see United States v. Thornhill*, 940 F.3d 1114, 1117 (9th Cir. 2019) ("A district court's evidentiary rulings are reviewed for abuse of discretion."); *United States v. Soto-Zuniga*, 837 F.3d 992, 998 (9th Cir. 2016) ("We review discovery rulings for abuse of discretion."). Furthermore, Morton has not shown that the district court plainly erred in issuing the jury instructions he challenges for the first time on appeal. *See United States v. Alferahin*, 433 F.3d 1148, 1153-54 (9th Cir. 2006).

Finally, the record does not support Morton's claim that the government engaged in outrageous conduct or selectively prosecuted him. *See United States v. Hullaby*, 736 F.3d 1260, 1262 (9th Cir. 2013) (stating test for outrageous government conduct claim); *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir. 1992) (stating standard for selective prosecution claim). Neither has Morton shown that the district court was unfairly biased against him. *See United States v. Wilkerson*, 208 F.3d 794, 797-98 (9th Cir. 2000).

We reject Morton's remaining challenges as unsupported by the record and applicable law.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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