CA No. 18-10134

District Court No. 2:15-cr-226-GMN-PAL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAZZMIN DAILEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GOVERNMENT'S ANSWERING BRIEF

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I.

STATEMENT OF JURISDICTION AND BAIL STATUS

Defendant-Appellant Jazzmin Dailey appeals from a sentence imposed upon final judgment in a criminal case.[1] The district court had jurisdiction under 18 U.S.C. § 3231; imposed sentence on March 30, 2018; and entered judgment on April 2, 2018. ER 31, 36. Dailey filed a timely notice of appeal on April 13, 2018. ER 145; *see* Fed. R. App. P. 4(b)(1). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Dailey is serving a three-year sentence of probation.

II.

ISSUES PRESENTED FOR REVIEW

A. Whether the appellate waiver in Dailey's plea agreement bars this appeal.

B. Whether the district court correctly imposed the requirement that Dailey register as a "sex offender," where Dailey's offense conduct was a sex offense against a minor under the Sex Offender Registration and Notification Act ("SORNA"), Dailey received adequate notice of the condition, and SORNA compliance is a mandatory condition for sex offenders.

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[1] "ER" denotes Dailey's Excerpts of Record. "OB" denotes Dailey's Opening Brief. "PSR" denotes the Presentence Investigation Report, which the government files under seal.

III.

STATEMENT OF THE FACTS

Jazzmin Dailey was indicted for transporting a minor for prostitution (18 U.S.C. § 2423) and attempted sex trafficking of a minor (18 U.S.C. § 1591). ER 146-47. Dailey pleaded guilty to interstate travel in aid of prostitution (18 U.S.C. § 1952) pursuant to a plea agreement, waiving nearly all her appeal rights. ER 42-43, 44-56. The district court sentenced Dailey to three years' probation. ER 156-57.

A. Offense Conduct

On June 15, 2015, Dailey rented a car in Arizona, and bought "prostitution attire" for "T.B.," a 16-year-old girl. ER 46; PSR ¶¶ 11, 15. Dailey drove T.B. from Arizona to Nevada intending for T.B. to prostitute herself. ER 46-47. Dailey told T.B. the rules in the pimp/prostitution subculture, which included performing whatever sexual acts were requested by the "john." ER 46; PSR ¶¶ 13, 17. When they arrived in Las Vegas in the early hours of June 16, Dailey rented a hotel room at the Orleans Hotel and Casino to facilitate T.B.'s prostitution. ER 46-47; PSR ¶¶ 15-18. Shortly thereafter, Dailey and T.B. were arrested in a high prostitution activity area. PSR ¶ 11; ER 46-47.

B. Dailey's Plea

Pursuant to a plea agreement with the government, ER 44-56, Dailey pleaded guilty to a superseding information. *See* ER 42-43. The information alleged, among other things, that Dailey travelled in interstate commerce with the intent to manage and facilitate the carrying on of an unlawful activity, and thereafter performed and attempted to perform prostitution offenses, all in violation of 18 U.S.C. § 1952(a)(3)(A). *Id.*

Dailey's non-binding plea agreement included several essential terms, advisements, and waivers. She admitted facts supporting the essential elements of the offense and enhancements in the plea agreement. ER 46-47. She agreed that her sentencing guideline range would be calculated under U.S.S.G. § 2G1.3(a)(4), the cross-reference guideline relating to transporating minors to engage in a commercial sex act or prohibited sexual conduct. ER 48. Dailey stipulated that her offense conduct involved a commercial sex act. *Id.* She confirmed that she understood she might have to register as a sex offender as a result of her conviction, but that the government had made no representations to her about that. ER 53. Dailey retained only two appellate and post-conviction rights: (1) her right to bring a non-waiveable claim of ineffective assistance of counsel as a post-conviction collateral challenge; and (2) her right to appeal "any portion of the sentence that is an upward departure from the

Sentencing Guidelines range determined by the Court." ER 54-55. Dailey "knowingly and expressly" waived "(a) the right to appeal any sentence imposed within or below the applicable Sentencing Guideline range as determined by the Court; (b) the right to appeal *the manner* in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and, (c) the right to appeal *any other aspect of the conviction or sentence* and any order of restitution or forfeiture." *Id.* (emphasis added).

At her change-of-plea hearing, Dailey confirmed she understood the plea agreement. ER 64-69. She further confirmed that she had discussed with her attorney the sentencing guidelines and how they applied to her case. ER 75. Dailey admitted under oath all the facts in the plea agreement. ER 80-84.

C. Presentence Investigation Report

The probation office provided the parties a draft of the Presentence Investigation Report (PSR) in November 2016. PSR, at 1. The November 2016 PSR included the mandatory condition of sex offender registration. PSR, at 18 ("You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense."), 19 (noting changes). Dailey did not submit any objections. PSR, at

19. Probation provided an updated draft of the PSR in July 2017, which included the same mandatory conditions as the November 2016 draft. PSR, at 1, 18. Again, Dailey raised no objections. PSR, at 19.

D. Sentencing

At sentencing, both Dailey and her attorney confirmed that they had read and reviewed the PSR and found no errors or mistakes of any kind. ER 107-08. Still, Dailey had no objections. *Id.*

Against the government's request for a custodial sentence, the court sentenced Dailey to three years' probation. ER 129. The court explained that because it was imposing probation instead of supervised release, Dailey would be subject to the same conditions recommended in the PSR as supervised release conditions to be used as the conditions of her probation. *Id.* The court directed Dailey to page 17 of the PSR where the conditions began, and imposed the "standard and mandatory conditions" of probation listed thereafter. *Id.* Listed under those mandatory conditions was the requirement for Dailey to comply with the requirements of SORNA. PSR, at 18. Before she left the courtroom, the court gave Dailey a written copy of the conditions imposed. ER 131-32. This appeal follows. ER 145.

IV.

SUMMARY OF ARGUMENT

Jazzmin Dailey pleaded guilty to bringing a child from Arizona to Nevada with the intent that the child engage in prostitution, and Dailey acted to facilitate and promote the child's prostitution. This conviction makes her a sex offender under the Sex Offender Registration and Notification Act (SORNA). The district court recognized the conduct in this case subjected Dailey to sex offender registration. So, after giving Dailey notice, the court correctly imposed sex offender registration as a mandatory condition of probation. As Dailey's sentence is legal, the appellate waiver of her plea agreement bars this appeal, and this Court should dismiss it.

V.

ARGUMENT

A. Standards of Review

This court reviews *de novo* the validity of an appellate waiver and legality of a sentence. *United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017). When the defendant fails to object to an imposed condition of supervision, this Court reviews for plain error. *United States v. Stephens*, 424 F.3d 876, 879 n.1 (9th Cir. 2005).

B. The Appellate Waiver in Dailey's Plea Agreement Bars This Appeal.

A defendant's right to appeal is statutory rather than constitutional. *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000), *superseded by rule on other grounds as recognized in United States v. Lo*, 839 F.3d 777, 784 n.1 (9th Cir. 2016). A plea agreement appellate waiver is not a "jurisdictional" defect, but such a waiver creates a "*preclusive effect*" to any appeal covered by the waiver. *United States v. Castillo*, 496 F.3d 947, 955-56 (9th Cir. 2007) (en banc) (emphasis in original). If there is a valid and enforceable appellate waiver that encompasses the grounds of the appeal, this Court must dismiss the appeal. *United States v. Jeronimo*, 398 F.3d 1149, 1152-53 (9th Cir. 2005), *overruled on other grounds by Castillo*, 496 F.3d at 957; *Anglin*, 215 F.3d at 1068 (noting that knowing and voluntary waivers are "regularly enforce[d]"). However, an appellate waiver will not apply if "the sentence violates the law." *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). "A sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *Id.*

The exception for an illegal sentence does not apply here because Dailey's sentence fell within the permissible statutory penalty and does not violate the Constitution. *Id.* As explained below, Dailey's conviction is a specified offense against a minor under SORNA's residual clause, thus the court properly ordered her to register as a sex offender, as discussed next. This

Court should determine that Dailey is required to register as a sex offender under SORNA, and dismiss this appeal as it falls squarely within the bargained-for appellate waiver in Dailey's plea agreement. ER 54 (Dailey waived her "right to appeal *the manner* in which the Court determined [her] sentence on the grounds set forth in 18 U.S.C. § 3742" and "the right to appeal *any other aspect* of the conviction or sentence. . ." (emphasis added).)

C. The District Court Correctly Imposed the Mandatory Requirement That Dailey Register as a Sex Offender.

1. Dailey is a sex offender required to register under SORNA.

Congress enacted SORNA "to protect the public from sex offenders and offenders against children . . . [by establishing] a comprehensive national system for the registration of those offenders." 34 U.S.C. § 20901 (formerly 42 U.S.C. § 16901). SORNA mandates registration by any "sex offender[]," that is, any "individual who was convicted of a sex offense." *Id.* at § 20911(1).

Apart from several inapplicable exceptions and definitions, 34 U.S.C. § 20911(5)(A) provides that "'sex offense' means—(i) a criminal offense that has an element involving a sexual act or sexual contact with another;" or "(ii) a criminal offense that is a specified offense against a minor . . . ." *Id.* at (i)-(ii). Thus, while subsection (5)(A)(i) targets only those prior offenses whose "elements" involve a sexual "act" or "contact" upon "another," subsection

(5)(A)(ii)—which applies to "minors"—criminalizes any "specified offense" against the minor, regardless of whether a sexual act or contact is involved.

Congress expanded subsection (5)(A)(ii)'s protection of minors by setting forth eight separate offenses that qualify as "specified offense[s] against a minor."[2] 34 U.S.C. § 20911(7). Critically, the list of "specified offenses against a minor" is capped by "catch-all" provision, *i.e.* residual clause, which includes "any *conduct* that *by its nature* is a sex offense against a minor." *Id.* at § 20911(7)(I) (emphasis added). The question, therefore, is whether—under § 20911(5)(A)(ii) and § 20911(7)(I)—Dailey's conviction is for an offense that involves "any conduct that by its nature is a sex offense against a minor."

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[2] Prefaced by a header that makes plain Congress's intent to afford minors special protection from sexual predators—§ 20911(7) explains that "specified offense against a minor" means "an offense against a minor that involves"

> (A) An offense . . . involving kidnapping.
> (B) An offense . . . involving false imprisonment.
> (C) Solicitation to engage in sexual conduct.
> (D) Use in a sexual performance.
> (E) Solicitation to practice prostitution.
> (F) Video voyeurism . . . .
> (G) Possession, production, or distribution of child pornography.
> (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
> *(I) Any conduct that by its nature is a sex offense against a minor.*

34 U.S.C. § 20911(7) (emphasis added).

a. The conduct-specific approach applies to SORNA's residual clause.

This circuit, and every other circuit to have considered the issue, has applied the conduct-specific or circumstance-specific approach to SORNA's residual clause. *See, e.g.*, *United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir.), *cert. denied*, 555 U.S. 1088 (2008); *see also United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 829 (2017); *United States v. Price*, 777 F.3d 700, 709 (4th Cir.), *cert. denied*, 135 S. Ct. 2911 (2015); *United States v. Gonzalez-Medina*, 757 F.3d 425, 431 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1529 (2015); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015); *United States v. Dodge*, 597 F.3d 1347, 1354 (11th Cir.) (en banc), *cert. denied*, 562 U.S. 961 (2010).

Although those other circuits considered the issue after the Attorney General promulgated the SMART Guidelines in July 2008, none considered the SMART Guidelines. *Id.* In fact, the Fourth and Fifth Circuits have expressly declined to give deference to the SMART Guidelines precisely because there is no ambiguity in the statute. *Price*, 777 F.3d at 709 ("We need not accord *Chevron* deference to [the SMART] Guidelines," because the statute is not "ambiguous or silent as to the proper method of analysis."); *United States v. Schofield*, 802 F.3d 722, 730-31 (5th Cir. 2015) ("Because we do not find the SORNA residual clause circular or ambiguous, . . . we need not address

whether deference to the SMART Guidelines under [*Chevron*] is required."). Instead, the other circuits relied on this Court's decision in *Byun* as setting forth the correct standard and analysis. *Hill*, 820 F.3d at 1005; *Price*, 777 F.3d at 709; *Gonzalez-Medina*, 757 F.3d at 431; *Rogers*, 804 F.3d at 1237; *Dodge*, 597 F.3d at 1354.

In *Byun*, this Court explained that the conduct-specific approach applies to SORNA's residual clause for two reasons. *Byun*, 539 F.3d at 992. First, the phrase "a criminal offense that is a specified offense against a minor" does not refer to "elements," unlike 34 U.S.C. § 20911(5)(A)(i) which does. *Id.* And second, the clause refers to an offense that involves "[a]ny *conduct* that by its nature is a sex offense against a minor," which shows that *conduct* drives the analysis, not *elements*. *Id.*

Byun is binding, and its longevity is evidenced by other circuits' reliance on its sound reasoning. *Hill*, 820 F.3d at 1005; *Price*, 777 F.3d at 709; *Gonzalez-Medina*, 757 F.3d at 431; *Rogers*, 804 F.3d at 1237; *Dodge*, 597 F.3d at 1354. Because congressional intent is clear from the language of SORNA's residual clause, Dailey's arguments regarding *Chevron* deference are unavailing, OB 23-32, *Byun*, 539 F.3d at 992; *Price*, 777 F.3d at 709; *Schofield*, 802 F.3d at 730-31. Applying *Byun* and the conduct-specific approach, Dailey is a sex offender.

b. Dailey is a sex offender under SORNA's residual clause because she engaged in conduct that by its nature is a sex offense against a minor.

In *Byun*, this Court considered an alien importation statute, applied the conduct-specific approach, and determined that Byun was a sex offender under SORNA's residual clause. Byun was convicted of importing an alien into the United States for the purposes of prostitution. *Byun*, 539 F.3d at 987. To determine if Byun was a sex offender under SORNA's residual clause, this Court applied the conduct-specific approach looking "to the underlying facts of Byun's crime." *Id.* at 988. This Court found that "transporting a minor to the United States with the intent that she engage in prostitution" is "conduct that by its nature is a sex offense against a minor" *regardless* of whether the minor engaged in prostitution. *Id.* This Court went further and also considered that the offense was "comparable to or more severe than" "transporting a minor in interstate or foreign commerce with the intent that the minor engage in prostitution."[3] *Id.* at 989. The Court determined Byun's conviction for importing a minor for prostitution made her a sex offender under SORNA. *Id.*

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[3] The *Byun* Court was unconcerned with the fact that Byun did not know the victim was a minor. *Byun*, 539 F.3d at 989. This is likely because ignorance of age is not a defense in a prosecution under 18 U.S.C. § 2423(a). *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001).

The conduct-specific approach and *Byun*'s reasoning yield the same straightforward result in Dailey's case. Dailey admitted that she drove T.B., a minor, in interstate commerce "with the intent to facilitate the the promotion, management, establishment, or carrying on of prostitution by . . . 'T.B.'" ER 46-47. If transporting a minor (to the United States) with the intent that the minor engage in prostitution is a "sex offense," *see Byun*, 539 F.3d at 988, then transporting a minor (in interstate commerce) with the intent that the minor engage in prostitution is also a sex offense. ER 46-47. The focus is on *why* the minor was transported, not *where*. Dailey's crime is also comparable to transporting a minor with the intent that the minor engage in prostitution (18 U.S.C. § 2423) as Dailey admitted that is what she did. *Byun*, 539 F.3d at 989;[4] ER 46-47.

Contrary to Dailey's assertions, OB 33, it is irrelevant whether T.B. actually engaged in prostitution, especially when considering that "Dailey was arrested with 'T.B.' . . . on suspicion of prostitution," and admitted that her conduct involved a commercial sex act. ER 47-48; *Byun*, 539 F.3d at 988 ("The

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[4] In an unpublished decision, the Fourth Circuit affirmed that a conviction under 18 U.S.C. § 1952 based on transporting a minor for prostitution would require a defendant to register as a sex offender under SORNA. *United States v. Vanderhorst*, 688 F. App'x 185, 187 (4th Cir.), *cert. denied*, 138 S. Ct. 522 (2017).

'transportation with intent' conduct in which Byun engaged was almost certain to end in Byun urging, advising, commanding, or otherwise inciting Seo to practice prostitution, unless Byun was deflected from carrying out her intent. Moreover, neither the transportation nor the solicitation crimes require that any prostitution actually occur, but both may well result in prostitution by a minor."). Just as Byun was deflected in having Seo prostitute, Dailey was deflected having T.B. prostitute because they were arrested. *Id.*

The conduct-specific approach yields only one conclusion—Dailey's conduct necessarily qualified as a "specified offense against a minor" under § 20911(5)(A)(ii) and § 20911(7)(I). Therefore, the court correctly required Dailey to register as a sex offender, her sentence is not illegal, her appellate waiver forecloses this appeal, and this appeal should be dismissed.

2. Dailey was given adequate notice of the SORNA registration condition in accordance with due process.

A defendant has the right to receive notice that a condition of supervision "*not* on the list of mandatory or discretionary conditions in the sentencing guidelines" is under consideration before it may be imposed. *United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004) (emphasis added). After Wise was convicted of lying to the federal government, the district court imposed a condition limiting Wise's contact with her son. *Id.* at 1030-31. This Court reversed because (1) the presentence report did not recommend the

condition, (2) the judge did not indicate he was contemplating it before imposing sentence, (3) the sentencing guidelines did not mention the condition, and (4) "nothing else in the record suggested the condition as a possibility before it was imposed." *Id.* at 1032–33.

Dailey was on notice of her sex offender registration requirement in at least *five* ways before sentence was imposed. First, the PSR recommended the condition as a mandatory condition in November 2016 and again in July 2017. PSR, at 18. Dailey acknowledged receiving and reviewing the PSR with her attorney. ER 107-08. The PSR applied the guideline provision associated with mandatory sex offender registration. PSR ¶ 26 (applying U.S.S.G. § 2G1.3). This was also the guideline provision explicitly listed in the plea agreement. ER 48. Second, sex offender registration is listed as a mandatory condition in the sentencing guidelines. U.S.S.G. § 5D1.3(a)(7). Dailey acknowledged that she discussed the guidelines and how they might apply to her case with her attorney. ER 75. Third, sex offender registration is listed as a mandatory condition in 18 U.S.C. § 3583(d). ("The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act."). Fourth, the plea agreement and colloquy both indicated that she might have to register as a sex offender. ER 53, 67-68. Fifth,

the court told Dailey that the terms of her probation would be the same as in the PSR. ER 129. Dailey's assertions that she had no notice ring hollow.

In any event, that error does not affect Dailey's rights because she is required to register as a sex offender by operation of law. Dailey's argument that the Probation Office's recommendation was "unsupported by any facts" is unavailing considering the offense conduct in the PSR elaborates on the facts in the plea agreement. PSR ¶¶ 11-24. Dailey admitted, and T.B. confirmed, that Dailey brought a minor to Las Vegas to work as a prostitute. PSR ¶¶ 12-18.

Dailey's reliance on Rule 32 cases, OB 36-37, is misplaced, because those cases turned on special conditions, rather than mandatory conditions. *United States v. Coenen*, 135 F.3d 938, 941 (5th Cir. 1998) ("special conditions at issue"); *United States v. Bartsma*, 198 F.3d 1191, 1199 (10th Cir. 1999)("sex offender registration requirement as a special condition"); *United States v. Angle*, 234 F.3d 326, 347 (7th Cir. 2000) ("not listed among the mandatory conditions . . . or the discretionary conditions of probation"); *United States v. Martinez*, 266 F. App'x 521, 523 (9th Cir. 2008) ("Special Conditions 5 through 9.").

Dailey had adequate notice of the mandatory condition of SORNA registration; thus, no error affecting Dailey's substantial rights occurred.

3. The district court required Dailey to register as a sex offender under SORNA and did not delegate its authority.

The sentencing court must impose as an "explicit condition of a sentence of probation" compliance with SORNA if the person is required to register as a sex offender. 18 U.S.C. § 3563(a). Because Dailey is a sex offender, the court correctly imposed this mandatory condition. ER 140. Dailey's argument to the contrary relies on an unreasonable reading of the condition.

By checking the "Mandatory Condition" box, the court affirmatively found that Dailey was, in fact, a "sex offender" who was required to register under SORNA. ER 140. The court's intentions are confirmed when contrasted against *United States v. Talbert*, where the district court ordered as a "*Special* Condition" that Talbert "shall register as a sex offender under state law *if required to do so.*" 501 F.3d 449, 452 (5th Cir. 2007) (emphasis added). Notably, the *Talbert* court did not check the SORNA "mandatory conditions" box because Talbert's conviction was not a "sex offense." *Id.* Here, the court explicitly ordered Dailey to "comply with the requirements of [SORNA]. . .," because Dailey is a sex offender. ER 140.

Contrary to Dailey's argument, the court did not "delegate" its authority to determine if Dailey was a sex offender or required to register. OB 44. The court had the authority to determine, and correctly determined, that Dailey is a sex offender. This is why the court expressly ordered Dailey to register under

SORNA. The probation officer,[5] bureau of prisons,[6] and state sex offender registries[7] may "direct" Dailey on how, where, and with whom to register, but they do not determine if she has to register. Dailey's argument requires an unreasonable reading of the mandatory condition, and has no merit.

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[5] Probation officers have broad statutory authority to enforce a sentencing court's terms and conditions of probation. *See* 18 U.S.C. § 3603.

[6] The Bureau of Prisons is required to give sex offenders notice of SORNA registration requirements prior to their release. *See* 42 U.S.C. § 16917.

[7] The Supreme Court has recognized that "the federal sex-offender registration laws have, from their inception, expressly relied on state-level enforcement." *Carr v. United States*, 560 U.S. 438, 452 (2010). SORNA did not change the "basic allocation of enforcement responsibilities." *Id.* at 453.

VI.

CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court dismiss the appeal.

Dated this 4th day of April, 2019.

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VII.

STATEMENT OF RELATED CASES

Dailey's co-conspirator Johnny Moore's appealed from his conviction and sentence. That appeal has been docketed as CA No. 18-10077.

Dated: April 4, 2019

/s/ Elham Roohani
ELHAM ROOHANI
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1

I hereby certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points, and contains 4,059 words.

Dated: April 4, 2019

/s/ Elham Roohani
Elham Roohani
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