

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DARNELL GARCIA,
Defendant-Appellant.

No. 91-50642
D.C. No.
CR 88-983-TJH
OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted
December 7, 1993—Pasadena, California

Filed October 4, 1994

Before: Procter Hug, Jr., Mary M. Schroeder, and
Warren J. Ferguson, Circuit Judges.

Opinion by Judge Hug

SUMMARY

**Criminal Law and Procedure/White Collar Crimes/
Jury Instructions**

The court of appeals affirmed in part a district court judgment of conviction and sentence, and remanded. The court held that the district court did not err when it refused to instruct the jury on how to evaluate proceeds from a commingled bank account in connection with money laundering charges.

Other circuits in analogous circumstances have withheld judgment on the conspiracy count for 30 days, giving the Government the right to resentence under the charge with the lesser penalty, in lieu of a new trial. *See Brown*, 299 F.2d at 440; *Orozco-Prada*, 732 F.2d at 1084; *Quicksey*, 525 F.2d at 341; *Owens*, 904 F.2d at 414-15; *Pace*, 981 F.2d at 1123. We will do the same. If the Government consents to a resentencing under 21 U.S.C. § 843(b), we will affirm the conviction on the conspiracy count and remand for resentencing. If the Government does not consent we will vacate Garcia's sentence on Count 1 and remand for a new trial on that count.

IV.

CONCLUSION

Garcia's conviction is affirmed. The case is remanded for resentencing consistent with the opinion. In the event the Government does not consent to resentencing under section 843(b), the district court is instructed to vacate the sentence for Count 1 and grant a new trial on that charge.

AFFIRMED in Part, and REMANDED.

The case at hand is a pre-guidelines case, but we acknowledge that the rationale of this holding casts doubt on the constitutionality of that provision of the sentencing guidelines, because that provision permits a judge rather than the jury to find the facts necessary to establish an element of the crime. The submission of a special verdict form would forestall any such issue.