A P P E N D I X 1

FILED

DEC 12 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GUY CHRISTOPHER MANNINO, Defendant-Appellant.	No. 16-30149 D.C. No. 4:14-cr-00026-RRB-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted December 8, 2017**
Seattle, Washington

Before: HAWKINS, McKEOWN, and CHRISTEN, Circuit Judges.

Guy Christopher Mannino appeals his jury conviction for three counts of solicitation of murder in violation of 18 U.S.C. § 373. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* 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).

1. Sufficient evidence supports Mannino's convictions. *United States v. Romero*, 282 F.3d 683, 686 (9th Cir. 2002). The evidence allowed reasonable jurors to conclude, beyond a reasonable doubt, that Mannino had the requisite intent to solicit the murders. Julius Chambers testified that Mannino asked him to commit the murders, provided him with information about the victims, suggested ways to commit the murders, offered him access to weapons and explosives with which to commit the murders, a place to stay, and aid in escaping. The government presented audio recordings in which Mannino discussed the murder plots with Chambers. And the trial court submitted notes and diagrams detailing Mannino's murder plots—either written by Chambers at the direction of Mannino or written by Mannino himself.

2. There was no error in failing to provide a renunciation defense instruction *sua sponte*. Mannino did not request such an instruction nor did he rely on the defense in his theory of the case. *United States v. Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998). Thus, there was no duty to give the instruction.

3. The alleged instances of prosecutorial misconduct were harmless given the overwhelming evidence of Mannino's guilt. *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190–91 (9th Cir. 2015).

AFFIRMED.

A P P E N D I X 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 4:14-cr-00026-RRB
	)	
GUY CHRISTOPHER MANNINO,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE RALPH R. BEISTLINE, DISTRICT JUDGE
Friday, January 29, 2016; 9:29 A.M.
Anchorage, Alaska

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FOR THE DEFENDANT:
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Anchorage, Alaska 99513

Proceedings Recorded by Digital Recording
Transcript Produced by Computer

1 (Call to order of the Court at 9:29:04 a.m.
2 DEPUTY CLERK: All rise. His Honor, the Court, the
3 United States District Court for the District of Alaska is now
4 in session, the Honorable Ralph R. Beistline presiding.
5 Please be seated.
6 THE COURT: Okay, good morning. We've got everybody
7 here on the telephone. Who's on the telephone?
8 MR. BOTTINI: This is Joe Bottini.
9 THE COURT: Okay.
10 MR. DATTAN: Scott Dattan.
11 THE COURT: Okay. All right. Well counsel, let's me
12 know if you can't hear. We're on the record, United States of
13 America versus Guy Christopher Mannino. It's Case
14 Number 4-14-26. This is the time set for the final pretrial
15 conference. Mr. Mannino is here in the courtroom. That's it,
16 other than the marshals.
17 Anything new before I begin? Anything I need to be
18 aware of, counsel?
19 MR. DATTAN: I think we've been filing it all for
20 you.
21 THE COURT: I've been getting all kinds of stuff.
22 MR. BOTTINI: Nothing from the Government either.
23 THE COURT: Okay, Mr. Mannino, any questions or
24 issues before we get started?
25 THE DEFENDANT: No.

1 mechanism for doing that. Okay?
2 MR. DATTAN: Do you usually have -- do you usually
3 have to ask us whether or not we want to be present for the
4 play-back if they're going to play back in the courtroom and
5 I'll discuss that with Mr. Mannino, as well.
6 THE COURT: Okay. That's right.
7 MR. BOTTINI: I'll make sure that --
8 THE COURT: Go ahead.
9 MR. BOTTINI: I said I'll make sure that we have the
10 adequate equipment, Your Honor.
11 THE COURT: And sometimes they -- you know, the
12 parties agree they can just play them in the jury room and no
13 one's present, because there'll be -- I understand the tapes
14 are going to be evidence and used like any other evidence. In
15 prior cases I've had where the tapes went back as evidence but
16 nobody could play them because they didn't have the machinery
17 to play them. So just be aware of that. Okay?
18 MR. BOTTINI: Okay.
19 THE COURT: All right. Let's talk about these
20 motions in limine. At Docket 58, the Government's motion
21 regarding defendant's exculpatory hearsay statements on the
22 recordings and to others. We've researched that. I've had
23 about -- a number of law clerks study this issue. Looks like
24 the law is pretty clear that exculpatory statements are hearsay
25 and not admissible through other witnesses or through

1 recordings and that's Ortega, 203 F.3rd 675 at 682, and even if
2 these statements are contemporaneous, in the Williamson case,
3 another Ninth Circuit case, has addressed this issue, 512 U.S.
4 675 at 682. So as a result of this, the motion in limine at
5 Docket 58 filed by the Government is granted.
6 The Government's motion in limine at 59 regarding
7 prior convictions of Julius Chambers, that's opposed by the
8 defendant. I need to ask Mr. Dattan, what exactly you have in
9 mind in this regard. It's hard for me to rule without knowing
10 more precisely what your -- what your thinking is.
11 MR. DATTAN: Well Your Honor, not only does Julius
12 Chambers have a long and colorful history, much of it within
13 the last ten years, and some of it involving crimes of
14 dishonesty, but after he was -- after he convinced the
15 Government that Chris Mannino was involved, wanted him to
16 murder people, he was released. He committed a number of
17 additional crimes and was paid money and went down to Texas and
18 committed another crime, and I think, you know, all of this
19 goes to his credibility and his character and to the idea that
20 Chris actually attempted to stop him from engaging in activity
21 that they had allegedly discussed and went to the corrections
22 officers and -- and said that, you know, the release of Julius
23 Chambers was going to be a problem and then sure enough, it
24 was. I mean, he engaged in a bunch of criminal activity.
25 THE COURT: Okay, you're getting a little ahead of

1 MR. BOTTINI: Well you're granting in part and
2 denying in part.
3 THE COURT: Okay, granted in part, denied in part.
4 That's 59. Because you know, I think I made it pretty clear so
5 there's no -- I think that the defendant is entitled to some
6 leeway to show bias or motive to fabricate, but again, I'll say
7 it for the third time, I don't want the side show to take over
8 here.
9 Then we get to the motion in limine at 59 -- well,
10 that's the one we just resolved. The motion in limine at 60
11 regarding Judge Gleason's ruling regarding relevant conduct and
12 the murder for hire enhancement. That motion in limine is
13 granted because her ruling occurred long after the events that
14 are the subject of this litigation took place. So the motion
15 in limine at Docket 60 is granted.
16 Then we have defendant's motion in limine at
17 Docket 63 regarding the transcripts, which is opposed by the
18 Government at Docket 71. And the bottom line is, for me to
19 really finally rule on this motion, I've got to, A, hear the --
20 hear the recordings and, B, see the transcripts. How are we
21 going to accomplish that?
22 MR. BOTTINI: Well, I can -- I can send you copies of
23 the transcripts.
24 THE COURT: Which don't -- which don't help me if I
25 can't compare them to the recordings.

1 MR. BOTTINI: Correct. Yeah. I'm trying to figure
2 out how we do that. I'm -- I'm going to fly up tonight and we
3 can -- we can have copies of the recordings to you over the
4 weekend if -- if we can get an idea how to -- how to facilitate
5 that.
6 THE COURT: How long are these -- how long are the
7 recordings that you propose to play?
8 MR. BOTTINI: I think in total it's -- it's probably
9 a couple of hours.
10 THE COURT: A couple hours of recordings? I thought
11 you were just going to pick bits and pieces.
12 MR. BOTTINI: Well, there -- there are clips of -- of
13 the meetings between Mr. Mannino and Mr. Chambers and the --
14 the lengthiest one is a telephone conversation that Mr. Mannino
15 had with a guy named Preston Miller. We're going to play the
16 entirety oft that. And I may be overestimating, Your Honor,
17 between and hour and a half and two, I think.
18 THE COURT: Well, I've got to take two hours sometime
19 before you get to that phase of the trial to listen to these
20 transcripts and to -- or to listen to these recordings and to
21 compare them to the transcripts. It sounds like I won't be
22 able to start doing it until Monday. So if you have them at my
23 chambers at 8:00 Monday morning, we can begin the process and I
24 can finish it Monday evening.
25 MR. BOTTINI: We will be there.

1 THE COURT: But there's no objection, as I understand
2 it, to the recordings being played. The objection is to the
3 transcripts, and I've read the Government's opposition. Those
4 were prepared by a neutral court reporter, but the issue -- I
5 still have an obligation, frankly, as I understand the law, to
6 independently look at -- listen to the recordings and see how
7 the transcripts are.
8 In any event, then, the transcripts are not evidence
9 and would not in any event even go to the jury, as I understand
10 it. I would rule -- I would read criminal instruction 2.7,
11 transcripts of recordings before they were played, to remind
12 the jury that the transcripts are not evidence. Recordings are
13 the evidence. Transcripts are simply there to assist the jury
14 and if there's a disagreement between the transcripts and the
15 recordings, it's the recordings that's the evidence. I
16 understand that.
17 So that's my -- that's my task for the week, to fit
18 in a couple hours in the evenings or at lunch listening to
19 those.
20 Okay, anything -- Mr. Dattan, any thoughts in this
21 regard?
22 MR. DATTAN: No, I agree that's what you need to do,
23 Your Honor.
24 THE COURT: Okay. Anything else with regards to the
25 motions in limine?

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 4:14-cr-00026-RRB
	)	
GUY CHRISTOPHER MANNINO,	)	
	)	
Defendant.	)	
______________________________	)	

TRANSCRIPT OF TRIAL BY JURY - DAY 2 (CORRECTED)
BEFORE THE HONORABLE RALPH R. BEISTLINE, DISTRICT JUDGE
Tuesday, February 2, 2016; 8:35 A.M.
Anchorage, Alaska

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Anchorage, Alaska 99513
Proceedings Recorded by Digital Recording
Transcript Produced by Computer

1 I N D E X

2 February 2, 2016; VOLUME 2

3

4

Government's Witnesses:	Direct	Cross	Redirect	Recross
William Moore	6	12		
Gregory Moore	14	20	24	
Greg Cox	26	50	54	55
Preston Miller	60	110	112	
Julius Chambers	114			

9

10

11 E X H I B I T I N D E X

Exhibit		Page
Government 1	Mannino Note Bates 40	147
Government 2	Mannino Note Bates 41-42	161
Government 3	Mannino Note Bates 43-45	175
Government 4	Mannino Note Bates 8-11	223
Government 7	9/16/14 Audio Clip	65
Government 9	10/24/14 Audio Clip	184
Government 11	10/24/14 Audio Clip	194
Government 13	10/24/14 Audio Clip	215
Government 16	10/31/14 Audio Clip	235

18 * * * * *

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20

21 CORRECTION REFLECTED AT PAGE 193, Lines 14, 15, and 16

22

23

24

25

1 (Call to Order of the Court at 8:35:20 a.m.)
2 DEPUTY CLERK: All rise. His Honor, the Court, the
3 United States District Court for the District of Alaska is now
4 in session with the Honorable Ralph R. Beistline presiding.
5 Please be seated.
6 THE COURT: All right. Good morning. We're ready to
7 go, it looks like. Did the Government ever submit any verdict
8 forms?
9 MR. BOTTINI: No, we did not.
10 THE COURT: Okay. Are you going to do --
11 MR. BOTTINI: In our view, the general verdict form
12 is sufficient.
13 THE COURT: Okay. All right. So, what's it look
14 like today?
15 MR. BOTTINI: We have a couple of fairly short
16 witnesses to lead off, and then Mr. Cox, who will be somewhat
17 longer, and then the first recording that we were going to
18 offer into evidence and play will be through the witness right
19 after Mr. Cox. So I'm anticipating that sometime --
20 THE COURT: I did review all the recordings. Some
21 are more challenging than others. Do you envision having the
22 witness testify that he listened to the -- I mean, it would be
23 whoever the witness is that was in on the recordings. I guess
24 generally it was Julius, J.T., or whatever they call him. Is
25 he going to say he's listened to them and they're accurate?

1 MR. BOTTINI: Yes.
2 THE COURT: Okay.
3 MR. BOTTINI: As will a witness before Mr. Chambers.
4 Preston Miller similarly has a recording, too.
5 THE COURT: Okay. All right. I'm going to --
6 they're -- I've listened to them. You can pretty clearly hear
7 Mr. Mannino in all of them. You can hear all -- if you really,
8 really listen careful, Clip 3 of the October 24th was the most
9 difficult for me. But anyhow, I think that they can be played.
10 I'll give the warnings. Obviously the tapes are not the
11 evidence -- I mean, sorry, obviously the tapes are the
12 evidence, not the transcripts. I'll advise the jury of that.
13 Anything else?
14 MR. BOTTINI: Mr. Dattan and I have just signed the
15 trial stipulation we referred to yesterday for the one expert
16 witness relating to fingerprint examination. So at some point
17 during the trial -- I don't think we need to do it necessarily
18 this morning -- but that's --
19 THE COURT: At some point whenever you want to, I'll
20 read to it the jury.
21 MR. BOTTINI: Okay. Probably towards the end of the
22 Government's case, I'm thinking.
23 THE COURT: Okay. Mr. Dattan?
24 MR. DATTAN: Yes, sir.
25 THE COURT: Your turn to say whatever you want.

A P P E N D I X 4

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	Case No. 4:14-cr-00026-RRB-SAO
	)	
Plaintiff,	)	**UNITED STATES' MOTION**
vs.	)	**IN LIMINE TO EXCLUDE**
	)	**ADMISSION OF HEARSAY**
GUY CHRISTOPHER MANNINO,	)	**STATEMENTS OF DEFENDANT**
	)	**MANNINO**
Defendant.	)	
	)	

The United States, by and through undersigned counsel, hereby submits this Motion *in Limine* to exclude the introduction of out of court hearsay evidence consisting of statements made by the defendant, which the defendant may attempt to introduce into evidence at trial.

Any such statements are inadmissible hearsay and must be excluded absent some applicable exception to the hearsay rule.

I. ARGUMENT

A. Out-of-Court Statements Made By the Defendant Are Inadmissible Hearsay if Offered by the Defendant

The defendant may attempt to call witnesses in the defense case (or cross examine government witnesses) for the purpose of impermissibly seeking to introduce evidence regarding prior, out-of-court statements made by the defendant. The Federal Rules of Evidence explicitly provide that such conversations are inadmissible when offered *by the defendant.* *See,* Rule 801(d)(2), Fed. R. Evid.

They are admissible, however, if offered *by the government,* because, under Fed.R.Evid. 801(d)(2)(A), a statement is not hearsay if it "is offered against a party and is ... the party's own statement." Therefore, such statements are not admissible unless they are offered by the other party – in this case, the United States. There is no evidentiary basis that would allow the defendants to admit these types of prior conversations for the truth of the matter asserted.

As to out-of-court statements of persons other than the defendants, these statements are also clearly hearsay for which there is no applicable exception that would allow their admission into the record. *See* Fed. R. Evid. 801-803. Nor can they be admitted as non-hearsay, co-conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E).

//

//

B. Specifically, Prior Exculpatory Statements of a Defendant are Inadmissible Hearsay if Offered by the Defendant

As noted, prior statements of a defendant *are* admissible as substantive evidence *in the government's case*. *See, United States v. Matlock*, 415 U.S. 164, 172, 94 S.Ct. 988, 994, 39 L.Ed.2d 242 (1974). [A defendant's "own out-of-court admissions ... surmount all objections based on the hearsay rule ... and [are] admissible for whatever inferences the trial judge [can] reasonably draw."]. However, a defendant's *prior exculpatory* statements are hearsay, and they are not admissible through other witnesses or through recordings. *See, United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000).

In other words, *a defendant* cannot call some other witness (or inquire of a government witness on cross examination for that matter) to admit some out-of-court exculpatory statement made by the defendant. Fed. R. Evid. 801(d)(2).

Such statements are inadmissible even if they were made contemporaneously with other self-inculpatory statements. *See Williamson v. United States,* 512 U.S. 594, 599 (1994). This is because the self-inculpatory statements, when offered by the government, are admissions by a party-opponent under Fed.R.Evid. 801(d)(2), and are therefore not hearsay.

However, the non-self-inculpatory statements – even if made contemporaneously with self-inculpatory statements – are inadmissible hearsay. *See Williamson,* 512 U.S. at 599 (finding that "[t]he fact that a person is making a broadly

self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts [which are hearsay]").

Allowing the admission of exculpatory out of court statements of a defendant would allow the defendant to place his exculpatory statements "before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids." *United States v. Fernandez,* 839 F.2d 639, 640 (9th Cir. 1988).

C. There is no Applicable Exception to the Hearsay Rule Which Would Permit the Admission of Statements Arguably Reflecting the Defendant's Beliefs or Opinions

The defendant may argue that even if such statements are hearsay, certain statements reflecting the defendant's beliefs or opinions should be admissible under an exception to the hearsay rule.[1] Specifically, the defendant may assert that certain statements of the defendant are admissible under Federal Rule of Evidence 803(3), which relates to a declarant's statements that express his or her "existing mental, emotional, or physical condition." Fed. R. Evid. 803(3). That exception provides that the hearsay rule does not exclude:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed ...

Id.

[1] "The proponent of the evidence" bears the "burden to demonstrate" the applicability of an exception to the hearsay rule. *See United States v. Chang*, 207 F.3d 1169, 1177 (9th Cir. 2000); *see also Los Angeles News Svc. v. CBS Broadcasting Corp.*, 305 F.3d 924, 934 (9th Cir. 2000).

In reviewing Rule 803(3) admissibility decisions, the Ninth Circuit has identified three factors bearing on the "*foundational* inquiry on admissibility" under that hearsay exception: "contemporaneousness, chance for reflection, and relevance." *United States v. Emmert*, 829 F.2d 805, 810 (9th Cir. 1987) (emphasis added). Where a defendant's own statements constitute "self-serving assertions that he did not have the requisite intent for the crime now charged," Rule 803(3) does not support the admission of those statements. *United States v. Bishop*, 264 F.3d 535, 549 (5th Cir. 2001).

A seminal case on the scope and application of Rule 803(3) is the Fifth Circuit's decision in *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980), *reh'g denied*, 636 F.2d 315 (1981). There, the defense sought to admit statements that would corroborate the defendant's direct testimony of threats made by Galkin, a co-conspirator. In upholding the district court's exclusion of that evidence, the Fifth Circuit first noted that Rule 803(3) is "limited" in its scope:

> Appellant seeks to stretch the limited scope of admissibility under F.R.E. 803(3). That rule by its own terms excepts from the ban on hearsay such statements as might have been made by Cohen of his then existing state of mind or emotion, but expressly excludes from the operation of the rule a statement of belief to prove the fact believed...

Applying Rule 803(3) to the proffered statements, the court held that the statements were inadmissible hearsay:

> [T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. *If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition* - “I'm scared” - and not belief - “I'm scared because Galkin threatened me.”

631 F.2d at 1225 (emphasis added).[2]

What *Cohen* acknowledged is that Rule 803(3) provides a limited safe harbor for a declarant’s description of his present mental condition. When the declarant’s statements stray from that narrow category – for instance, when the defendant expresses a belief, an opinion, an explanation, or any other such expression –the statement falls outside the Rule’s protection and constitutes inadmissible hearsay.

The distinction set forth in *Cohen* – a difference between an expression of state of mind (“I’m scared”) and an expression of a belief admitted for the purpose of proving the truth of that belief (“I’m scared because of X”) was explicitly adopted by the Ninth Circuit in *United States v. Emmert*, 829 F.2d 805, 810 (9th Cir. 1987). In *Emmert*, the Ninth Circuit concluded that the defendant was not permitted to elicit, from a third party witness, the defendant’s prior statements that the defendant feared government investigators. As the *Emmert* panel held, because the “testimony would have fallen within the ‘belief’ category and would not have been limited to Emmert's current state of mind, it was properly excluded.” *Id.*

[2] For a more detailed explanation of this aspect of Rule 803(3), *see United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005).

Similarly, in *United States v. Sayakhom*, 186 F.3d 928, 936-37 (9th Cir. 1999), the defendant sought to admit an audio recording of a meeting between the defendant and government investigators. The defendant proffered that the "recording was relevant to her state of mind," in that the recording would "show her knowledge in order to refute the intent requirement of the crimes charged." *Id.* at 937. Concluding that the defendant "thus proffered the tape to prove the truth of her statements to the investigators," the Ninth Circuit affirmed the district court's exclusion of the recorded statements. *Id.* In so holding, the Ninth Circuit ruled that "Sayakhom's attempt to introduce statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good faith) is improper." *Id.*

Here, in the event that the defendant seeks admission under Rule 803(3), the government submits that any proffered statements do not constitute a statement of present mental condition, and are thus inadmissible under Rule 803(3). Similarly, statements by the defendant regarding his belief or opinion on certain issues constitute statements of *belief* that are inadmissible under Rule 803(3).

RESPECTFULLY SUBMITTED January 25, 2016, at Anchorage, Alaska.

KAREN L. LOEFFLER
United States Attorney

s/ Joseph W. Bottini
JOSEPH W. BOTTINI
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on January 25, 2016, via the CM/ECF system, to the following counsel of record:

D. Scott Dattan, Esq.

s/ Joseph W. Bottini
Office of the U.S. Attorney

APPENDIX 5

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Attorney for Defendant, Guy Christopher Mannino

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. GUY CHRISTOPHER MANNINO, Defendant.	**DEFENDANT'S TRIAL BRIEF** Case No. 4:14-cr-00026-RRB

Defendant Guy Christopher Mannino, by and through counsel, submits this trial brief to inform the court of various issues that may arise during the trial in this matter.

I. Introduction

Guy Christopher Mannino "Chris" Mannino was originally indicted in Case No. 4:13-cr-00021 with transfer of unregistered firearms, possession of an unregistered machine gun, illegal possession of a machine gun and making a false statement. By plea agreement with the US Attorney in March, 2014 he pled to a superseding information in which he was charged with the transfer of unregistered firearms, possession of an unregistered machine gun, illegal possession of a machine gun and concealment of bankruptcy assets.

Undersigned counsel was appointed in August of 2014 after Chris and his federal defender M. J. Haden disagreed about how to proceed at sentencing. The disagreement was apparently over the issue of "relevant conduct" through which the government sought to sentence Chris for soliciting the murder of John Tiemessen, a lawyer in Fairbanks.

The latter issue depended solely on the testimony of one Greg Cox who Judge Gleason found not to be credible.

Interestingly, both M. J. Haden and Greg Cox, are supposed intended victims of Chris Mannino in the instant case, which relies primarily on the testimony of one Julius "JT" Chambers who was interviewed by law enforcement on September 10, 2014 (although the recording of that interview was not provided until January 22, 2016). At that point in time JT Chambers became a government agent.

During the time that Chris Mannino and JT Chambers were both incarcerated in the Fairbanks Correctional Center (FCC), Chambers sought Chris Mannino out in an effort to incriminate him so that he (Chambers) could be released from jail with time served.

Chris Mannino was sentenced in the prior case on March 11, 2015, after two days of hearings. He was not sentenced for the "plot to murder John Tiemessen" that the government insisted upon. Again, Judge Gleason found that Greg Cox was not a credible witness during the hearings.

On July 22, 2015, the government filed a superseding indictment in this case (docket 31) in which the "victims" of this new "plot" were identified in each count. Count 1 involves "G. C." or Greg Cox, the unreliable informant in the previous case. Count 2 involves "M. J. H." who is M. J. Haden, Chris Mannino's public defender. Count 3 is "G. M.", who is presumably Greg Moore an agent with the Bureau of Alcohol, Tobacco, Firearm and Explosives (BATF). Count 4 is "W. M.",

apparently William Moore, G. M.'s brother and also an agent with BATF. Count 5 is R. S. who is presumably Rick Sutcliffe, an FBI agent.

Trial in this matter begins February 1, 2016 in Fairbanks.

II. Solicitation of Murder

Chris Mannino is charged with 5 counts of solicitation of the murder of federal agents in violation of 18 USC 373(a). That section states:

> **Solicitation to commit a crime of violence**
> (a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

This is essentially a murder for hire statute. In United States v. Chong, 419 F.3d 1076, 1081 (9th Cir. 2005), the Court of Appeals stated:

> To convict under the murder-for-hire statute, however, the government must further prove that Chong gave or promised something of pecuniary value in exchange for seeking Ming's murder. See 18 U.S.C. § 1958 (providing that a person commits murder-**for-hire** by causing another to travel interstate to commit murder "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value"). "The intent to pay someone to commit murder is . . . a critical element of 'murder-**for-hire**.' *United States v. Ritter,* 989 F. 2d 318, 321 (9th Cir. 1993). According to the legislative history of § 1958, Congress intended the statute to punish "[b]oth the man who ordered the murder and the 'hitman.' S. Rep. 98-225, at 306 (1983). As for the pecuniary component, "[t]he murder must be carried out or planned as consideration for the receipt of

> 'anything of pecuniary value.' This term is defined to mean money, a negotiable instrument, a commercial interest, of anything else the primary significance of which is economic advantage. . . ." *Id.*

The court went on to say, "We agree with our sister circuits that there must be evidence that the hitmen clearly understood they would receive something of pecuniary value in exchange for performing the solicited murderous act. The evidence is lacking here." Id., at 1082. As it is here.

At this point it should be obvious that the Government maintains that the crime charged is "murder for hire". See, Governments Proposed Jury instructions at docket 56. See, also United States v. Devorkin, 159 F.3d 465 (9th Cir., 1998) and United States v. Blevins, 397 Fed App 72, 2010 WL 3937364 (5th Cir., 2010). Both cases treat 18 USC 373 as murder for hire cases.

To date the Government has produced no discovery whatsoever that shows or indicates that Chambers would receive anything of pecuniary value for the purported murders that he was allegedly solicited to perform. Only the Government (the FBI) has paid Chambers. It is respectfully submitted that the Government must prove that Chris Mannino gave to Chambers or promised him something of pecuniary value in order to convict him under this statute.

III. Affirmative Defenses

Subsection (b) of the 18 USC 373 provides an affirmative defense to this crime. That section states:

> (b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

What Chris Mannino did not realize was that Chambers was a government agent. What Chris did when Chambers was released was go immediately to correction officers and tell them that he thought Chambers was going to kill a Fairbanks policeman named Stonecipher. However, at least one of the correction officers, Sgt. Colang, knew of the set up. Chris Mannino voluntarily and completely renounced any involvement with Chambers and tried to prevent Chambers from committing crimes. But prior to JT's release, Chris was recorded on October 31, 2014. The recordings that the Government made of conversations between Chambers and Chris Mannino in which Chris tells him that he does not want JT to do anything should be admissible as evidence that Chris renounced any criminal activity by JT, prior to his release. Specifically, on January 25, 2016, the Government provided a copy of a recording made on October 31, 2014, in which Chris tells JT at least twice not to do anything for him, not to do anything illegal.

Of course the Government seeks suppression of these recordings (See Government's motion in limine at docket 58), but in a fair trial, the jury would listen to <u>all</u> of the recordings and decide for themselves whether Chris actually solicited JT.

Despite the fact that Chris was being set up by Chambers, Chris Mannino tried to prevent the commission of crime(s) by Chambers. Chris didn't know that Chambers was a government agent and he tried to prevent Chambers from committing murder.

IV. Entrapment

By no later than September 10, 2014, JT Chambers became an agent of the government. As such he induced Chris Mannino to discuss the possibility of murder. There are no tapes of the conversations between Chambers and Mannino prior to September 10, 2014. There is, however, 1 ½

hours of grandiose story telling by JT Chambers who has a history of violent assaultive behavior and who has told others that he would do or say anything to get out of jail. Presumably that includes lying to law enforcement and the court.

In United States v. Jones, 231 F.3d 508 (9th Cir. 2000) there is a discussion of the entrapment defense:

> The entrapment defense contains two elements: (1) government inducement of the crime, and (2) the absence of predisposition on the part of the defendant.

Id., at 516.

It is well settled that inducement must be provided by someone acting for the government. As stated in United States v. Jones, Id., at 517:

> Inducement must be provided by someone acting for the government. See Davis, 36 F.3d at 1430. A person is a government agent "when the government authorizes, directs and supervises that person's activities and is aware of those activities." Ninth Cir. Model Jury Instr. Crim. S 6.3 (2000); United States v Fontenot, 14 F.3d 1364, 1369 (9th Cir. 1994); see also Sanchez v. United States, 50 F.3d 1448, 1452 (9th Cir. 1995). Factors in determining whether a person is a government agent include "the nature of that person's relationship with the government, the purposes for which it was understood that person might act on behalf of the government, the instructions given to that person about the nature and extent of permissible activities, and what the government knew about those activities and permitted or used." Ninth Cir. Model Jury Inst. Crim S 6.3.

We have already seen from the proceedings in Chris Mannino's prior case, 4:13-cr-00021, that the testimony of Greg Cox was unreliable, even fantastic. The "evidence" offered in this case is similarly unreliable. With Greg Cox the government offered evidence from a known, admitted liar (and then paid him $40,000!). In this case the testimony will be from a career criminal who clearly knows how to manipulate the system and how to manipulate law enforcement. As a result he had

felonies reduced to misdemeanors, was released from prison with time served and was given almost $8,000 from the FBI!

At this point, as an aside, it must be pointed out that such conduct by a defendant would probably be considered a criminal act pursuant to 18 USC 201(a)(3). Be that as it may, in exchange for the story that a bankrupt chiropractor has suddenly turned criminal mastermind, the government released a career criminal who immediately assaulted a family member in Texas. The government not only induced Chris Mannino to talk, it facilitated further criminal activity by Chambers.

The government must prove that Chris Mannino was disposed to commit the crimes charged. Again, as stated in United States v. Jones, at 518:

> In evaluating predisposition, we consider five factors: (1) the character and reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. United States v. Tucker, 133 F.3d 1208, 1217 (9th Cir., 1998) (citations omitted).

The story offered by Greg Cox in the previous case was not credible; the story offered by JT Chambers in this case is not credible. Chris Mannino had no motive to seek to harm Tom Temple or M. J. Haden or Eric Grabber or, for that matter, Greg Cox or the government law enforcement agents. Chambers concocted the story and tried to induce Chris to participate in his fantasies.

No one who heard the testimony of Greg Cox in the previous case, except apparently the prosecution team, would believe the fabrications of JT Chambers. Chris Mannino was set up by government agents. This is a classic case of entrapment.

V. Motion in Limine

Concurrently herewith the defense seeks to prevent the government from offering transcripts of purported recordings of meetings between Chambers and Mannino at FCC. The defense has no objection to use of the recordings, but the transcripts are not evidence. The recordings provided by the government to the defense are not clear enough to hear what has been put in the transcripts. Therefore, the transcripts should not be allowed.

Let the jury hear the recordings and decide for themselves what is said in these recordings.

VI. Jury Instructions

The defense requests separate jury instructions for each count as well as special verdict forms as suggested by footnote 5 in United States v. Jones, 231 F.3d at 516:

> Because the determination of whether a defendant is entrapped is often confusing and difficult, we encourage the district courts to use special verdict forms that query jurors as to the elements of the entrapment defense. Not only does this ease the process of appellate review, it encourages juries to focus their deliberations on the elements of the defense.

Proposed special verdict forms are filed by the defense with the proposed jury instructions.

VII. Prior Convictions

Ordinarily a defendant's prior convictions are not referred to in a criminal trial. In this case, however, both the fact of and the substance of, Chris Mannino's prior convictions, as well as the sentencing proceedings are germane to providing a complete picture for the jury, which the Government, of course, seeks to prevent. See, Motion in Limine at docket 60. Obviously the prosecution has no use for a fair trial, it has already decided to believe a liar and a felon.

Chris Mannino was in prison for non-violent crimes. In contrast, JT Chambers is a violent and dangerous felon.

VII. Conclusion

This is the second time that the Government is attempting to portray Chris Mannino as a vindictive murderer based on the testimony of liars and felons. The court should be very careful to ensure that the Government meets its burdens of proof in this matter.

Dated this 25th day of January, 2016 at Anchorage, Alaska.

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I hereby certify that on January 25, 2016, a copy of the foregoing Defendant's Trial Brief was served electronically on

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s/ D. Scott Dattan

APPENDIX 6

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Attorney for Defendant, Guy Christopher Mannino

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GUY CHRISTOPHER MANNINO,	)	**MOTION IN LIMINE**
	)	**RE: USE OF TRANSCRIPTS**
Defendant.	)	
	)	Case No. 4:14-cr-00026-RRB

Defendant Guy Christopher Mannino, by and through counsel, moves this court to exclude the transcripts of the recordings prepared by the government of purported meetings between Julius "JT" Chambers and "Chris" Mannino.

The government provided copies of the recordings to the defendant which are largely inaudible. It is not possible to ascertain if the transcripts provided by the government accurately state what is in the recordings which the government provided.

The defendant has no objection to the proper use of the recordings themselves. However, the "transcripts" of those recordings are unduly suggestive and indicate what the government expects or wants those recordings to say. The jurors should listen to those recordings and

decide what is said by whom and whether or not such recordings indicate that Chris Mannino has somehow committed any of the crimes charged.

The transcripts themselves are inadmissible hearsay and, given the lack of quality of the recordings provided to the defense, do not comport with what may actually be heard on the recordings themselves.

The government cites United States v. Delgado, 357 F.3d 1061 (9th Cir., 2004), in its trial brief as support for the use of transcripts. Given that defense counsel cannot hear on the recordings what the government has put in its transcripts, the court should certainly review the transcripts before allowing them to be given to the jury. The court in Delgado, Id., at 1070-71 stated:

> We review, however, the use of transcripts as an aid in listening to tape recordings for an abuse of discretion. United States v. Armijo, 5 F.3d 1229, 1234 (9th Cir. 1993). In so doing, we review the steps taken to ensure the accuracy of the transcripts: whether the court reviewed the transcripts for accuracy; whether defense counsel was allowed to highlight alleged inaccuracies and to introduce alternative versions; whether the jury was instructed that the tape, rather than the transcript, was evidence; and whether the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations. Id., see also United States v. Booker, 952 F.2d 247, 249-50 (9th cir. 1991) (per curiam) (considering same critera plus whether the federal agent who prepared the transcript testified to its accuracy).

The transcripts should be excluded from use at the trial in this matter.

Dated this 25th day of January, 2016 at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2016, a copy of the
foregoing MOTION IN LIMINE RE: USE OF TRANSCRIPTS
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APPENDIX 7

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. 4:14-cr-00026-RRB
	)	
Plaintiff,	)	
	)	**RESPONSE TO DEFENDANT'S**
vs.	)	**MOTION IN LIMINE RE: USE**
	)	**OF TRANSCRIPTS**
GUY CHRISTOPHER MANNINO,	)	
	)	
Defendant.	)	
	)	

COMES NOW the United States of America, by and through undersigned counsel, responds to defendant Mannino's motion *in limine* regarding the use of transcripts to assist the trial jury in understanding recordings which the government will offer in its case-in-chief.

Mannino's objection to the transcripts is that they "are unduly suggestive and indicate what the government expects or wants those recordings to say." However, the transcripts were not prepared by any government agents or other personnel. They were prepared by a third-party vendor at government expense. Other than to provide the identity of speakers (not for attribution, but to just provide the names of the parties to the conversation) or, in the case of the September 16, 2014, transcript to provide edits for spellings or typographical errors, no one suggested to anyone at H&M Court Reporting what the transcripts should say. It was for this very reason – to avoid the possibility that transcripts prepared by government personnel might appear suggestive – that the recordings were sent out to a third-party vendor for transcription.

Some of the recordings are difficult to hear in places, but they are not totally inaudible as the defendant suggests. The court will instruct the jury that the transcripts are not evidence – the recordings are – but that certainly does not mean that the jury cannot use transcripts to assist in listening to the recordings during trial.

//

//

//

//

Should the court choose to review copies of the transcripts which have been prepared by H&M Court Reporting, the government will make them immediately available for review.

RESPECTFULLY SUBMITTED January 28, 2016, in Anchorage, Alaska.

KAREN L. LOEFFLER
United States Attorney

s/ Joseph W. Bottini
JOSEPH W. BOTTINI
Assistant U.S. Attorney
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016,
a true and correct copy of the foregoing
was served electronically on the following:

D. Scott Dattan, Esq.

s/ Joseph W. Bottini
Office of the U.S. Attorney

A P P E N D I X 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 4:14-cr-00026-RRB
	)	
GUY CHRISTOPHER MANNINO,	)	
	)	
Defendant.	)	
______________________________	)	

REDACTED TRANSCRIPT
TRANSCRIPT OF TRIAL BY JURY - DAY 3
BEFORE THE HONORABLE RALPH R. BEISTLINE, DISTRICT JUDGE
Wednesday, February 3, 2016; 8:33 A.M.
Anchorage, Alaska

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R. JOY STANCEL, RMR-CRR
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Proceedings Recorded by Digital Recording
Transcript Produced by Computer

1 right? You wouldn't have to worry about that murder-for-hire
2 guideline?
3 A I really didn't think I had to worry about it anyways.
4 Q That's not what you told Preston Miller on September 16th;
5 was it?
6 A That was when I first talked to Scott. After I talked to
7 Scott a few times, I felt very confident that we could show
8 that Greg Cox was lying.
9 Q And so that's how Julius Chambers knew that Cox worked out
10 at Planet Fitness, because he happened to walk by and hear you
11 talking to a correctional officer about it?
12 A Actually, exactly.
13 Q Mr. Mannino, would you agree with me that the recordings
14 that were made on October 24th and October 31st of 2014, you're
15 doing most of the talking in those?
16 A I would say that I did a lot of the talking.
17 Q You're not going to spot me most of it?
18 A It's not in front of me. I'd have to look at it. What
19 exhibit is it?
20 Q We won't listen to it again. We'll just let the jury
21 decide.
22 A Okay.
23 Q And by the way, you know that the entirety of the
24 conversation between you and Julius Chambers in the law library
25 on October 24th and October 31st, you were given that in

1 discovery; weren't you?
2 A Yes.
3 Q So if there was something that you thought we didn't play,
4 you could have played it for us; right?
5 A That's probably true. I -- I didn't -- that's really the
6 PI's job.
7 Q Who was the correctional officer that you say you were
8 telling about where Cox worked out?
9 A C.O. Jones.
10 Q C.O. Jones?
11 A Jones, yeah.
12 Q Jones?
13 A Yeah. Black guy, built.
14 Q Are we going to hear from him?
15 A I had talked to my attorney about that, and we -- I
16 discussed --
17 Q I don't want to know what you talked to Mr. Dattan about.
18 I'm just asking, are we going to hear from him?
19 A You'd have to ask my attorney.
20 Q If I understand this right, Mr. Mannino -- well, let me
21 ask you this. When you were talking to Dr. Dan on November 6th
22 as Chambers is (verbally illustrating) going out the door there
23 at FCC -- you heard the recording; right?
24 A I did.
25 Q All right. And somebody says, "There goes J.T."; right?

APPENDIX 9

CA NO. 16-30149

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	(D.C. No. 4:14-cr-00026-RRB)
Plaintiff-Appellee,	)	
v.	)	
GUY CHRISTOPHER MANNINO,	)	
Defendant-Appellant.	)	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RALPH R. BEISTLINE
United States District Judge

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TABLE OF CONTENTS

PAGE

I. STATEMENT OF JURISDICTION. 1

II. STATEMENT OF ISSUES PRESENTED. 2

III. BAIL STATUS OF DEFENDANT. 3

IV. STATEMENT OF THE CASE. 4

A. THE INVESTIGATION. 4

B. THE CHARGES AND TRIAL. 5

1. The Charges. 5

2. The Victims' Testimony. 6

3. The Jail Informant's Testimony. 7

4. The Other Jail Recordings. 9

5. The Defense Case. 13

6. The Instructions, Deliberations, and Verdict. 14

V. SUMMARY OF ARGUMENT. 15

VI. ARGUMENT. 18

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS FOR SOLICITATION OF MURDER. 18

1. Reviewability and Standard of Review. 18

2. There Was Insufficient Corroboration of Mr. Mannino's Intent for a Rational Jury to Find Beyond a Reasonable Doubt the "Strong[ ] Corroborat[ion]" of Intent Required by 18 U.S.C. § 373(a). 19

3. There Was Insufficient Evidence to Reject the Renunciation Defense Codified in 18 U.S.C. § 373(b) Because No Rational Jury Could Have Failed to Find that (a) Mr. Mannino Provided a Warning to the Authorities and (b) the Murders Did Not Take Place. 22

TABLE OF CONTENTS (cont'd)

PAGE

B. IT WAS PLAIN ERROR FOR THE DISTRICT COURT TO FAIL TO GIVE AN INSTRUCTION ON THE RENUNCIATION DEFENSE. 26

1. Reviewability and Standard of Review.. 26

2. Failure to Give the Instruction Was Plain Error.. 26

C. MULTIPLE FORMS OF PROSECUTORIAL MISCONDUCT DENIED MR. MANNINO A FAIR TRIAL.. 29

1. Reviewability and Standard of Review.. 29

2. The Prosecutor Engaged in Misconduct by Suggesting Mr. Mannino Could Have Introduced Other Portions of the Recordings When the Court Had Precluded Such Defense Evidence on the Prosecutor's Motion.. 30

3. The Prosecutor Engaged in Misconduct When He Argued Mr. Mannino Should Have Called Friends as Character Witnesses.. 33

4. The Prosecutor Engaged in Misconduct by Eliciting Testimony from an Arresting Agent that Mr. Mannino Had Been "Uncooperative" in Failing to Answer Questions after Having Been Arrested.. 37

5. The Prosecutor Engaged in Misconduct by Vouching For and/or Expressing His Personal Opinion About the Government's Case When He Told the Jury in His Opening Statement, "I Wouldn't Be Here" if There Wasn't Something More than the Informant's Testimony and Argued in Closing "We" "Had Our Eye" on Mr. Mannino and "We" "Wouldn't Be Here" if Mr. Mannino Would Stop Plotting to Murder People.. 38

a. The vouching in opening statement.. 39

b. The vouching and/or improper expression of opinion in closing argument.. 41

TABLE OF CONTENTS (cont'd)

PAGE

6. The Prosecutor Engaged in Misconduct When He Began Cross-Examination with, "How Long Did It Take You to Come Up with That Ridiculous Story You Just Told the Jury?" 43

7. The Multiple Forms of Prosecutorial Misconduct Constitute Plain Error Requiring Reversal Because They So Affected the Jury's Ability to Consider the Totality of the Evidence Fairly that They Tainted the Verdict and Deprived Mr. Mannino of a Fair Trial. 46

VII. CONCLUSION. 52

TABLE OF AUTHORITIES

CASES

PAGE

Berger v. United States,
295 U.S. 78 (1935). 31, 42

Bradley v. United States,
420 F.2d 181 (D.C. Cir. 1969). 34

City and County of San Francisco v. U.S. Dept. Of Transp.,
796 F.3d 993 (9th Cir. 2015). 23, 24

Dale v. United States,
66 F.2d 666 (7th Cir. 1933),
rev'd on other grounds
sub nom. Massey v. United States, 291 U.S. 608 (1934). 34

Doyle v. Ohio,
426 U.S. 610 (1976). 37

Jackson v. Virginia,
443 U.S. 307 (1979). 19

Jacobson v. United States,
503 U.S. 540 (1992). 48

McKnight v. United States,
97 F. 208 (6th Cir. 1899). 34

Middleton v. United States,
49 F.2d 538 (8th Cir. 1931). 34

Paxton v. Ward,
199 F.3d 1197 (10th Cir. 1999). 32

Russello v. United States,
464 U.S. 16 (1983). 23, 24, 25, 28

United States v. Bear,
439 F.3d 565 (9th Cir. 2006). 26, 29

United States v. Birges,
723 F.2d 666 (9th Cir. 1984). 44

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

United States v. Branson,
756 F.2d 752 (9th Cir. 1985). 30

United States v. Cabrera,
201 F.3d 1243 (9th Cir. 2000). 33, 37

United States v. Collicott,
92 F.3d 973 (9th Cir. 1996). 30

United States v. Demma,
523 F.2d 981 (9th Cir. 1975) (en banc). 27

United States v. Dvorkin,
799 F.3d 867 (7th Cir. 2015). 25

United States v. Ebens,
800 F.2d 1422 (6th Cir. 1986). 31

United States v. Flores,
802 F.3d 1028 (9th Cir. 2015),
cert. denied, 137 S. Ct. 36 (2016).. 47

United States v. Frederick,
78 F.3d 1370 (9th Cir. 1996). 47

United States v. Fuchs,
218 F.3d 957 (9th Cir. 2000). 26, 29

United States v. Gabriel,
810 F.2d 627 (7th Cir. 1987). 20, 21, 23

United States v. Garcia-Guizar,
160 F.3d 511 (9th Cir. 1998). 45

United States v. Giese,
597 F.2d 1170 (9th Cir. 1979). 34

United States v. Hale,
422 U.S. 171 (1975). 38

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

United States v. Hermanek,
289 F.3d 1076 (9th Cir. 2002) 39, 40, 41

United States v. Kerr,
981 F.2d 1050 (9th Cir. 1992) 29, 40, 41, 46, 47

United States v. Kojayan,
8 F.3d 1315 (9th Cir. 1993) 31

United States v. Laurins,
857 F.2d 529 (9th Cir. 1988) 44, 45

United States v. LKAV,
712 F.3d 436 (9th Cir. 2013) 24

United States v. McNeill,
887 F.2d 448 (3d Cir. 1989) 23

United States v. Miller,
460 F.2d 582 (10th Cir. 1972) 34

United States v. Molina,
934 F.2d 1440 (9th Cir. 1991) 46

United States v. Ortega,
203 F.3d 675 (9th Cir. 2000) 30

United States v. Pelisamen,
641 F.3d 399 (9th Cir. 2011) 19

United States v. Potter,
616 F.2d 384 (9th Cir. 1979) 44, 45

United States v. Roberts,
618 F.3d 530 (9th Cir. 1980) 39, 46

United States v. Sanchez,
176 F.3d 1214 (9th Cir. 1999) 32, 45, 46

United States v. Sine,
493 F.3d 1021 (9th Cir. 2007) 32

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

United States v. Smith,
962 F.2d 923 (9th Cir. 1992). 29, 39, 47

United States v. Stewart,
420 F.3d 1007 (9th Cir. 2005). 21, 23

United States v. Stinson,
647 F.3d 1196 (9th Cir. 2011). 32

United States v. Talley,
164 F.3d 989 (6th Cir. 1999). 23

United States v. Toney,
599 F.2d 787 (6th Cir. 1979). 32

United States v. Velarde-Gomez,
224 F.3d 1062 (9th Cir. 2000). 44

United States v. Velarde-Gomez,
250 F.3d 1288 (9th Cir. 2001). 44

United States v. Vizcarra-Martinez,
66 F.3d 1006 (9th Cir. 1995). 19

United States v. Weatherspoon,
410 F.3d 1142 (9th Cir. 2005). 29, 42, 43, 47

United States v. Wilkes,
662 F.3d 524 (9th Cir. 2011). 44

United States v. Williams,
990 F.2d 507 (9th Cir. 1993). 37

United States v. Wright,
625 F.3d 583 (9th Cir. 2010). 39, 41, 44

United States v. Young,
470 U.S. 1 (1985)... . . . . 42, 46

Wallace v. United States,
281 F.2d 656 (4th Cir. 1960). 34, 36

TABLE OF AUTHORITIES (cont'd)

STATUTES AND RULES

PAGE

18 U.S.C. § 3231. 1

18 U.S.C. § 373. . . . . passim

28 U.S.C. § 1291. 1

Rule 404(a), Federal Rules of Evidence. 35

OTHER AUTHORITIES

Joel Prentiss Bishop, *New Criminal Procedure or New Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases* (4th ed. 1895). 34

Cal. Law Revision Comm'n, *Rep., Rec. & Studies* (1964). 35

Criminal Justice Standards for the Prosecution Function (4th ed. 2015), *available at* http://www.americanbar.org/groups/ criminal_ justice/ standards/ProsecutionFunctionFourthEdition.html. 32

Fed. R. Evid. 404 advisory committee's note. 35

Final Report of the National Commission on Reform of Federal Criminal Laws (1971), *available at* http://www.ndcourts.gov/court/resource/ CriminalCode/FinalReport.pdf 24, 25

Thomas A. Mauet, *Trial Techniques and Trials* (9th ed. 2013). 44

Model Penal Code § 5.01(4).. . . . . 24, 25

S. Rep. No. 97-307 (1982).. . . . . 21, 23, 24, 28

Norman J. Singer, *Sutherland on Statutory Construction* (7th ed. 2012). 24

CA NO. 16-30149

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GUY CHRISTOPHER MANNINO, Defendant-Appellant.	))))))))))	(D.C. No. 4:14-cr-00026-RRB)

I.

STATEMENT OF JURISDICTION

This appeal is from convictions for solicitation to commit murder, in violation of 18 U.S.C. § 373. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Mr. Mannino was sentenced on June 15, 2016. ER 2-7. He filed a timely notice of appeal on June 20, 2016. ER 1.

* * *

II.

STATEMENT OF ISSUES PRESENTED

A. WAS THE EVIDENCE INSUFFICIENT TO SUPPORT CONVICTIONS FOR SOLICITATION OF MURDER?

1. Was There Insufficient Corroboration of Mr. Mannino's Intent for a Rational Jury to Find Beyond a Reasonable Doubt the "Strong[ ] Corroborat[ion]" of Intent Required by 18 U.S.C. § 373(a)?

2. Was There Insufficient Evidence to Reject a Renunciation Defense Codified in 18 U.S.C. § 373(b) Because No Rational Jury Could Have Failed to Find that (a) Mr. Mannino Provided a Warning to the Authorities and (b) the Murders Did Not Take Place?

B. WAS IT PLAIN ERROR FOR THE DISTRICT COURT TO FAIL TO GIVE AN INSTRUCTION ON THE RENUNCIATION DEFENSE?

C. DID MULTIPLE FORMS OF PROSECUTORIAL MISCONDUCT DENY MR. MANNINO A FAIR TRIAL.

1. Did the Prosecutor Engage in Misconduct by Suggesting Mr. Mannino Could Have Introduced Other Portions of Recordings of Conversations Between Mr. Mannino and an Informant When the Court Had Precluded Such Defense Evidence on the Prosecutor's Motion?

2. Did the Prosecutor Engage in Misconduct When He Argued Mr. Mannino Should Have Called Friends as Character Witnesses?

3. Did the Prosecutor Engage in Misconduct by Eliciting Testimony from an Arresting Agent that Mr. Mannino Had Been "Uncooperative" in Failing to Answer Questions after Having Been Arrested?

4. Did the Prosecutor Engage in Misconduct by Vouching For and/or Expressing His Personal Opinion About the Government's Case When He Told the Jury in His Opening Statement, "I Wouldn't Be Here" if There Wasn't Something More than the Informant's Testimony and Argued in Closing "We" "Had Our Eye" on Mr. Mannino and "We" "Wouldn't Be Here" if Mr. Mannino Would Stop Plotting to Murder People?

5. Did the Prosecutor Engage in Misconduct When He Began Cross-Examination with, "How Long Did It Take You to Come Up with That Ridiculous Story You Just Told the Jury?"

6. Did the Multiple Forms of Prosecutorial Misconduct Constitute Plain Error Requiring Reversal Because They So Affected the Jury's Ability to Consider the Totality of the Evidence Fairly that They Tainted the Verdict and Deprived Mr. Mannino of a Fair Trial?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory provision is set forth in the Statutory Appendix.

III.

BAIL STATUS OF DEFENDANT

Mr. Mannino is presently serving the 17-year sentence imposed.

IV.

STATEMENT OF THE CASE

A. THE INVESTIGATION.

In September, 2014, law enforcement officers were informed that Julius Chambers, an inmate at the same jail where Mr. Mannino was housed, had information about Mr. Mannino. *See* RT(2/3/16) 57. Mr. Mannino was awaiting sentencing in another case in which he had pled guilty to bankruptcy fraud and unlawful transfer of an unregistered firearm. CR 55, at 4-5.

Officers met with Mr. Chambers, and he told them Mr. Mannino had asked him to kill several individuals. CR 55, at 5. This included a local Fairbanks attorney, an ATF agent, the bankruptcy trustee in Mr. Mannino's bankruptcy case, a public defender who had represented Mr. Mannino in his guilty plea, and a man named Greg Cox. CR 55, at 5. Mr. Cox was an informant who claimed Mr. Mannino's transfer of the firearm was to facilitate a murder, which would have dramatically enhanced the guideline range for the firearm offense. CR 55, at 2-4.[1] Mr. Chambers provided a paper to the officers with diagrams Mr. Mannino had drawn and information about Mr. Cox and others. ER 75; Govt. Ex. 1.

At another meeting a week later, Mr. Chambers provided the officers with a map drawn by Mr. Mannino and notes Mr. Chambers had written on the back. ER 87-88; CR 55, at 6-7; Govt. Ex. 2. The notes allegedly reflected what Mr.

[1] The court which sentenced Mr. Mannino in the initial case ultimately found Mr. Cox not credible and rejected the enhancement, however. CR 61, at 2.

Mannino had said about agents Mr. Mannino wanted to kill, where Mr. Chambers could get weapons and explosives, and how Mr. Chambers might go about killing the agents. CR 55, at 6-7; ER 91-96.

The officers subsequently arranged to have jail officials place a recording device in the jail law library, where Mr. Mannino and Mr. Chambers met. CR 55, at 8; ER 30. This produced recordings of two meetings, and jail officials also provided recordings of two jail visits Mr. Mannino had from friends. *See* Govt. Exs. 8-19.

B. THE CHARGES AND TRIAL.

1. <u>The Charges.</u>

Mr. Mannino was initially charged with one count of soliciting the murder of multiple federal officers. CR 1. A subsequent superseding indictment broke that charge up into multiple soliciting murder counts and added a count for soliciting the murder of Greg Cox. *See* ER 243-47. The charges ultimately tried were: (1) soliciting the murder of Greg Cox; (2) soliciting the murder of Mr. Mannino's former public defender; (3) soliciting the murder of an ATF agent named Gregory Moore; (4) soliciting the murder of another ATF agent named William Moore; and (5) soliciting the murder of an FBI agent named Richard Sutherland. ER 243-47.

2. The Victims' Testimony.

The first witnesses were the alleged victims. Agent Sutherland testified he was a Fairbanks FBI agent, had had a conflict with Mr. Mannino in an unrelated matter several years earlier, and had been the case agent in the initial firearms and bankruptcy fraud case. *See* RT(2/1/16) 219-26. Agent William Moore testified he was a Fairbanks ATF agent who had been involved in the investigation of the first case. *See* RT(2/3/16) 6-11. Agent Gregory Moore, who was William Moore's brother, testified he arrested Mr. Mannino in Tennessee and participated in the execution of a search warrant at Mr. Mannino's wife's residence. *See* RT(2/2/16) 14-20. Mr. Mannino's former public defender testified she had a "rather difficult" relationship with Mr. Mannino and withdrew when they were surprised by the possible guidelines enhancement. *See* RT(2/1/16) 184-92. The bankruptcy trustee, Larry Compton, also testified, about conflicts with Mr. Mannino in the bankruptcy proceedings and how he concluded Mr. Mannino had committed bankruptcy fraud. *See* RT(2/1/16) 195-208.

Finally, Greg Cox testified about acting as an informant. He claimed Mr. Mannino had solicited him to kill an attorney named John Tiemessen[2] and given him a Sten machine gun. *See* RT(2/2/16) 35-45.

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[2] This testimony had been rejected by the judge at the sentencing hearing in the initial case, as noted *supra* p. 4 n.1.

3. The Jail Informant's Testimony.

The government's main witness was the jail informant, Julius Chambers. He testified Mr. Mannino approached him in the jail because he "had a lot of time in there," "knew the ins and outs," and "ha[d] a good head on his shoulders about jail house etiquette." ER 53. The informant talked about getting released to a treatment program and claimed Mr. Mannino started talking to him about killing the alleged victims when he got out. *See* ER 62-64, 67-69. He claimed he went to his lawyer when he concluded it was "pretty serious." ER 70. Though he did get "a pretty good deal" in his pending state case, he claimed that was his lawyer's idea. *See* ER 73.[3]

The informant further testified about four sets of handwritten notes from his meetings with Mr. Mannino that he had provided at different times. *See* ER 74-75, 87-88, 102, 151; Govt. Exs. 1-4. The notes had what the informant claimed were diagrams of explosive charges he could use to kill various individuals, along with other suggestions about the killings, information about the individuals, maps, and information about people who could help him when he got out. ER 74-82, 87-96, 102-09, 151-61; *see* Govt. Exs. 1-4. The informant admitted much of the handwriting in the notes was his, however, *see* ER 75-80 (information on bottom third written by informant); ER 88 (notes on back written by informant); ER 105-09 (notes on drawings and notes on first page written by informant); ER 152-58

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[3] The lawyer also testified and agreed he was the one who brought up the idea of seeking something in return for the assistance. *See* RT(2/3/16) 57. Still, the informant was an experienced defendant , who in his own words, "knew the ins and outs," *supra*, and he could well have anticipated some sort of deal.

(notes on first page, half of notes on second page, and all notes on third page written by informant), and the only explicit references to killing people were in the informant's handwriting, *see* Govt. Exs. 2, 3. While the informant claimed his notes were information Mr. Mannino had provided, *see* ER 80-81, 93, 105-06, 109, 154, 156, there was no corroboration of this. The informant's notes also included a list, allegedly made at his lawyer's suggestion, of "possible things that I would want out of this case." ER 96-97.

Finally, the informant testified about selected clips from the two recordings of his meetings with Mr. Mannino in the law library. The recordings were in many instances difficult to hear, as evidenced by (1) the district judge's own acknowledgment, *see* ER 121; RT(2/2/16) 3-4; RT(2/4/16) 59; (2) defense counsel's complaints, *see* ER 121; CR 53, at 2; (3) multiple descriptions of some speech as "indiscernible" on virtually every page of transcripts the government provided, *see* Govt. Exs. 10, 12, 14, 17; *see also* CR 71, at 2 (government acknowledgment that "[s]ome of the recordings are difficult to hear in places"); (4) the official court reporter's inability to transcribe the greater part of the recordings, as indicated by repeated entries in the official trial transcripts that "no meaningful transcripts can be made of the recording," ER 113-20, 123-42, 144-50, 165-69; and (5) the informant's multiple corrections of the transcripts the government provided, *see, e.g.*, ER 114, 115, 116, 117, 120, 141-42; *see also* ER 118 (informant testifying "Not really" when asked "Could you hear what was going on there?"). Still, parts of the recordings were introduced and could be heard, and the informant testified about some of what could be heard. *See* ER 113-69. He claimed Mr. Mannino was giving instructions on where to go after he

got out, where to get weapons, how to make explosive charges, and other things he would need to have and know. *See* ER 113-69.

At no point in the recordings did Mr. Mannino definitively say he wanted a murder committed, however, as even the prosecutor acknowledged, *see* ER 219 ("The recordings that we listened to of you and Mr. Mannino in the law library, you guys aren't talking in explicit terms about a murder plot; are you?"). Instead, Mr. Mannino's words were explained by the informant. As one example, the informant claimed that when Mr. Mannino said, "At the very least, you know this much, they're going to be looking hard in Louisiana," Mr. Mannino was saying they would be looking for him in his home state if he committed the murders. *See* ER 138-39. As a second example, the informant claimed that when Mr. Mannino talked about "getting one under [my] belt," he meant the other murders would be easier after the first. *See* ER 140. As a third example, the informant claimed that when Mr. Mannino said, "Let's say you did Rick and Cox," and "They're going to be so fucking mad it's not funny. They're mean," he understood Mr. Mannino to mean the federal authorities would be coming after him.[4] *See* ER 147.

4. <u>The Other Jail Recordings.</u>

The government also introduced portions of the recordings of the two jail visits – with friends named Preston Miller and Dan Schoonover. The

[4] The informant did not explain why he thought Mr. Mannino would characterize it as "mean" for federal authorities to try to find someone who had murdered a federal agent and a witness. Most people would presumably think this an eminently reasonable reaction.

portions the government highlighted from the lengthy Preston Miller visit recording were some brief exchanges which the government asserted, *see* ER 236; RT(2/4/16) 17, showed Mr. Mannino was trying to find Greg Cox. But it was Mr. Miller who brought that up.

> MANNINO: . . . Greg Cox got busted.
> And while they were searchin' the house they fuckin' went, "Oh, what's this? This is a machine gun, and this is a hand grenade."
> And, he goes, "Listen, uh, I know you want my buddy Chris, and, uh, I'll turn snitch for ya' if you just don't arrest me."
> *MILLER: Where's he at anyway?*
> MANNINO: I don't know, I'd love to know. So, um, he – then he went and got Grabber and Grabber's an idiot. And now he's out in Fotech (ph) trying fucking nail Fotech (ph). He did, uh . . .
> MILLER: Really?
> MANNINO: Yeah. He – ah, he took me – you know, the, uh, Tannerite mixture that you gave me.
> MILLER: Uh-huh (affirmative).
> MANNINO: I told 'em, well if you put silica sand in it – you know put 6 percent silica sand, you know, it will go off with the .22's. Right.
> MILLER: Uh-huh (affirmative).
> MANNINO: So, he's marketing it as – as "Arctic Thunder" binary explosives. He's out there doin' it right now.
> MILLER: He is?
> MANNINO: Yeah.
> *MILLER: Then where is he?*
> MANNINO: I don't know. I'd sure like to know. How long you here for?
> MILLER: Uh, I'm here til Sunday.
> MANNINO: It'd be great to get on the computer and find that shit out. I mean, I'd really like to know where he's at.

Govt. Ex. 8, at 19-20 (emphasis added).[5]

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[5] While it is the recordings which are the actual evidence, the defense, for ease of reference, is citing to transcript page numbers when it does not contest the transcript's accuracy. If the government disagrees with the accuracy of any of the transcript portions quoted, the Court should review the actual recordings, which the defense is moving be lodged with this Court.

Later conversation during this visit suggested Mr. Mannino's interest was investigating Greg Cox. At one point where Mr. Mannino returned to the idea of locating Greg Cox and repeated he'd "really like to know" where he lived, Govt. Ex. 8, at 53, he went on to explain his legal team was conducting an investigation:

> MANNINO: . . .
> So, ah – and we're gonna fucking talk to people like Scott Paden (ph). Right? He's been his friend for 20 years, and he's gonna tell 'em, "That for 20 years he's been telling me he's a Navy SEAL."
> And he told – he went on Michael Duke's radio show and said he was a Navy SEAL.
> MILLER: Uh-huh (affirmative).
> MANNINO: And they'll make a liar of him.
> * * *
> MANNINO: Yeah. Well, we got – I guess Mike's picked out a whole bunch of fucking radio shows where he's introduced, "I'm Greg Cox, I'm an ex-Navy SEAL.
> MILLER: Uh-huh (affirmative).
> MANNINO: So . . .
> MILLER: Oh my God. Put that in front of a jury. He's lyin' about that.
> MANNINO: Oh, yeah, so . . .
> MILLER: And he's gonna fuck anything else he . . .
> MANNINO: Well, it's his word against mine. Whether that STEN gun is – a) is a STEN gun; and, b) is a machine gun; and, c) was mine?
> Number two, it's his word against my word that whether or not I hired him to kill somebody. They do have a tape where I denied everything.

Govt. Ex. 8, at 53-55.

The second jail visit recording the government introduced – with the other friend, Mr. Schoonover – began with Mr. Schoonover telling Mr. Mannino he had seen the informant being released. The government witness who produced the recording testified he heard references to a possible "wire" on this recording, though he heard them only the second time he listened to it. *See* ER 33-34. Mr. Mannino agreed he "ma[d]e a comment about being warned about a wire," but

also said he "had no idea" the meetings were being recorded. *See* RT(2/3/16) 206.

The government argued these comments about a "wire" showed Mr. Mannino suspected he was being recorded, in an effort to explain other evidence raising serious doubts about Mr. Mannino's intent. *See* RT(2/4/16) 14. That evidence included statements in the recordings of the law library meetings such as the following:

> MANNINO: So why am I gonna fuck that up by me being stupid. You know what I'm saying? And I'll tell you again, you don't have to do a thing.
> CHS: Okay.
> MANNINO: Just get there. You know what I'm saying? Just get there.
> CHS: Yeah.
> MANNINO: And I'm good. Because even if I went to sentencing right now today and Uncle Rick showed up, just gonna throw up a bunch of stuff and say all sorts of nasty stuff and we're gonna say – we're gonna call it bull shit.
> And he's gonna say, "Well I heard it from him, and I heard it from Greg."
> And we're gonna say "Snitch," and then we're gonna say, "Snitch," and then we're gonna put our own people up to prove what they are. Right?

Govt. Ex. 12, at 25.

> Well, I am not asking you to do anything, and I think you should take care of your fuckin' shit and take care of you to get out'a here. By involving yourself in something you think that I want, you're just making a mistake.

Govt. Ex. 17, at 2.

> I don't want you to do that. I think you're causin' a shit storm. I am telling you straight up, to talk about it and all that stuff will kill ya', but you're not my missile.

Govt. Ex. 17, at 9.

There was also testimony from the jail official who testified about the second jail visit recording. He testified Mr. Mannino had given him a warning

several days after the informant had been released.

> [Mr. Mannino] asked me if I knew where J.T. [the informant] was, and I said no, and he said, well, you know, we talked about things that could probably get somebody hurt and, you know, there was nothing to it, you know. It was something that, you know, I was trying to work with some people about, but I need to find out where he is, because he could hurt somebody if we don't find out where he is right away.

ER 35. The jail official inferred from this that "if Mr. Mannino did want someone hurt, . . . [h]e wanted that stopped." ER 39.

5. <u>The Defense Case.</u>

The defense presented testimony from Mr. Mannino and two other witnesses. The first witness was another jail inmate named Tanner Claus. He described the informant as "a self-appointed shot-caller" who was "always riding [Mr. Mannino's] bumper," RT(2/3/16) 106. He also opined the informant was not truthful, noting he had "been burned by that kid so many times, it's not even funny." RT(2/3/16) 107. He described Mr. Mannino as a "good guy," non-violent, and someone he had never known to lie. RT(2/3/16) 105, 107.

The second defense witness was the case agent. He had gone to a location on a map Mr. Mannino drew where there was supposed to be a conex containing guns, body armor, and "all the stuff [the informant] needed," ER 152, and found there was no conex there, though he claimed "[y]ou could see where it had been." RT(2/3/16) 115.

Finally, Mr. Mannino testified. He denied soliciting either Greg Cox or the jail informant to murder anyone. *See* RT(2/3/16) 127, 129, 135, 156, 149-50, 186-

87. He had met the informant in jail, thought he seemed "like he was in charge," and concluded "it would be best to be on his good side." RT(2/3/16) 137. Mr. Mannino had caught the informant on two occasions going through his discovery, RT(2/3/16) 142-43, which had some of the agents' names in it, RT(2/3/16) 147-48. Mr. Mannino admitted he had written and drawn in the notes the informant produced, but testified he did this in response to questions and requests by the informant. *See, e.g.*, RT(2/3/16) 159-62, 163, 164, 173. Mr. Mannino played along with the informant when the informant talked about getting released and then absconding and killing people, including an officer who had arrested the informant. RT(2/3/16) 157, 165-66, 181-82. Mr. Mannino provided the informant with false information and directed him to people who could keep track of him in case he really did try to do the things he was talking about. RT(2/3/16) 157, 165-66, 181-82. Mr. Mannino also told the informant multiple times he did not need to do anything for Mr. Mannino. RT(2/3/16) 182-83. When the informant was released, Mr. Mannino tried to warn jail officials the informant might be dangerous. RT(2/3/16) 185-86.

6. <u>The Instructions, Deliberations, and Verdict.</u>

In addition to the offense elements, the court instructed on the defense of entrapment. CR 91, at 33. But the court did not instruct on a defense of renunciation which is expressly codified in the solicitation statute, *see* 18 U.S.C. §

373(b).[6] The jury deliberated a total of more than a day before reaching a verdict. *Compare* RT(2/4/16) 56 (jury excused to deliberate at 10:23:02 a.m.) *with* CR 85-2 (jury note reporting verdict dated 2/5/16 with time of 1:04 p.m.). It found Mr. Mannino not guilty of soliciting the murders of the public defender and one of the agents, but guilty of the other solicitations. *See* RT(2/5/16) 4.

V.
SUMMARY OF ARGUMENT

To begin, the evidence was insufficient to support convictions for solicitation of murder – in two respects. First, there was insufficient corroboration of Mr. Mannino's intent for a rational jury to find beyond a reasonable doubt "strong[ ] corroborat[ion]" of intent which is required by 18 U.S.C. § 373(a). On the one hand, there was only mixed evidence of factors case law instructs courts and juries to consider, which include (i) whether the defendant offered or promised payment or some other benefit to the person solicited, (ii) whether the defendant threatened the person to convince him to commit the offense, (iii) whether there were repeated solicitations and express protestations of seriousness, (iv) whether the defendant was aware the person had previously committed similar offenses, and (v) whether the defendant acquired weapons, tools, or information suited for the person to use. On the other side of the coin, there was significant countervailing evidence, in the form of the absence of the supposed conex full of

[6] Defense counsel did not submit a proposed jury instruction on the defense, but he did describe the defense in his trial brief, *see* CR 61, at 4.

weapons, Mr. Mannino's statements on the recordings that he was not asking the informant to do anything, and the warning Mr. Mannino gave to the jail official.

Second, there was insufficient evidence for the jury to reject the renunciation defense codified in 18 U.S.C. § 373(b). That provision makes it a defense for the defendant to prevent the offense he has solicited, even if the person solicited was not actually going to commit the offense. Two indisputable facts made it impossible to reject this defense here: (a) that the murders did not take place; and (b) that Mr. Mannino warned the jail official the informant might hurt somebody. The government's argument Mr. Mannino provided this warning only because he was concerned about a "wire" is irrelevant, because the renunciation defense can be asserted even if the reason for the renunciation is a concern about apprehension. This follows from both the plain statutory language, which contains no exception for renunciation due to a concern about apprehension, and a Senate Report showing Congress had model renunciation defense provisions before it that had such limiting language and did not include that language in § 373(b).

There also should have been an instruction on the renunciation defense. While defense counsel did not request such an instruction, the failure to give one was plain error. The evidence clearly supported such an instruction, the defense was described in the defense trial brief, and the failure to give an instruction affected Mr. Mannino's substantial rights and the fairness, integrity, or public reputation of judicial proceedings. The references to a "wire" in the recording of the second jail visit were both difficult to hear and sufficiently ambiguous that a jury could have found concern about apprehension was not the reason Mr. Mannino gave the warning. And renunciation was possibly the best defense Mr.

Mannino had, because the evidence of inducement to support an entrapment defense was weak and the defense that Mr. Mannino never even solicited the murders was more dependent on the jury believing him as a witness. Finally, the evidence was far from overwhelming in light of the fact the government's case depended largely on the word of the informant and there was the conflicting evidence about Mr. Mannino's intent in the form of the missing conex and his statements that he was not asking the informant to do anything.

There were also multiple forms of prosecutorial misconduct that denied Mr. Mannino a fair trial. First, the prosecutor engaged in misconduct by suggesting in cross-examination that Mr. Mannino could have introduced other portions of the recordings when the prosecutor had successfully precluded this though a pretrial motion. Second, the prosecutor engaged in misconduct by arguing Mr. Mannino should have called friends as character witnesses, because the decision to raise character lies entirely in the discretion of the defense. Third, the prosecutor engaged in misconduct by eliciting testimony Mr. Mannino had been "uncooperative" in failing to answer questions after having been arrested, which was an infringement on Mr. Mannino's Fifth Amendment rights. Fourth, the prosecutor engaged in misconduct by vouching and/or expressing his personal opinion about the government's case – in opening statement when he told the jury, "I wouldn't be standing here," if there wasn't something more than the informant's testimony, and in rebuttal closing argument when he told the jury that "we" had "had our eye" on Mr. Mannino and "wouldn't be here" if Mr. Mannino hadn't been plotting to murder people. Fifth, the prosecutor engaged in misconduct when he began cross-examination with an argumentative question characterizing Mr.

Mannino's testimony as a "ridiculous story." While defense counsel objected to only this last instance of prosecutorial misconduct, all of the misconduct taken together rises to the level of plain error.

VI.

ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS FOR SOLICITATION OF MURDER.[7]

1. Reviewability and Standard of Review.

Defense counsel made a motion for judgment of acquittal at the close of the government's case, which the district court denied. *See* ER 21-25. At the end of the defense case, during the jury instructions conference, he effectively renewed the motion by stating, "I didn't get our Rule 29 motion," and the district court effectively denied it, by responding, "Well, other than that . . . Okay." ER 13.

A ruling on sufficiency of the evidence is reviewed de novo and the

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[7] The testimony of the informant and the jail official whom Mr. Mannino warned about the informant – which, along with the case agent's brief testimony about the missing conex, is the most important to consider in evaluating the sufficiency of the evidence – is included in the Excerpt of Record. As for the recordings, the defense is moving to have all of the exhibits lodged with the Court, as noted *supra* p. 10 n.5. The Court should consider the transcript exhibits only to the extent the parties concede their accuracy in the briefs, *see, e.g., supra* p. 10 n. 5, as it is the recordings which are the actual evidence and the transcripts are far from consistently accurate, *see supra* p. 8.

conviction upheld if "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pelisamen*, 641 F.3d 399, 409 n.6 (9th Cir. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).[8] The analogous standard where there is an affirmative defense the defendant must prove by a preponderance of evidence would be whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found there was not a preponderance of evidence supporting the defense.

2. There Was Insufficient Corroboration of Mr. Mannino's Intent for a Rational Jury to Find Beyond a Reasonable Doubt the "Strong[ ] Corroborat[ion]" of Intent Required by 18 U.S.C. § 373(a).

The informant did claim Mr. Mannino asked him to commit murders and provided him with information about the victims and suggestions of how to commit the murders. The informant also claimed Mr. Mannino directed him to others who could help him once he got out, with a place to stay, money, help escaping, and weapons and explosives. There were also the notes and diagrams the informant claimed reflected that information. Finally, some of the recordings, though difficult to hear, provided arguable corroboration.

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[8] Even an unpreserved challenge is reviewable for plain error, and the difference between the ordinary and plain error standards of review for sufficiency of evidence is "largely academic," *Pelisamen*, 641 F.3d at 409 n.6, because "it is difficult . . . to envision a case in which the result would be different because of the application of one rather than the other of the standards," *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995).

On the other hand, there was significant evidence, independent of Mr. Mannino's testimony, raising doubt about Mr. Mannino's intent. There was the map Mr. Mannino provided to a conex allegedly containing weapons which was no longer there if it ever had been. Even more significant, there were Mr. Mannino's multiple statements on the recordings that, inter alia, "you don't have to do a thing," "I am not asking you to do anything," and "you're not my missile." *Supra* p. 12.

This countervailing evidence might have been insufficient to prevent a rational jury from finding intent beyond a reasonable doubt under an ordinary criminal statute, but the solicitation statute is not an ordinary statute. It requires additional proof – of "circumstances strongly corroborative of that intent." 18 U.S.C. § 373(a). Factors to be considered in judging whether there is such corroboration are (i) whether "the defendant offered or promised payment or some other benefit to the person solicited if he would commit the offense"; (ii) whether "the defendant threatened harm or some other detriment to the person solicited if he would not commit the offense"; (iii) whether "the defendant repeatedly solicited the commission of the offense, held forth at length in soliciting the commission of the offense, or made express protestations of seriousness in soliciting the commission of the offense"; (iv) whether "the defendant believed or was aware that the person solicited had previously committed similar offenses"; and (v) whether "the defendant acquired weapons, tools or information suited for use by the person solicited in the commission of the offense, or made other apparent preparations for the commission of the offense by the person." *United States v. Gabriel*, 810 F.2d 627, 635 (7th Cir. 1987) (quoting S. Rep. No. 97-307,

at 183 (1982) (hereinafter "Senate Report") (footnotes omitted)), *cited with approval in United States v. Stewart*, 420 F.3d 1007, 1020 (9th Cir. 2005).

These factors were mixed here. The second and fourth factors were absent because the informant did not claim Mr. Mannino threatened him and the informant's criminal history included only ordinary assault, not murder, *see* ER 49. The third factor was present to some extent if the informant was believed, as he did claim Mr. Mannino had approached him multiple times, but this factor was also absent to an extent because there were no "protestations of seriousness"; to the contrary, there were Mr. Mannino's statements that he was not asking the informant to do anything. With respect to the first factor, the promises of benefit were ambiguous at best; the things the informant described Mr. Mannino offering him were mostly money or weapons he needed to commit the supposedly solicited murders or escape afterward, *see, e.g.*, ER 96, 99-100, 129, 131, 136. The fifth factor would have been satisfied if Mr. Mannino really had the weapons and/or explosives he offered to supply, but the missing conex suggested he did not have what he offered.[9]

The foregoing might be enough if there were no countervailing evidence of Mr. Mannino's intent, *cf. Stewart*, 420 F.3d at 1021 (finding similar factors sufficient), but there was countervailing evidence here. First, there was the fact there was no conex with weapons where Mr. Mannino said one was. Second,

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[9] The case law does state that the listed factors "are not exclusive or conclusive indicators of intent to solicit," *Gabriel*, 810 F.2d at 635, and the government did argue there was an additional factor in the form of Mr. Mannino's motive to solicit the murders, *see* RT(2/4/16) 16-17. Motive will exist in almost any solicitation case, however, as people rarely solicit murders for no reason at all.

there were Mr. Mannino's statements on the recordings that he was actually not asking the informant to do anything. Third, there was the warning Mr. Mannino gave the jail official. That countervailing evidence took the government's proof below the threshold necessary for a rational jury to find the "strong corroboration" required by the statute.

3. There Was Insufficient Evidence to Reject the Renunciation Defense Codified in 18 U.S.C. § 373(b) Because No Rational Jury Could Have Failed to Find that (a) Mr. Mannino Provided a Warning to the Authorities and (b) the Murders Did Not Take Place.

Even if a rational jury could find the required strong corroboration of intent beyond a reasonable doubt, there is the affirmative defense of renunciation to consider. 18 U.S.C. § 373(b) provides:

> It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

Two facts relevant to this defense were indisputable. First, the murders did not take place. Second, Mr. Mannino approached the jail official – Fairbanks Correctional Center Sergeant Colang – soon after the informant was released and warned him the informant "could hurt somebody if we don't find out where he is right away." ER 35.

It does not matter that the informant never intended to commit the crime. The Senate Report, which has been relied upon to guide application of the statute in multiple other cases, *see United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989); *United States v. Gabriel*, 810 F.2d at 635; *see also United States v. Stewart*, 420 F.3d at 1020 (citing *Gabriel*); *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999) (citing *McNeill* and *Gabriel*), states:

> [I]f the solicitee never intended to commit the crime, but the solicitor (not knowing this) took steps to inform the authorities so that the crime would have been prevented if the person solicited had tried to commit it, the solicitor could avail himself of the affirmative defense herein.

Senate Report, at 185 n.113.

The government's position was that Mr. Mannino approached Sergeant Colang only because he suspected the informant had been wearing a "wire" and he was trying to "buy[ ] insurance." RT(2/4/16) 14. That is not sufficient to defeat the renunciation defense for two reasons, however. Initially, the brief references to a "wire" were (a) at first not even heard and (b) ambiguous. The assertion that was the reason Mr. Mannino decided to prevent the murders is speculative at best.

More important, it does not matter whether that is the reason. Nothing in § 373(b) makes the defense inapplicable when the defendant's decision to prevent the solicited offense is triggered by a concern he might be apprehended. The "short answer" to an argument that the defense *ought* to be inapplicable in that circumstance "is that Congress did not write the statute that way," *Russello v. United States*, 464 U.S. 16, 23 (1983), and it is the plain language of the statute that controls, *City and County of San Francisco v. U.S. Dept. of Transp.*, 796 F.3d 993, 998 (9th Cir. 2015).

Also pertinent is § 373(b)'s contrast with the renunciation defense proposed by the National Commission on Reform of Federal Criminal Laws and in the Model Penal Code. That version of the defense does contain language making it inapplicable if the renunciation was motivated by a fear of being apprehended. *See Final Report of the National Commission on Reform of Federal Criminal Laws* 73 (1971), *available at* http://www.ndcourts.gov/court/resource/CriminalCode/FinalReport.pdf (hereinafter "*Commission Report*") (precluding defense where renunciation "motivated in whole or in part . . . by a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation"). *See also* Model Penal Code § 5.01(4) (same). And Congress had these models before it when it wrote § 373(b) without that language. *See* Senate Report at 179 (noting solicitation offense "recommended by the Model Penal Code and the National Commission"); *id.* at 182 n.100 (noting other "recommendation of the National Commission" about solicitation offense).

This triggers another principle of statutory construction. Initially, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. Courts also "look to . . . similar statutes to aid in interpretation." *City and County of San Francisco*, 796 F.3d at 998 (quoting *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013)). Finally, the principle extends to deviations from model laws a legislature is considering. *See* 2B Norman J. Singer, *Sutherland on Statutory Construction* 370 (7th ed. 2012).

This principle is squarely applicable here. In drafting § 373(b), Congress

had before it and considered the National Commission and Model Penal Code version of the renunciation defense that precludes the defense if the renunciation is due to the defendant's belief he might be apprehended. Congress chose not to include that limitation in § 373(b), so "it may be presumed that the limitation was not intended," *Russello*, 464 U.S. at 24.[10] This presumption is particularly appropriate here, because Congress *did* include a second limitation which accompanied the one it did not include, making the renunciation defense inapplicable when "it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective." 18 U.S.C. § 373(b). *Compare Commission Report*, at 73; Model Penal Code § 5.01(4).

Why Mr. Mannino renounced any criminal intent he had and warned Sergeant Colang about the informant is therefore irrelevant. The renunciation is a defense regardless of the reason.

*   *   *

[10] The Seventh Circuit took a contrary view in *United States v. Dvorkin*, 799 F.3d 867 (7th Cir. 2015), but that case is unpersuasive and should not be followed, because it relied on the same Model Penal Code provision that Congress chose not to follow, *see id.* at 880.

B. IT WAS PLAIN ERROR FOR THE DISTRICT COURT TO FAIL TO GIVE AN INSTRUCTION ON THE RENUNCIATION DEFENSE.[11]

1. Reviewability and Standard of Review.

Defense counsel noted the renunciation defense in his trial brief, *see* CR 61, at 4, but did not request an instruction on the defense. The failure to give such a theory of defense instruction remains reviewable for plain error, however. *See, e.g., United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006). Plain error exists when (1) there is error, (2) the error is plain, and (3) the error effects substantial rights. *United States v. Fuchs*, 218 F.3d 957, 962 (9th Cir. 2000). The error must also "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

2. Failure to Give the Instruction Was Plain Error.

The requirements for plain error are all satisfied here. First, there was error, because there was more than sufficient evidence presented to support the defense, even if concern about apprehension negates the defense. It was uncontested that Mr. Mannino approached Sergeant Colang and warned him the informant "could hurt somebody if we don't find out where he is right away." ER 35. While a jury could have found this was because of a suspicion about a "wire," the evidence of

[11] This instructional error does not matter if the Court agrees there was insufficient evidence to support the convictions.

that was sufficiently ambiguous that a jury also could have found this was not the reason for the warning. That made an instruction appropriate regardless of whether concern about apprehension negates the defense.

Second, the error was plain because defense counsel presented the law to the district court, the government's own evidence supported the defense, and Mr. Mannino's testimony supported the defense. The statute was quoted verbatim in the defense trial brief. *See* CR 61, at 4. The government's own witness – Sergeant Colang – testified Mr. Mannino warned him about the informant. Finally, Mr. Mannino affirmed in his testimony that he moved to prevent the harm when he heard the informant was released. *See* RT(2/3/16) 184-86. While Mr. Mannino also testified he never had an intent to solicit murder in the first place, that does not mean renunciation could not be an alternative theory of defense. A defendant may present alternative affirmative defenses even when he denies the elements of the offense. *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc). Indeed, the court instructed on the alternative defense of entrapment in this very case. *See* CR 91, at 33.

Third, the error affected Mr. Mannino's substantial rights. The renunciation defense was possibly the best defense Mr. Mannino had. Entrapment was a weak defense because there was relatively little evidence of the "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship" the entrapment instruction suggested as examples of inducement, CR 91, at 33. The defense that Mr. Mannino never even solicited the murders in the first place was more dependent on the jury believing him as a witness. The defense of renunciation, in contrast, was supported by

testimony from a *government* witness, namely, Sergeant Colang. He not only described Mr. Mannino giving the warning, but also offered the opinion on cross-examination that "if Mr. Mannino did want someone hurt, . . . [h]e wanted that stopped." ER 39.

Finally, the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. To begin, as suggested by the statutory requirement of "strong corroboration," solicitation is by its nature an offense that (a) can approach penalizing mere bravado, tough talk, and posturing, and (b) is readily subject to vacillation, changes of heart, and correction through prevention. *Cf.* Senate Report, at 180 (noting "the need for a relatively high degree of proximity, probability, or seriousness in the evil the state seeks to prevent"); *id.* at 183 (noting possibility of "spontaneous utterance reflecting emotional excitement or agitation").

In addition, the evidence here was far from overwhelming. The government's case depended largely, if not entirely, on the word of an informant with a prior criminal record, presently in jail, facing serious charges he had an incentive to work off. There was also significant conflicting evidence about Mr. Mannino's intent – from sources other than Mr. Mannino's own testimony. This included (a) his statements on the recordings telling the informant, inter alia, "you don't have to do a thing," "I am not asking you to do anything," and "you're not my missile," *supra* p. 12; (b) directions he gave to a conex supposedly containing weapons that was not even there; and (c) the warning about the informant he ultimately gave to Sergeant Colang.

When there is this sort of conflicting evidence and a statutorily recognized

defense that is not even considered by the jury, there must be a "serious [e]ffect[ ] [on] the fairness, integrity, or public reputation of judicial proceedings." *See Bear*, 439 F.3d at 570 (finding effect on fairness, integrity, or public reputation of proceedings where strong evidence against defense but record "would also support a contrary finding"); *Fuchs*, 218 F.3d at 963 (finding effect on fairness, integrity, or public reputation of proceedings because "while there was enough evidence to support the verdict, the entire record also supports an inference [to the contrary]").

C. MULTIPLE FORMS OF PROSECUTORIAL MISCONDUCT DENIED MR. MANNINO A FAIR TRIAL.

1. Reviewability and Standard of Review.

Defense counsel objected to the argumentative question on cross-examination discussed *infra* pp. 43-46, but did not object to the other instances of prosecutorial misconduct discussed herein. Review is therefore for plain error. *See United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005). Prosecutorial misconduct rises to the level of plain error requiring reversal if it "so affected the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [the defendant] of a fair trial." *Id.* (quoting *United States v. Smith*, 962 F.2d 923, 935 (9th Cir. 1992)). While this sets a higher standard than the ordinary harmless error standard, it is hardly an insurmountable one. *See, e.g., Weatherspoon*, 410 F.3d at 1151-52; *United States v. Kerr*, 981 F.2d 1050, 1053-54 (9th Cir. 1992); *Smith*, 962 F.2d at 935-36; *United States v.*

Branson, 756 F.2d 752, 754 (9th Cir. 1985).

2. The Prosecutor Engaged in Misconduct by Suggesting Mr. Mannino Could Have Introduced Other Portions of the Recordings When the Court Had Precluded Such Defense Evidence on the Prosecutor's Motion.

The prosecutor introduced only limited portions of the recordings of Mr. Mannino's conversations with the informant. He also affirmatively precluded Mr. Mannino from introducing other portions of the recordings. In a pretrial motion citing *United States v. Ortega*, 203 F.3d 675 (9th Cir. 2000), the prosecutor argued Mr. Mannino could not offer exculpatory statements in the recordings just because the prosecutor offered inculpatory statements.[12] And the district court granted that motion. *See* RT(1/29/16) 8-9.

The prosecutor suggested something entirely different during cross-examination of Mr. Mannino, however. He began by confirming Mr. Mannino had been given "the entirety of the conversation between you and [the informant] in the law library on October 24 and October 31." ER 15-16. The prosecutor then asserted, in the form of a leading question, that "if there was something that you thought we didn't play, you could have played it for us; right?" ER 16. Mr. Mannino, not being a lawyer and not knowing the law, responded: "That's

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[12] *Ortega* held a district court had properly excluded exculpatory statements made by a defendant during the same interview in which he had made inculpatory statements government witnesses testified about. *See id.* at 682. *See also United States v. Collicott*, 92 F.3d 973, 982-83 (9th Cir. 1996) (applying comparable rule to written and recorded statements), *cited in Ortega*, 203 F.3d at 682.

probably true. I – I didn't – that's really the PI's job." ER 16.

This violated the most basic standards of prosecutorial fair play and was a gross "foul [blow]," *Berger v. United States*, 295 U.S. 78, 88 (1935).[13] This Court found prosecutorial misconduct in the mirror image of this situation in *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), where a prosecutor suggested in closing argument that the government did not have a witness available when he knew full well the witness was available. *See id.* at 1321-22. Other courts have found prosecutorial misconduct where, as here, the prosecutor argued an absence of defense evidence when the government had affirmatively excluded the evidence. In *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986), the court found it improper to imply the defense had hidden evidence from the jury by choosing to use only selected portions of recordings when a pretrial evidentiary ruling prevented the defense from introducing the rest. *See id.* at 1439, 1440-41.

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[13] In an oft-quoted explanation of the special obligations of federal prosecutors, the Supreme Court explained in *Berger*:

> The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id.

In *United States v. Toney*, 599 F.2d 787 (6th Cir. 1979), the court found it improper to argue there was no evidence corroborating the defendant when there was a corroborating witness statement but the prosecutor had successfully excluded it. *See id.* at 790-91. In *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999), the court found it improper to argue a capital defendant had failed to counter evidence showing he had been charged with another homicide when the prosecutor had successfully excluded evidence the other homicide charge had been dismissed based on the defendant's presentation of exculpatory polygraph results. *See id.* at 1203, 1216.

It is not an excuse that the prosecutor made his assertion only in a leading question, moreover. Telling a jury something through a leading question is just as improper as making the assertion in other ways. *See, e.g., United States v. Stinson*, 647 F.3d 1196, 1214 (9th Cir. 2011); *United States v. Sine*, 493 F.3d 1021, 1031 (9th Cir. 2007); *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir. 1999). As expressed in the ABA Criminal Justice Standards, "[t]he prosecutor should not ask a question that implies the existence of a factual predicate for which a good-faith belief is lacking." *Criminal Justice Standards for the Prosecution Function,* Std. 3-6.8 (4th ed. 2015), *available at* http://www.americanbar.org/groups/criminal_ justice/standards/ProsecutionFunctionFourthEdition.html.

It is not just the possibility that other portions of the recordings were exculpatory, moreover. Simply showing the other portions of the recordings were inaudible would have been helpful. That would have raised reasonable doubt by establishing there was an insufficient record of much of what was said. What the jury was left with instead was an implication the defense had not introduced the

remaining portions of the recordings because they were just as damaging as the portions the government had introduced. Making this suggestion while knowing that was not the reason is exactly the sort of "foul blow" which both Supreme Court precedent and this Court's precedent forbid.

3. The Prosecutor Engaged in Misconduct When He Argued Mr. Mannino Should Have Called Friends as Character Witnesses.

In addition to suggesting Mr. Mannino could have presented evidence the prosecutor had affirmatively prevented him from presenting, the prosecutor argued Mr. Mannino should have presented evidence he could have presented but chose not to. Specifically, the prosecutor argued Mr. Mannino should have called character witnesses. After implying the jail inmate, Tanner Claus, was just a character witness, the prosecutor argued Mr. Mannino should have called certain friends as character witnesses: "Where's Mike Dukes? Where's Dr. Dan? Where are his character references that are a little more reputable?" ER 11.

This argument also violated constraints placed on prosecutorial argument. It is true a prosecutor generally may comment on a defendant's failure to call witnesses. *See, e.g., United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000). But there are exceptions to this general rule. One is that a prosecutor may not argue the defense should have called the defendant himself as a witness. *Cabrera*, 201 F.3d at 1250. Another is that a prosecutor may not argue the defense should have called a witness whom the prosecutor knew or should have known was unavailable. *See, e.g., United States v. Giese*, 597 F.2d 1170, 1199

(9th Cir. 1979); *United States v. Miller*, 460 F.2d 582, 588 (10th Cir. 1972); *Bradley v. United States*, 420 F.2d 181, 185-87 (D.C. Cir. 1969).

Finally, there is an exception which is directly applicable here. Another line of cases holds a prosecutor may not comment on a defendant's failure to call character witnesses. *See Wallace v. United States*, 281 F.2d 656, 668 (4th Cir. 1960); *Dale v. United States*, 66 F.2d 666, 668 (7th Cir. 1933), *rev'd on other grounds sub nom. Massey v. United States*, 291 U.S. 608 (1934); *Middleton v. United States*, 49 F.2d 538, 541 (8th Cir. 1931); *McKnight v. United States*, 97 F. 208, 211 (6th Cir. 1899). As explained in a treatise quoted in the earliest of these cases by then Judge, later Supreme Court Justice, Day:

> It is the defendant's privilege, not his duty, to open by evidence the question of his character. The expense, the remoteness of witnesses confidence in his case, and other considerations would often dissuade him therefrom, however certain of success therein. Hence, and because the state may not show a character bad which the defendant has not put in issue, the omission of his evidence does not justify the presumption that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict.

McKnight, 97 F. at 211 (quoting 1 Joel Prentiss Bishop, *New Criminal Procedure or New Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases* § 1119 (4th ed. 1895)).[14]

While the cases stating this rule are older cases, the underlying rationale is just as strong today. The rule of evidence upon which the cases rely – that "it is

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[14] One of the recordings of Mr. Mannino's jail visits with a friend illustrated the problem recognized in this treatise. He explained that "[e]verybody's freaked out" and "[n]obody fuckin' wants to have anything to do with it." Govt. Ex. 8, at 22.

the defendant's privilege, not his duty, to open by evidence the question of his character" – is still the rule. Indeed, it is now expressly codified – in Rule 404(a) of the Federal Rules of Evidence. This rule, like the old common law rule, allows the defendant to offer character evidence whenever he wishes, *see* Fed. R. Evid. 404(a)(1), but allows the prosecutor to offer character evidence only in rebuttal, *see* Fed. R. Evid. 404(a)(2)(A).[15] A criminal defendant thus controls the presentation of character evidence just as he controls the presentation of his own testimony. It follows that comment on failure to present character evidence should be barred just as comment on failure to present the defendant's own testimony is barred.

That there was arguably some limited character testimony given by the jail inmate witness whom the prosecutor attacked in his argument did not make the prosecutor's argument permissible, moreover. To begin, the main reason the defense called this witness was to expose the government informant as a "self-appointed shot-caller" in the jail who was "always riding [Mr. Mannino's] bumper" and expose the informant as a person who could not be trusted. *Supra* p. 13. The additional testimony elicited about Mr. Mannino – that he was "a good guy," non-violent, and someone the other inmate had never known to lie, *supra* p. 13 – was tangential to the main reason for calling the other inmate. Presenting this

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[15] The reason for the limitation is explained in the advisory committee notes. Character evidence "is of slight probative value and may be very prejudicial," "tends to distract the trier of fact from the main question," and "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." Fed. R. Evid. 404 advisory committee's note (quoting Cal. Law Revision Comm'n, *Rep., Rec. & Studies* 615 (1964)).

sort of tangential "character evidence" is a far cry from a full-on character evidence defense.[16]

Further, eliciting character testimony from one witness as an aside to the witness's main testimony does not allow a prosecutor to argue the absence of other character witnesses. This is established by the most recent of the cases recognizing the bar on such arguments. The defendant in *Wallace v. United States* called multiple character witnesses, including his minister, a bank president and trust officer, and a certified public accountant. *See id.*, 281 F.2d at 668. The prosecutor argued in response that the defendant, who was a lawyer, should have called fellow attorneys as character witnesses. *See id.* at 668 & n.5. The court held this argument "was completely improper," in part because it "sought to have the jurors draw an unfavorable inference from the failure of [the defendant] to call as character witnesses his fellow attorneys." *Id.* at 668.

In sum, comment on the decision not to present character witnesses, like comment on the decision not to present evidence from the defendant himself, is an exception to the general rule allowing comment on a defendant's failure to call witnesses. Such comment is barred even if there is some tangential presentation of character evidence through a witness called for other purposes.

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[16] The de minimus nature of this "character" testimony is illustrated by the defense attorney's discussion of it in his closing argument. He told the jury to simply "[t]ake that for whatever it means." RT(2/4/16) 30 (emphasis added).

4. The Prosecutor Engaged in Misconduct by Eliciting Testimony from an Arresting Agent that Mr. Mannino Had Been "Uncooperative" in Failing to Answer Questions after Having Been Arrested.

The prosecutor crossed the prosecutorial misconduct line for proper comment on the failure to present evidence even if his comment on failure to call character witnesses was permissible. What is indisputably impermissible – under case law established for decades and also repeatedly reaffirmed – is that comment on a defendant's failure to testify and/or silence in response to an agent's interrogation after arrest is improper. *See Doyle v. Ohio*, 426 U.S. 610 (1976). *See also United States v. Cabrera*, 201 F.3d at 1250; *United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993) (collecting cases).

The prosecutor crossed this even more established line in a particularly egregious fashion. First, he elicited testimony from Agent Gregory Moore that "after we had arrested him, we took him to the airport authority office and interviewed him, and he was very uncooperative in that – in that interview. You know, just didn't tell us anything." ER 223. Then, to make sure the jury got the point, the prosecutor repeated the agent's characterization of the refusal to answer questions as "uncooperative" in his next question – "Beyond being uncooperative, what was his demeanor like?" ER 224. The agent responded: "Very quiet. Very – almost like we were playing a game. You know, I mean, it was just – I was trying to get information from him, he didn't want to give me information." ER 224.

This characterization of the refusal to answer questions as being

"uncooperative" made the testimony a particularly aggravated infringement on Mr. Mannino's Fifth Amendment rights. It was not just that the jury heard Mr. Mannino had refused to answer questions, which by itself created the danger of an adverse inference. *See United States v. Hale*, 422 U.S. 171, 180 (1975) (recognizing jury "likely to draw" "strong negative inference" from silence after arrest). The jury also heard both a federal law enforcement agent and the federal prosecutor label this refusal as unacceptably "uncooperative." The jury was thus told not only that Mr. Mannino had refused to answer questions, but also that the law enforcement agent and the prosecutor thought such silence was improper – or "uncooperative."

5. <u>The Prosecutor Engaged in Misconduct by Vouching For and/or Expressing His Personal Opinion About the Government's Case When He Told the Jury in His Opening Statement, "I Wouldn't Be Here" if There Wasn't Something More than the Informant's Testimony and Argued in Closing "We" "Had Our Eye" on Mr. Mannino and "We" "Wouldn't Be Here" if Mr. Mannino Would Stop Plotting to Murder People.</u>

The prosecutor also engaged in improper vouching and/or expressions of personal opinion about Mr. Mannino's guilt – at both the very beginning of the case and the very end. First, in his opening statement, the prosecutor told the jury:

> [I]f Julius Chambers was the only thing that supported the charges in this trial, let me tell you something, you wouldn't be sitting there, and I wouldn't be standing here. We wouldn't even be here if this was all based on the word of Julius Chambers, because there isn't anybody who's going to ask you to believe just the bald word of that guy.

ER 233. Second, in his final, rebuttal closing argument, the prosecutor told the jury:

> [The defense attorney] says that by 2012, the FBI and the government had their eye on Chris Mannino. Yep, yep, we sure did, because 2012 is when the murder plot involving John Tiemessen came to light. So you bet we had our eye on him then. You know, he tries to make it sound like this is some personal vendetta by the Government against Chris Mannino. That's nonsense. If Chris Mannino would stop plotting to murder people, we wouldn't be here.

ER 9.

a. The vouching in opening statement.

What the prosecutor told the jury in his opening statement was a classic form of impermissible vouching. As this Court noted long ago, and has continued to note, "[v]ouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." *United States v. Roberts*, 618 F.3d 530, 533 (9th Cir. 1980). *See also United States v. Wright*, 625 F.3d 583, 610 (9th Cir. 2010) (same); *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (same); *United States v. Smith*, 962 F.2d 923, 934 (9th Cir. 1992) (quoting *Roberts*). The second type of vouching "may occur more subtly than personal vouching, and is also more susceptible to abuse." *Roberts*, 618 F.2d at 533. It is particularly problematic when the prosecutor suggests he was part of the investigative team. *Hermanek*, 289 F.3d at 1100.

The statement that "I wouldn't be standing here" if the government's informant was the only thing that supported the charges clearly suggested there

was something more. That suggestion was aggravated by the prosecutor's later repeated assertions in his rebuttal closing argument that "we" had our eye on Mr. Mannino and "we" "wouldn't be here" if Mr. Mannino had stopped plotting to murder people. This suggested the prosecutor was part of an investigative team that "had their eye on Chris Mannino" and so knew everything. *See Hermanek*, 289 F.3d at 1098 (noting that repeated use of terms "we" and "us" suggested prosecutors were part of investigating team).

The prosecutor did also describe the diagrams and notes the government's informant provided to the government and the recordings from the jail, *see* ER 235-37, 238-40, but that was two pages of transcript later, and it was evidence that in most instances was still tied to the informant.[17] Further, that other evidence, when actually presented, was of rather poor quality, because the recordings were difficult to hear and the diagram and notes had as much handwriting by the informant as by Mr. Mannino. The other evidence also had to be explained by the informant.

These limitations of the additional evidence and its connection to the informant whom the prosecutor represented was not "the only thing" made it far from clear it was this actually presented evidence that led the prosecutor to be "standing here" rather than some unpresented evidence completely independent of the informant. And prosecutors should not create that sort of ambiguity. As this Court stated in *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992), a prosecutor has a "special obligation to avoid improper suggestions and insinuations." *Id.* at 1053, *quoted in Hermanek*, 289 F.3d at 1100. As the Court further explained in

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[17] The two exceptions were the jail visit recordings.

Hermanek:

> [P]rosecutors' arguments not only must be based on facts and evidence, but should be phrased in such a manner that it is clear to the jury that the prosecutor is summarizing evidence rather than inserting personal knowledge and opinion into the case. This concern is heightened where . . . the jury has . . . been informed that the prosecutors were part of the investigating team.

Id.

It is possible the jury here thought the prosecutor was referring to the poor quality recordings and ambiguous notes and diagrams as the additional evidence that led the prosecutor to be "standing here." But it is equally possible the jury thought the prosecutor was referring to something more that he and the investigative team – first referred to as "I" and later referred to as "we" – knew.

b. The vouching and/or improper expression of opinion in closing argument.

The second of the prosecutor's statements – made in closing argument, about why "we" "had our eye on him" and why "we" were here – was also impermissible vouching. Alternatively, it could be viewed as an expression of opinion about Mr. Mannino's guilt, *cf. United States v. Wright*, 625 F.3d at 611 & n.15 (suggesting misconduct at issue was more correctly labeled as improper expression of personal opinion rather than vouching), which is equally improper, *see id.* at 610 ("A prosecutor may not, for instance, express an opinion of the defendant's guilt, ...". (Quoting *Hermanek*, 289 F.3d at 1098.)); *see also Kerr*, 981 F.2d at 1053 ("A prosecutor has no business telling the jury his individual

impressions of the evidence."). However it may be labeled, it was an improper way to present argument. The prosecutor did not just describe the evidence and information that justified the government's investigation of Mr. Mannino, but expressed his opinion – and, worse, the opinion of "we," the United States government – that Mr. Mannino was guilty. The prosecutor agreed that "we sure did" "ha[ve] an eye on Chris Mannino" because there *was* a murder plot in 2012. He asserted that "we" were there in court only because "Chris Mannino would[n't] stop plotting to murder people." Implicit in these assertions was the prosecutor's opinion – or, worse, the opinion of "we," the United States government – that Mr. Mannino was guilty.

Such vouching and/or expressions of personal opinion create two dangers. As explained by both the Supreme Court and this Court:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *See Berger v. United States*, 295 U.S. at 88-89.

United States v. Young, 470 U.S. 1, 18-19 (1985). *See also United States v. Weatherspoon*, 410 F.3d 1142, 1147-48 (9th Cir. 2005) (quoting *Young*).

It is not an excuse that the defense attorney, in the prosecutor's view, "trie[d] to make it sound like this is some personal vendetta by the Government against Chris Mannino," *supra* p. 39. The doctrine of "invited response" does not mean a prosecutor can respond with vouching. *Weatherspoon*, 410 F.3d at 1150.

As this Court has recognized:

> Prosecutors must understand the different – and special – place that they occupy in the criminal justice system. Though we do not of course countenance, let alone encourage, excesses on the part of defense counsel, the prosecutor's role as representative of the United States (the named plaintiff in every federal criminal prosecution) demands the exercise of far better restraint and better judgment . . . .

Id. (citations and internal quotation marks omitted). The proper response for the prosecutor here was to talk about what the evidence showed the government had been told by its informants as a justification for the investigation of Mr. Mannino. It was not to talk about what "we" did because of, by implication, what "we" believed. And an "invited response" justification rings especially hollow when the prosecutor began his vouching in his opening statement, before the defense attorney had said anything at all.

6. The Prosecutor Engaged in Misconduct When He Began Cross-Examination with, "How Long Did It Take You to Come Up with That Ridiculous Story You Just Told the Jury?"

The prosecutor began cross-examination of Mr. Mannino with a blatantly improper question. He asked: "I'm just curious. How long did it take you to come up with that ridiculous story you just told the jury?" ER 19. Defense counsel objected to this comment – on the ground that it was argumentative – and the district court sustained the objection. ER 19.

As noted *supra* p. 32, a prosecutor's question may be construed as a statement or comment. That is especially appropriate in the case of an

argumentative question. Indeed, that is precisely what an argumentative question is – a statement of argument rather than a question. Thomas A. Mauet, *Trial Techniques and Trials* 539 (9th ed. 2013).

It is true this Court has allowed a prosecutor to label a defendant a "liar," *United States v. Laurins*, 857 F.2d 529, 539 (9th Cir. 1988), label a defendant's testimony a "fabrication," *United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984), and even label a defendant's testimony a "preposterous charade," *United States v. Wilkes*, 662 F.3d 524, 541 (9th Cir. 2011), or "inherently incredible," *United States v. Potter*, 616 F.2d 384, 392 (9th Cir. 1979). One of this Court's opinions has even suggested language such as that used by the prosecutor in this case – "ridiculous" – may, but also may not, be permissible. *See United States v. Wright*, 625 F.3d at 611 & n.14 (citing prosecutor's statement that he thought what defendant said was "absolutely ridiculous" as additional, albeit "less egregious," example of improper argument, but also adding in footnote that "we have not found remarks such as ["absolutely ridiculous"] to be improper").[18]

Such labeling is allowed, however, only when it is accompanied by an analysis that makes clear the label is an interpretation of the evidence rather than an expression of personal opinion. *See, e.g., Wilkes*, 662 F.3d at 541 (noting prosecutor made alleged improper statement only "after explaining at length to the jury what it had to prove in order for the jury to find [the defendant] guilty");

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[18] The example given in the cited footnote was the initial panel opinion in *United States v. Velarde-Gomez*, 224 F.3d 1062 (9th Cir. 2000), but that opinion was withdrawn in an order which granted a petition for rehearing en banc and ordered that the panel opinion "not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court." *United States v. Velarde-Gomez*, 250 F.3d 1288 (9th Cir. 2001).

Laurins, 857 F.2d at 539 (noting argument could have been construed as comment on evidence because "[a]lthough the prosecutor did express an opinion that [defendant] was a liar, he indicated that it is 'after listening to all the evidence' that he reached that conclusion"); *Potter*, 616 F.2d at 392-93 (explaining prosecutor's argument "must be viewed in the context of the argument of [defendant's] counsel questioning the credibility of the Government's witnesses"). *Compare United States v. Garcia-Guizar*, 160 F.3d 511, 520 (9th Cir. 1998) (concluding from context that "rather than commenting on the evidence and asking the jury to draw reasonable inferences, as was allowed in *Laurins* [and other cases], the prosecutor in Garcia's trial impermissibly interjected his own personal opinions"). When such comments are not accompanied by such an analysis, and especially when accompanied by other forms of misconduct, they require reversal. *See, e.g., United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999) (denigrating defense as "sham" in combination with vouching and other prosecutorial misconduct required reversal).

Here, the prosecutor's assertion that Mr. Mannino's testimony was a "ridiculous story" was accompanied by the vouching and other forms of prosecutorial misconduct described above. It was also, as an argumentative question at the beginning of cross-examination, unaccompanied by any analysis or explanation that suggested it was just an interpretation of the evidence. It instead came across as an expression of the prosecutor's personal opinion that Mr. Mannino's testimony was a "ridiculous story." This interpretation was made even more likely by the personal comment which introduced the question: "I'm just curious."

Such expressions of personal opinion are completely improper. *Accord Sanchez*, 176 F.3d at 1224 (noting that "[a]s a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses" (quoting *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991)). The opinion of a prosecutor, as "the sovereign's representative," *United States v. Kerr*, 981 F.2d at 1053, "carries with it the imprimatur of the Government," *United States v. Young*, 470 U.S. at 18. It "places the prestige of the government [against the defendant]." *United States v. Roberts*, 618 F.2d at 533. That in turn "may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19. The government representative's personal opinion here – that Mr. Mannino had just told a "story" which was "ridiculous" – had no place in the trial.

7. <u>The Multiple Forms of Prosecutorial Misconduct Constitute Plain Error Requiring Reversal Because They So Affected the Jury's Ability to Consider the Totality of the Evidence Fairly that They Tainted the Verdict and Deprived Mr. Mannino of a Fair Trial.</u>

As noted *supra* p. 29, prosecutorial misconduct rises to the level of plain error when it "so affected the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [the defendant] of a fair trial." Factors to be considered in making this determination include the timing and specificity of any potentially curative jury instructions, the importance of the evidence to which the prosecutorial misconduct relates, and the closeness of the

case. *See United States v. Weatherspoon*, 410 F.3d at 1151; *United States v. Kerr*, 981 F.2d at 1054; *United States v. Smith*, 962 F.2d at 935. And it is the cumulative impact of the misconduct which the Court must consider. *United States v. Flores*, 802 F.3d 1028, 1042 (9th Cir. 2015) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)), *cert. denied*, 137 S. Ct. 36 (2016). *See also Kerr*, 981 F.2d at 1053 (reviewing "the context of the entire record").

The cumulative impact of the prosecutorial misconduct in the present case did "so affect[ ] the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [Mr. Mannino] of a fair trial." Initially, there were no sufficient curative instructions given, even in the instance where defense counsel made a timely objection – to the prosecutor's argumentative "ridiculous story" question. The court did give standard model instructions that the attorneys' statements, arguments, and questions are not evidence, *see* CR 91, at 7, 18, 19, but these were insufficient because they did not reference any particular statements by the prosecutor and were not given at the time of the misconduct, *see Kerr*, 981 F.2d at 1054 (finding curative instructions insufficient to neutralize harm because "[t]hey did not mention the specific statements of the prosecutor and were not given immediately after the damage was done"); *see also Weatherspoon*, 410 F.3d at 1151 (quoting *Kerr*). Because Mr. Mannino testified, there was no instruction at all on the right to remain silent. *See* CR 91. There was also no instruction telling the jury the defense has no burden of calling witnesses; indeed, there was not even an instruction on the general presumption of innocence. *See* CR 91.

Secondly, the credibility of the informant whom Mr. Mannino allegedly solicited was critical to the government's case. The informant was the *only*

witness to testify about the alleged solicitations. And he was about as far from a pristine witness as there could be; he was a jail inmate – according to the other inmate, a "self-appointed shot-caller," *supra* p. 13 – with a case to work off and multiple prior convictions, *see* ER 49, 73. Even the prosecutor recognized – in the first instance of vouching – that the informant was not enough by himself.

There were the notes and diagrams produced by the informant and the conversations recorded in the jail. But those suffered from multiple other infirmities. At least half the writing on the notes and diagrams was the informant's, and the government's claims about such things as what the writing meant, why it was written, and when it was written, whether it was written at the same time as the other writing, and whether Mr. Mannino was present when the informant wrote what he wrote depended largely, if not entirely, on whether the informant was believed.

The recordings did establish things were said when the two men were together, but (1) the recordings were of poor quality and (2) partly because of the poor quality and partly because of the ambiguity of what was said, they also required the informant's explanation. On multiple occasions, the informant had to explain what Mr. Mannino meant – or at least what he claimed Mr. Mannino meant – and on several occasions the informant had to clarify who was speaking, *see, e.g.,* ER 114, 115, 116, 117, 120, 141-42. Of particular importance to the entrapment defense, the recordings were of only later meetings, not the earlier meetings at which the informant could have set the stage. *See Jacobson v. United States*, 503 U.S. 540, 553 (1992) (holding predisposition must exist at time of initial contact with defendant).

Finally, even in these later meetings, there were multiple occasions on which Mr. Mannino appeared to suggest he was *not* soliciting the informant to commit murder. The government's rationalization of these statements was that Mr. Mannino was becoming suspicious he was being recorded, but in making that argument, the government was seeking to have its cake and eat it too, for it argued other things said in the same conversation were in furtherance of the alleged murder plots, *see* RT(2/4/16) 14.

The only two recordings that did not require the informant's explanation were the recordings of Mr. Mannino's jail visits with his friends, Preston Miller and Dan Schoonover. Those actually added little to the government's case, however. All the recording of the conversation with Mr. Schoonover added was an argument that Mr. Mannino and/or Mr. Schoonover suspected a "wire." But, first, it was debatable whether this was even said, or at least what it meant, and, second, it was debatable how it added to the government's case even if it was said, because it put the government in the position of making the inconsistent argument described above – that Mr. Mannino thought he was being recorded but continued to solicit the informant for his murder plot anyway.

As for the recording of the conversation with Mr. Miller, the theory Mr. Mannino was recruiting Mr. Miller to locate Greg Cox is belied by the fact it was *Mr. Miller* who brought up the question of where Mr. Cox was. Further, wanting to know where Greg Cox was begged the question of why. The additional comments by Mr. Mannino near the end of the visit with Mr. Miller, s*ee supra* p. 11, were consistent with an interest in countering Mr. Cox's claim by investigating and impeaching him.

Another problem with the recordings is they were incomplete. Under the case law cited by the government in its pretrial motion, the jury heard just the parts of the recordings the government wanted it to hear. This could and should have raised doubt about the government's case, and it failed to raise such doubt only because of what was probably the most egregious form of prosecutorial misconduct. That was the suggestion the defense could have been introduced any exculpatory portions, so the ones introduced by the government must be representative.

More generally, this case was a close one in which the evidence was far from overwhelming. One reason the case was close is that it depended so critically on (1) an unsavory informant who had reason to give the government something it wanted and (2) transcripts and notes that depended largely on that same informant's explanation. And other evidence raised doubts as well. Most significant was the warning Mr. Mannino gave to Sergeant Colang after the informant was released. Another piece of evidence which raised doubt was the government's inability to corroborate the one thing it did try to corroborate, when the agent followed Mr. Mannino's map and did not find the conex that was supposed to be there. Then there were Mr. Mannino's statements on the recordings that "you don't have to do a thing," "I am not asking you to do anything," and "you're not my missile," *supra* p. 12.

The prosecutor did not engage in just a single, isolated instance of misconduct, moreover. There was a "perfect storm" of intertwined and mutually supporting improprieties. First, the prosecutor vouched for the critical witness in the case – both at the start in his opening statement and at the end in his rebuttal

argument. Second, the prosecutor attacked the defense in three different improper ways: eliciting testimony that Mr. Mannino had been "uncooperative" by simply exercising his right to remain silent after being arrested; beginning cross-examination of what Mr. Mannino said at trial with the opinion that it was a "ridiculous story"; and suggesting Mr. Mannino should have called character witnesses. Third, the prosecutor made his most important arguably corroborating evidence – the jail recordings – into something more than it was, by suggesting any exculpatory portions of the recordings could have been introduced by the defense, when the prosecutor knew that was untrue.

This misconduct taken as a whole more than "tainted the verdict and deprived [the defendant] of a fair trial." It is plain error which requires reversal despite defense counsel's failure to object to most of the misconduct.

* * *

VII.

CONCLUSION

The Court should vacate Mr. Mannino's convictions and order judgments of acquittal entered because the evidence was insufficient to support the convictions. If the Court believes the evidence was not insufficient, it should order a new trial because (1) it was plain error to fail to instruct on the renunciation defense and (2) multiple forms of prosecutorial misconduct denied Mr. Mannino a fair trial.

Respectfully submitted,

DATED: January 3, 2017

s/ Carlton F. Gunn
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CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that he is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: January 3, 2017

s/ Carlton F. Gunn
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(c) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,994 words.

DATED: January 3, 2017

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

STATUTORY APPENDIX

18 U.S.C. § 373

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.