A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. KENNETH WILLIAM KIRKLAND, *Defendant-Appellant.*	No. 16-10514 D.C. No. 1:15-cr-00322- DAD-BAM-1 OPINION

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted July 10, 2018
Pasadena, California

Filed November 28, 2018

Before: D. Michael Fisher,[*] Paul J. Watford,
and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Watford

[*] The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed the defendant's convictions and sentence for being a felon in possession of a destructive device in violation of 18 U.S.C. § 922(g)(1) and possessing an unregistered destructive device in violation of 26 U.S.C. § 5861(d).

The defendant contended that the definition of "destructive device" in 18 U.S.C. § 921(a)(4)(C) requires possession of every component necessary to construct a functional weapon, and that he would be entitled to a judgment of acquittal because the government did not introduce any evidence to establish that he possessed the eight C-cell batteries needed for the device in question to operate.

The panel held that § 921(a)(4)(C) requires only that the defendant possess a combination of parts from which a functional device "may be readily assembled"; that the requirement does not categorically exclude situations in which the assembly process entails the acquisition and addition of a new part; and that the "readily assembled" element can still be met so long as the defendant could acquire the missing part quickly and easily, and so long as the defendant could incorporate the missing part quickly and easily. The panel concluded that because the defendant could have quickly and easily obtained the missing batteries

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

assuming he did not have them lying around the house already, and because he could have quickly and easily incorporated them into his partially constructed bomb to render it functional, ample evidence supports the conclusion that a functional explosive device could be readily assembled from the combination of parts the defendant possessed.

COUNSEL

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Angela Scott (argued) and Christopher D. Baker, Assistant United States Attorneys; Camil A. Skipper, Appellate Chief; United States Attorney's Office, Fresno, California; for Plaintiff-Appellee.

OPINION

WATFORD, Circuit Judge:

When executing a search warrant at Kenneth Kirkland's home, police officers discovered a partially constructed homemade bomb concealed inside a shoe box. The device contained: a battery box designed to hold eight C-cell batteries, which served as the device's power source; a radio frequency receiver to pick up the radio signal that would detonate the device; a detonator; wires to conduct electricity from the batteries to the detonator; and shotgun shells that served as the explosive main charge. All of the components necessary for the device to function were present except for the eight C-cell batteries. An explosives expert testified at

trial that to render the device functional, Kirkland simply had to insert the batteries into the battery box and connect the detonator to the power source. That process, the expert said, would take "a matter of minutes."

Based on Kirkland's possession of this homemade bomb, the jury convicted him of being a felon in possession of a destructive device in violation of 18 U.S.C. § 922(g)(1), and possessing an unregistered destructive device in violation of 26 U.S.C. § 5861(d). On appeal, Kirkland challenges the sufficiency of the evidence to support his convictions, on the ground that the device he possessed does not qualify as a "destructive device." He also argues that his sentence should not have been enhanced under the "destructive device" provision of the Sentencing Guidelines, U.S.S.G. § 2K2.1(b)(3)(B), as that enhancement turns on the same definition of "destructive device." (We resolve his remaining contentions in an unpublished memorandum disposition filed concurrently with this opinion.)

Both of the statutes under which Kirkland was convicted prohibit the unlawful possession of a "firearm," which is defined to include a "destructive device." 18 U.S.C. § 921(a)(3)(D); 26 U.S.C. § 5845(a)(8). Both statutes—one a provision of the Gun Control Act of 1968, the other a provision of the National Firearms Act—define the term "destructive device" in almost identical language. 18 U.S.C. § 921(a)(4); 26 U.S.C. § 5845(f). We will refer throughout to the definition found in the Gun Control Act, but our analysis applies equally to the definition provided in the National Firearms Act. *See United States v. Lussier*, 128 F.3d 1312, 1314 n.3 (9th Cir. 1997).

Section 921(a)(4) defines "destructive device" in relevant part as follows:

(4) The term "destructive device" means—

(A) any explosive, incendiary, or poison gas—

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

> (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.
>
> The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon . . . .

Subsections (A) and (B) cover fully assembled weapons; subsection (C) generally applies to a combination of parts that has not yet been assembled into a functional weapon. *Lussier*, 128 F.3d at 1315. At trial, the government proceeded against Kirkland solely under subsection (C), so we will confine our discussion to that provision.

Kirkland does not dispute that the parts he possessed were designed for use as one of the weapons described in subsection (A)—namely, an explosive bomb. He challenges only the sufficiency of the evidence to support the jury's finding that he possessed a combination of parts "from which" an explosive bomb could be "readily assembled." In his view, a conviction under subsection (C) requires proof that the defendant possessed every component necessary to construct a functional weapon. Under Kirkland's reading of the statute, he would be entitled to a judgment of acquittal because the device in question needed eight C-cell batteries to operate, and the government did not introduce any evidence establishing that he possessed such batteries.

We do not think the statute can be read in the manner urged by Kirkland. Nothing in the text of § 921(a)(4)(C) states that a defendant must possess every component necessary to render a partially constructed device capable of detonating. The statute requires only that the defendant possess a combination of parts from which a functional device "may be readily assembled." As used in this provision, the term "readily" means quickly and easily: The combination of parts possessed by the defendant must be capable of being assembled into a functional device within a short period of time and with little difficulty—measures that may depend on the expertise of the defendant constructing the device. That requirement does not categorically exclude situations in which the assembly process entails the acquisition and addition of a new part. Thus, if the defendant lacks a part necessary to render the device functional, the "readily assembled" element can still be met so long as the defendant could acquire the missing part quickly and easily, and so long as the defendant could incorporate the part into the device quickly and easily. *See United States v. Sheehan*, 838 F.3d 109, 125 (2d Cir. 2016) (upholding a conviction even though the device lacked a piece of tape needed to connect the wires to the battery); *United States v. Russell*, 468 F. Supp. 322, 329–30 (S.D. Tex. 1979) (same where the device lacked a 1.5-volt battery).

Ample evidence supports the conclusion that a functional explosive device could be readily assembled from the combination of parts Kirkland possessed. As noted above, Kirkland had assembled a nearly complete homemade bomb; only the eight C-cell batteries were missing. The testimony at trial confirmed that those batteries are common household items "readily available to an ordinary consumer." Thus, Kirkland could have quickly and easily obtained the missing batteries, assuming he did not

have them lying around the house already. The jury also heard expert testimony that it would have taken only a matter of minutes to install the batteries and connect the detonator to the power source. Thus, once he obtained the batteries, Kirkland could have quickly and easily incorporated them into his partially constructed bomb to render it functional. This evidence is more than sufficient to satisfy the "readily assembled" element.

Kirkland contends that our reading of the statute will lead to intractable line-drawing problems as courts are forced to decide which components a defendant must possess in order to be convicted, and which he need not. We do not think that prediction will prove accurate. Whether a particular combination of parts may be "readily assembled" into an operable device is an inherently factbound issue that juries will have to resolve on a case-by-case basis. With one exception, mentioned below, no bright-line rules can be drawn declaring which components of a destructive device must be in the defendant's possession in order for a conviction to be sustained. That will depend in every case on both the nature of the parts the defendant has already assembled and the ease with which the defendant could acquire and incorporate any missing parts. At the end of the day, regardless of which components are missing from the device, the ultimate question will be the same: Can the missing parts be obtained quickly and easily, and if so, can they quickly and easily be incorporated to render the device functional?

The one exception involves the material necessary to bring a device within the coverage of § 921(a)(4). Subsection (A) covers any "explosive, incendiary, or poison gas" bomb, grenade, etc. At least two circuits have held that a conviction may not be sustained under subsection (C),

which tracks the coverage of subsection (A), unless the defendant possesses the explosive material necessary to construct an operable explosive weapon. *See United States v. Blackburn*, 940 F.2d 107, 110 (4th Cir. 1991); *United States v. Malone*, 546 F.2d 1182, 1184 (5th Cir. 1977). The same would be true of the incendiary material or poison gas necessary to construct a weapon of that ilk. This exception does not apply here, as Kirkland does not dispute that he possessed the necessary explosive material in the form of a detonator and shotgun shells.[1]

We reject Kirkland's reading of the statute for the additional reason that it is at war with Congress' purpose in enacting the "combination of parts" provision. Congress sought to protect the public from the danger posed by military-style weaponry and "the street variety of homemade instruments and weapons of crime and violence." *United States v. Peterson*, 475 F.2d 806, 810 (9th Cir. 1973). That danger exists not only when a defendant possesses a fully assembled weapon, but also when a defendant who intends to construct such a weapon has gathered enough of the necessary components such that a functional weapon can be readily assembled. Reading the statute to require possession of *every* necessary component, even a single item that could be readily obtained, would defeat the flexibility Congress sought to build into the statutory scheme and "would foster easy evasion to thwart the Congressional intent." *United States v. Shafer*, 445 F.2d 579, 583 (7th Cir. 1971). While

[1] The court in *Malone* did state, as Kirkland points out, that "the defendant cannot be guilty of [possessing a destructive device] because he did not have in his possession all of the component parts from which a destructive device might be readily assembled." 546 F.2d at 1184. The court, however, explicitly limited its holding to the facts before it—namely, a "complete absence of explosive material." *Id.*

the ultimate harm that Congress sought to prevent occurs when the covered weapons are *used*, Congress chose to take the prophylactic measure of criminalizing the *possession* of such weapons—as well as the possession of parts that could readily become such weapons. Under Kirkland's reading, an individual could render that prophylactic measure futile, avoiding criminal exposure for possession simply by refraining from adding some easily obtainable part to an otherwise fully assembled weapon until use of the weapon is imminent.

This case provides a good illustration of the concerns that motivated Congress to enact the "combination of parts" provision. The evidence at trial showed that Kirkland's explosive device lacked batteries because he was not yet ready to use it. In a post-arrest interview, Kirkland told the police that he had not added the batteries because he knew the device could explode inadvertently once he did. Because C-cell batteries could be readily obtained at any time, there was no need for Kirkland to add them in advance. If and when he was ready to deploy his weapon, he could acquire the batteries and insert them into the device right before doing so. The absence of the batteries does not make Kirkland less culpable from the standpoint of the statute's prime objective—keeping inherently dangerous weapons out of the hands of those who are not permitted to possess them.

AFFIRMED.

A P P E N D I X 2

CA No. 16-10514

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH WILLIAM KIRKLAND, Defendant-Appellant.	)	(D.Ct. 15-cr-00322-DAD)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HONORABLE DALE A. DROZD
United States District Judge

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I.

STATEMENT OF ISSUES PRESENTED

A. MUST CONVICTIONS FOR FELON IN POSSESSION OF A DESTRUCTIVE DEVICE AND POSSESSION OF AN UNREGISTERED DESTRUCTIVE DEVICE, AND A RELATED DESTRUCTIVE DEVICE SENTENCING GUIDELINES ENHANCEMENT, BE VACATED BECAUSE A PARTIALLY ASSEMBLED DEVICE QUALIFIES AS A DESTRUCTIVE DEVICE ONLY IF THE DEFENDANT HAS ALL THE NECESSARY COMPONENTS, AND MR. KIRKLAND DID NOT HAVE BATTERIES WHICH WERE NEEDED TO PROVIDE A POWER SOURCE?

B. MUST THE DESTRUCTIVE DEVICE CONVICTIONS AND RELATED SENTENCE ENHANCEMENT BE VACATED BECAUSE IT WAS PLAIN ERROR TO (1) ALLOW COMBINED EXPERT AND PERCIPIENT WITNESS TESTIMONY BY A BOMB SQUAD OFFICER ABOUT THE ALLEGED DEVICE WITHOUT APPROPRIATE GATEKEEPING AND (2) ALLOW AN OFFICER TO TESTIFY AS PART OF AN EXPLANATION FOR NOT RECORDING AN INTERVIEW OF MR. KIRKLAND THAT HE BELIEVED MR. KIRKLAND MIGHT BE MAKING IMPROVISED EXPLOSIVE DEVICES FOR TERRORIST ORGANIZATIONS?

1. Was It Plain Error to Allow Combined Expert and Percipient Witness Testimony by a Bomb Squad Officer About the Alleged Device Without Appropriate Gatekeeping?

2. Was It Plain Error to Allow an Officer to Testify as Part of an Explanation for Not Recording an Interview of Mr. Kirkland that He Believed Mr. Kirkland Might Be Making Improvised Explosive Devices for Terrorist Organizations?

C. DID THE DISTRICT COURT ERR IN DENYING A DEFENSE MOTION TO SUPPRESS EVIDENCE BECAUSE THE PRESENCE OF MR. KIRKLAND'S THUMBPRINT ON A BEER CAN WHICH TRESPASSERS HAD BROUGHT INTO A HOUSE, THE PRESENCE OF A WHITE TRUCK AT THE TIME THE TRESPASSERS WERE INSIDE THE HOUSE , AND THE PRESENCE OF A WHITE TOYOTA PICKUP AT MR. KIRKLAND'S HOME A MONTH LATER DID NOT ESTABLISH PROBABLE CAUSE TO BELIEVE

PROPERTY STOLEN FROM THE HOUSE WOULD BE FOUND IN MR. KIRKLAND'S HOME?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory provisions are included in a Statutory Appendix.

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is from convictions for felon in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(1); felon in possession of a destructive device, in violation of 18 U.S.C. § 922(g)(1); felon in possession of explosives, in violation of 18 U.S.C. § 922(g)(1); and possession of an unregistered destructive device, in violation of 26 U.S.C. §§ 5845, 5861. The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 28 U.S.C. § 1291. The appeal is timely because Mr. Kirkland was sentenced on December 5, 2016, ER 2, and a notice of appeal was filed on December 13, 2016, ER 1.

B. COURSE OF PROCEEDINGS.

On November 12, 2015, an indictment was filed, ER 156-59, and on

December 9, 2015, Mr. Kirkland was arraigned and pled not guilty, CR 5. On August 16, 2016, defense counsel filed a Motion to Quash Warrant and Suppress Evidence. CR 25. The government filed an opposition to the motion on August 19, 2016, CR 29, and the defense filed a reply the same day, CR 32. On August 22, 2016, the district court held a hearing and denied the motion. ER 135-40.

On August 30, 2016, trial began. CR 54. The trial ended on September 1, 2016, CR 56, and the jury returned verdicts of guilty on September 2, 2016, ER 9-13.

On November 23, 2016, the probation office filed a final revised presentence report. *See* PSR. On December 5, 2016, the court sentenced Mr. Kirkland – to 57 months in prison. ER 3. On December 13, 2016, the defense filed a notice of appeal. ER 1.

C. BAIL STATUS OF DEFENDANT.

Mr. Kirkland is presently serving his sentence. His projected release date is November 30, 2019.

III.

STATEMENT OF FACTS

A. THE SEARCH WARRANT.

On October 10, 2015, local police officers sought a search warrant for Mr.

Kirkland's home. ER 149-55. The affidavit stated that the owner of a house in California City, California, had contacted police on September 5, 2015 after a neighbor reported multiple people appeared to be using the house, which the owner had last visited in July. *See* ER 152. The owner said he had not authorized anyone to be in the house and took the affiant officer and the officer's sergeant to the house. ER 152. The residence appeared to have been recently occupied, and there were several items inside that did not belong to the owner, including beer cans, fresh fruit, candles, novelty items, a business card, and bolt cutters. ER 152-53.[1] In addition, several items of the owner's property were missing, which the affidavit described as (1) "1989 'Geo Tracker' transmission without a shifter handle, aluminum in color (estimated value $600)"; (2) "2006 Coleman Generator, red in color (estimated value $350)"; (3) "2004 'Pantera Specialist' digital computer, black in color (estimated value $800)"; (4) 2005 'Kennedy' adapter plate, aluminum in color (estimated value $900)"; and (5) Duffle bag, black in color, containing eleven (11) life jackets (estimated value $450)." ER 153.

The affidavit also summarized an interview of the neighbor. The neighbor said he had been checking his own property the day before and saw several beer cans, a barbecue, and a white truck outside the victim's house. ER 153. He also heard more than two people talking inside the house at approximately 3:00 a.m. on September 5 and saw candlelight coming from inside. ER 153.

The affidavit then described the identification of a thumbprint. The officers had taken the beer cans which the owner said had not been in the house, dusted

[1] There were also items that did not belong to the owner outside the house, including two flags, several empty beer cans, a sign stating "new owners," a skateboard, and a pizza box containing two slices of unspoiled pizza. ER 152.

them for fingerprints, and found several latent prints which they sent to a lab for evaluation. ER 153. More than a month later, on October 7, the lab had provided a report identifying one of the prints as the left thumbprint of Mr. Kirkland. ER 153.

The affidavit next described further investigation the officers conducted. First, it indicated the affiant officer had spoken with the owner of the house who said he had never authorized Mr. Kirkland to be in the house. *See* ER 153. Second, the affiant officer and his sergeant had driven by Mr. Kirkland's home on October 10, and seen a white Toyota pickup parked in front of Mr. Kirkland's home. ER 153.

Based on this affidavit, a state court judge issued a search warrant for Mr. Kirkland's home.

B. THE SEARCH OF MR. KIRKLAND'S HOME.

Officers went to Mr. Kirkland's home to execute the search warrant on October 11, the day after the warrant was issued. RT(8/30/16) 134. Mr. Kirkland's father answered the door and told the officers Mr. Kirkland was sleeping in his bedroom. RT(8/30/16) 135. The officers went to the bedroom and saw a rifle "kind of propped up at the doorjamb of the bedroom door." RT(8/30/16) 136. After the officers entered the bedroom, they saw two more rifles on the floor, near a bed in which Mr. Kirkland was sleeping. RT(8/30/16) 136-37. Finally, they found ammunition and magazines in a dresser in the bedroom, in a bathroom connected to the bedroom, and in a rolltop desk just outside the

bedroom. RT(8/30/16) 143-53.

The officers also discovered detonators, which led them to call in bomb squad officers. RT(8/30/16) 154. The bomb squad officers seized the detonators, which were also described as blasting caps, *see* ER 100, and found additional explosives and suspected explosive devices during a further search. This included additional detonators/blasting caps, dynamite, and two shoeboxes under Mr. Kirkland's bed. *See* ER 100-20; RT(8/31/16) 262. Because the officers suspected the shoeboxes might be explosive devices, they removed them from under the bed with a long stick and then x-rayed them. *See* ER 118-20; RT(8/31/16) 262.

The x-rays convinced the officers it was safe to open the shoeboxes, so they did that. *See* ER 125; RT(8/31/16) 264. In one shoebox, there was a battery box, a capacitor, an explosives load with "cap wires" wound around it, and an additional blasting cap. ER 126. In the other shoebox, there were LED lights, a circuit board, a battery box, a pushbutton switch, and an alphanumeric keypad. RT(8/31/16) 265-66. This shoebox did not have an explosives load in it. *See* RT(8/31/16) 267.

For the explosive materials, the officers then proceeded with what were described at trial as "render safe procedure[s]," ER 124. For the shoebox that had an explosives load, this meant using what is called a "pan disruptor" to separate the wires attached to the explosives load from the other components, and then destroying the explosives load on site with a "counter charge." *See* ER 127-29. For the dynamite, which showed signs of deterioration, this meant spraying it with diesel fuel to stabilize it and then taking it to a safe location and burning it. *See* ER 109-14.

C. THE TRIAL.

1. Percipient Witnesses.

The initial government witnesses at trial were the officers who conducted the search and/or subsequently interviewed Mr. Kirkland. They testified about finding the guns and ammunition, the blasting caps and dynamite, and the shoeboxes, *see* ER 91-93, 99-126; RT(8/30/16) 136-53; RT(8/31/16) 262; destroying the dynamite and the explosives load from the first shoebox, *see* ER 110-14, 127-31; and statements Mr. Kirkland made about the guns, the explosives, and the shoeboxes, *see* ER 67-76; RT(8/30/16) 155-72.

The bomb squad officers who found the shoeboxes also offered expert testimony about the shoeboxes and their contents.[2] The officer who found the shoebox that did have an explosives load testified he could see at least four shotgun shells in the x-ray of the shoebox, *see* ER 123, 134, and that a void in the x-ray could have been dynamite, *see* ER 123-24, 131. This officer also testified the explosion when he blew up the explosives load was larger than he would have expected from just shotgun shells. *See* ER 130-31. He added that the only reason he could see for including the shotgun shells was to create shrapnel, so it "appeared to me to be built as an antipersonnel-type device." ER 132. He also characterized it as an "improvised explosive device," ER 126, and opined the "device" was "relatively sophisticated," because he seldom saw people integrating

[2] The bomb squad officer who handled the blasting caps and dynamite also gave some expert testimony about blasting caps and dynamite, see, e.g., ER 106-10, but that testimony is not pertinent to this appeal.

circuits, battery boxes, and a capacitor, ER 128-29. He felt safe opening the shoebox because there did not appear to be any batteries or other power source. ER 125.

The officer who handled the other shoebox described it as not "an actual IED," but as "contain[ing] the components of an IED." RT(8/31/16) 267. He explained the alphanumeric keypad in the box could serve as a switch and the battery box could be used to provide power. *See* RT(8/31/16) 266-67. He explained, "All these components put together in the proper manner and adding batteries and an explosive load can be used as an explosive device." RT(8/31/16) 267.

Two officers also testified about Mr. Kirkland's statements, which were made during two custodial interviews. The officer who had obtained the search warrant identified excerpts of a recorded interview in which Mr. Kirkland had said, inter alia, that he found the blasting caps and dynamite in a mine in the desert, Govt. Ex. 28A, at 4; Govt. Ex. 30A, at 1; Govt. Ex. 36A, at 1-2, 8, 11-12, and had put together the components in the shoeboxes as just "goofin' around," Govt. Ex. 28A, at 2, or "goofin' off," Govt. Ex. 32A, at 1, "trying to simulate a bomb of some sort," Govt. Ex. 32A, at 1, to scare an ex-girlfriend who kept "jumping over my fence," Govt. Ex. 36A, at 9; *see also* Govt. Ex. 31A, at 1.[3] A local officer who had been called to the scene because he was part of a federal/state Joint Terrorism Task Force with duties that included investigating terrorism, *see* ER 61-64, testified about similar statements in a second, unrecorded

[3] Mr. Kirkland also provided a comparable explanation in testimony he gave at the trial. *See* RT(9/1/16) 393-96.

interview. *See* ER 67-75. *See also* RT(8/31/16) 305-06 (concession on cross examination that what said in second interview was "pretty much" or "close" to what said in first interview).

For the second interview, the government also elicited an explanation about why the officer had not recorded that interview. The officer testified he was thinking he might be able to use Mr. Kirkland as a confidential informant, and it was "common practice" not to record interviews of informants. ER 78. And the reason he gave for thinking Mr. Kirkland could act as an informant was:

> Mr. Kirkland did not appear to have any ties to any kind of international or domestic terrorism, gang organization or any criminal enterprise.
>
> For that reason, what I have seen in the past is people will make devices for other people. And what I believed was Mr. Kirkland could have been making a device for a member of one of those organizations.

ER 77-78.

2. Non-Percipient Expert Witnesses.

After the percipient witness officers testified, the government called two FBI experts. One of the experts was a chemist who testified that nitroglycerin is commonly used in some dynamites, *see* RT(8/31/16) 324,[4] and that he found traces of nitroglycerin on the parts which had been saved from the shoebox with the explosives load, *see* RT(8/31/16) 321-23. The other FBI expert, who was an explosives and hazardous device examiner, *see* ER 16, testified about the x-ray

[4] The bomb squad expert who handled the dynamite at the scene also testified nitroglycerin is used in some dynamite. *See* ER 109-10.

from the first shoebox and the components which had not been destroyed. He identified what he believed to be shotgun shells in the x-ray and testified shotgun shells alone could serve as the explosives load in a destructive device. *See* ER 51-52. He also testified it was possible the void in the x-ray was dynamite. *See* ER 54. Finally, he gave an opinion characterizing the device – as a "partially constructed improvised explosive device," ER 32, 56, which could be "readily assembled" into "a fully constructed improvised explosive device," ER 56. He explained that "what this device needs to function is a power source." ER 56. He further explained the device had "a battery box . . . which could have held the power source and also provided a switching mechanism." ER 57. The expert concluded that "if I had the eight C-cell batteries, it would take a matter of minutes to plug the batteries in, turn the device on, hook the detonator up to it, then it would be essentially ready to go." ER 58. There was no testimony Mr. Kirkland had the eight batteries, however.

D. THE VERDICT.

After closing arguments on the morning of the third day of trial, the jury retired to deliberate. *See* RT(9/1/16) 501. The jury deliberated for the entire afternoon and all of the next morning and did not return a verdict until after lunch the next day. *See* RT(9/2/16) 511. While the jury found Mr. Kirkland guilty on all counts, it was with limited findings on the special verdict form the jury had been given. It found Mr. Kirkland possessed components of a destructive device as charged in Counts 2 and 4 that were "designed . . . for use as a weapon," but did

not find the components were "intended . . . for use as a weapon." *See* ER 11, 13. The jury also found the components included a detonator and at least one shotgun shell, but did not find they included dynamite. *See* ER 11.

E. SENTENCING.

Mr. Kirkland was subsequently sentenced based on a guideline range recommended in a presentence report prepared by the probation office. *See* PSR. The report recommended that all of the counts be "grouped" under the sentencing guidelines grouping rules. *See* PSR, ¶ 21 (applying USSG § 3D1.2 and USSG § 3D1.3(a)). The report then recommended a 2-level offense level increase under § 2K2.1(b)(3)(B) for possession of a destructive device. *See* PSR, ¶ 23. When combined with the other offense level factors and Mr. Kirkland's criminal history category of III, this produced a guideline range of 51-63 months. *See* PSR, at 4, 20. Given this range and a probation office recommendation of a mid-range sentence, *see* PSR, at 22, the district court decided on a sentence of 57 months. *See* RT(12/5/16) 12. The Court imposed this sentence concurrently on each of the four counts, *see* ER 3, consistent with the guidelines multiple counts sentencing rules, *see* USSG § 5G1.2(b),(c) & n.1 (providing that total punishment shall be imposed on each count concurrently if total punishment is within statutory maximum).

IV.

SUMMARY OF ARGUMENT

Initially, there was insufficient evidence to support the two destructive device convictions and the destructive device guidelines enhancement. Under both the most reasonable interpretation of the statutory language and the most persuasive case law, a combination of component parts qualifies as a destructive device only if the defendant possesses *all* of the parts necessary to construct a device that will serve as a bomb or a device similar to a bomb. Even cases arguably qualifying this requirement require the defendant to possess all of the key components. The "device" here did not satisfy this requirement, because it was, according to the government's own expert, only "partially constructed," and was missing a key component, namely, the batteries which were needed to provide a power source.

Secondly, the combined prejudice from two plain evidentiary errors would require a new trial on the destructive device counts even if the evidence could somehow be found sufficient to support conviction. The first plain error was in allowing one of the bomb squad officers to give combined expert and percipient witness testimony about the alleged device without appropriate gatekeeping. This Court allows such "dual role" testimony only when there are protective measures taken, such as an instruction to the jury on the difference between the expert and percipient witness testimony, clear separation of the two forms of testimony, and/or assuring there is a clear foundation for the expert testimony. Here, the foundation for at least some of the opinions, including in particular the opinion

that the device was "an improvised explosive device," was weak or completely lacking; there was no cautionary instruction; and there was no separation of the expert and percipient witness testimony.

The second plain evidentiary error was in allowing the officer who conducted the second interview of Mr. Kirkland to testify, as part of his explanation for not recording the interview, that he believed Mr. Kirkland might be making destructive devices for terrorist organizations. This Court has held in prior decisions that an officer's reasons for his investigation and how he conducts it are generally irrelevant, and this case law readily extends to the testimony here. And the testimony was highly prejudicial, especially in today's climate, invoking the specter of a "Joint Terrorism Task Force" investigator, terrorism, and "improvised explosive devices."

Finally, all of the convictions must be vacated because the district court erred in denying the defense motion to suppress evidence. A fingerprint on a movable object that was not previously present at the crime scene – which is the only significant information in the affidavit that pointed to Mr. Kirkland – is weak probable cause at best. And the requirement that courts consider the "totality of circumstances" means this weakness must be layered on top of at least two other uncertainties. Those are (1) the fact that there were multiple people heard in the house, so the stolen property could have been taken by someone other than Mr. Kirkland, and (2) the fact that more than a month had passed since the property had been stolen and most thieves would have disposed of stolen property by then. There were thus at least three layers of uncertainty: first, the weak inference to be drawn from a fingerprint on a movable object that was not previously at the scene;

second, the fact that there were multiple people in the house who could have taken the stolen property; and, third, a strong likelihood that whoever took the property would have disposed of it during the month that had passed. These multiple layers of uncertainty – or what might be called the "totality" of uncertainty – prevented the affidavit from establishing probable cause.

V.

ARGUMENT

A. THE TWO DESTRUCTIVE DEVICE CONVICTIONS AND THE DESTRUCTIVE DEVICE SENTENCING GUIDELINES ENHANCEMENT MUST BE VACATED BECAUSE A PARTIALLY ASSEMBLED DEVICE QUALIFIES AS A DESTRUCTIVE DEVICE ONLY IF THE DEFENDANT HAS ALL THE NECESSARY COMPONENTS, AND MR. KIRKLAND DID NOT HAVE THE BATTERIES WHICH WERE NEEDED TO PROVIDE A POWER SOURCE.

1. Reviewability and Standard of Review.

A ruling on a timely motion challenging the sufficiency of the evidence is reviewed de novo, and the conviction is 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)). A motion was not made in the present case, but there can still be review for plain error, and this Court has characterized the difference in review as "largely academic." *Pelisamen*, 641 F.3d at 409 n.6. That is 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). *See, e.g., United States v. Flyer*, 633 F.3d 911, 917-19 (9th Cir. 2011) (finding evidence insufficient even under plain error standard); *United States v. Garcia-Guizar*, 160 F.3d 511, 517 (9th Cir. 1998) (same).

2. An Unassembled Destructive Device Qualifies as a Destructive Device Only If the Defendant Has All the Necessary Components, and Mr. Kirkland Did Not Have the Batteries Which Would Have Been the Power Source.

"Destructive device" is defined in 18 U.S.C. § 921(4) and 26 U.S.C. § 5845(f) to include the following:

> (1) "any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device";
>
> (2) "any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the

Secretary finds is generally recognized as particularly suitable for sporting purposes"; and

(3) "any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled." 26 U.S.C. § 5845(f); *see also* 18 U.S.C. § 921(4). Explosive devices which are fully assembled fall under the first of these alternatives, and collections of component parts which are not fully assembled fall under the third alternative. *United States v. Lussier*, 128 F.3d 1312, 1315 (9th Cir. 1997); *United States v. Ruiz*, 73 F.3d 949, 951 (9th Cir. 1996). As expressed by this Court in its first opinion interpreting § 5845(f), unassembled components "may be 'converted' into a destructive device as defined in Subparagraphs (1) and (2) by way of 'design or intent.'" *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971).

The "device" here did not qualify under the first alternative, as the government implicitly recognized in the instructions it proposed, *see* CR 47, at 19, 30 (proposing "components" instructions). This is because the "device" was, in the words of the government's own FBI expert, only "partially constructed." ER 32, 56. Specifically, "[t]here was not a power source associated with this device." ER 56. "There was a battery box associated with this device, which could have held the power source and also provided a switching mechanism," ER 57, but there were no batteries. Eight batteries were needed to transform the shoebox and the components into a "fully constructed" device, ER 39, 58 – two to provide power to a radio frequency receiver, and six more to provide an electrical charge to set off the blasting caps, ER 39.

The FBI expert did testify the "device" could be quickly assembled into a "fully constructed" device by inserting the required eight batteries. ER 56-57. But there was no evidence Mr. Kirkland had the batteries. He was therefore missing a key component of the "device." This presents the question of whether a mere partial "combination of parts" can constitute a destructive device.

Both an analysis of the statutory language and the case law suggest the best answer to this question is "No." As to statutory language, there is both the language of the "combination of parts" clause itself and contrasting language in one of the other provisions of 26 U.S.C. § 5845. With respect to the language of the "combination of parts" clause itself, as noted by the Fifth Circuit in *United States v. Malone*, 546 F.2d 1182 (5th Cir. 1977), "[t]he words of the statute are 'from which a destructive device may be readily assembled', and not, as the government contends, 'from which a destructive device may be readily assembled with addition of other parts.'" *Id.* at 1184.

Then there is language in one of the other subsections of § 5845 which contrasts with the language in subsection (f). The subsection defining "machinegun" includes not just any "combination of parts designed and intended [ ] for use in converting a weapon into a machine gun," but also "any part designed and intended solely and exclusively" for that purpose. 26 U.S.C. § 5845(b). The contrasting language in this other subsection triggers the principle that the use of limiting or broadening language in one statutory provision and the failure to use the limiting or broadening language in a second statutory provision evidences an intent that the limitation or broadening not apply to the second provision. *See, e.g., United States v. Johnson*, 529 U.S. 53, 57-58 (2000); *United States v. Wipf*,

620 F.3d 1168, 1171 (9th Cir. 2010); *United States v. Youssef*, 547 F.3d 1090, 1094-95 (9th Cir. 2008).

Case law also supports an interpretation of the "combination of parts" clause as requiring all components to be present. In the *Malone* case quoted above, the court held "the defendant cannot be guilty of [possessing a destructive device] because he did not have in his possession all of the component parts from which a destructive device might be readily assembled." *Id.*, 546 F.2d at 1184. *Malone* cited *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972), *see Malone*, 546 F.2d at 1184, in which the court similarly stated, "All of the necessary components 'from which a destructive device may be readily assembled' must be possessed in order to possess a 'destructive device' under subparagraph (3)." *Posnjak*, 457 F.2d at 1116. The Fourth Circuit held similarly in *United States v. Blackburn*, 940 F.2d 107 (4th Cir. 1991), stating that "[a] defendant must possess *every* essential part necessary to construct a destructive device." *Id.* at 110 (emphasis in original) (citing *Malone* and *Posnjak*).

While the missing component in *Malone* and *Blackburn* was the actual explosive charge, *see Blackburn*, 940 F.2d at 108; *Malone*, 546 F.2d at 1183, nothing in the courts' interpretation of the statutory language can be limited to the absence of just that component. This was recognized by another Fourth Circuit panel in *United States v. Hamrick*, 995 F.2d 1267 (4th Cir. 1993), *rev'd on other grounds by evenly divided court*, 43 F.3d 877 (4th Cir. 1995) (en banc). The component the panel in *Hamrick* understood to be missing[5] – or, more accurately,

[5] At least one judge on the en banc court – and possibly more – disagreed with this reading of the record, as discussed *infra* p. 20 n.6.

deficient – was, as in the present case, the power source, specifically, an igniter substance that was not flammable and a battery which would not generate sufficient heat. *See id.*, 995 F.2d at 1269. The court applied *Malone* and *Blackburn* nonetheless, stating that "[t]he language of the statute and our prior precedents make it clear that a defendant must be in possession of all of the necessary component parts to be convicted under section 5845." *Hamrick*, 995 F.2d at 1271. The court considered, but rejected, a government argument that the defendant need not possess component parts which are "readily available."

> The Government's readily available components theory requires reading the statute too broadly. The *Malone* court rightly rejected this argument. *Malone*, 546 F.2d at 1184. The Government's interpretation of the statute alters its plain meaning and relies on constructive possession of the missing component to satisfy the statute's requirements. We hold that actual physical possession of all of the working parts is required.

Hamrick, 995 F.2d at 1272.[6]

There are cases which have purported to limit the holding in *Malone*, but those cases are, first, distinguishable, and, to the extent they are not distinguishable, unpersuasive. *United States v. Simmons*, 83 F.3d 686 (4th Cir. 1996), which held a defendant did not have to possess matches or a lighter to use with his Molotov cocktail, *see id.* at 686, is distinguishable because matches

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[6] The Fourth Circuit subsequently sua sponte granted rehearing en banc in *Hamrick*, but split evenly on the destructive device question. *See United States v. Hamrick*, 43 F.3d 877, 884 (4th Cir. 1995) (en banc). For at least one of the judges – and possibly more – the different result was based on a different reading of the record, as explained in a concurring opinion. *See id.* at 886-91 (Luttig, J., concurring). This concurring opinion did not address the panel's statutory interpretation, and neither did the plurality opinion, *see id.* at 884 (simply noting that "convictions are now affirmed by an equally divided court"). *See also id.* at 891 n.1 (Ervin, J., dissenting) (noting that affirmance by equally divided court is not entitled to precedential weight).

and/or a lighter would not be part of the device. The same is true of pliers which were missing in *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001), *see United States v. Crocker*, 260 Fed. Appx. 794, 797 (6th Cir. 2008) (unpublished) (characterizing *Langan* as holding it was unnecessary for government to show possession of pliers needed to solder insulated wires to pager that was part of detonating mechanism).[7] Pliers, like a match or lighter, would not be part of the device, but would simply be a tool used to assemble the device.

Crocker, which is only an unpublished opinion, and *United States v. Sheehan*, 838 F.3d 109 (2d Cir. 2016), arguably come closer to conflicting with and/or limiting *Malone* and the other cases. In *Crocker* and *Sheehan*, the arguably missing "component" was tape to hold wires in place, which would at least be physically attached to and included in the device. But the tape was not really missing in *Sheehan*, for there was tape around the device in that case which could have been used to attach the wires. *See id.*, 838 F.3d at 125 (noting defendant's own expert "acknowledged that there was tape around the device that could have been used to attach one of the wires from the pipe to the top of the battery"). In any event, tape which is used to do something like hold a wire in place is very different from a battery which is – as characterized by the government's own expert in the present case – the "power source" for the "device." *See Sheehan*, 838 F.3d at 115, 117 (describing expert characterization of battery as one of components of "electrical fuzing system" and presence of battery in device in case at bar); *Hamrick*, 995 F.2d at 1269 (noting deficient battery). Such a power source is one of the "key components" which even *Sheehan* recognized must be

[7] *Langan* itself did not actually discuss the absence of pliers. *See id.*

possessed. The court in *Sheehan* articulated its holding as only that "the government need not offer evidence that the defendant possessed commonly available materials – such as tape – *if the defendant otherwise possesses all of the key components* necessary to assemble a destructive device." *Id.* at 125 (emphasis added).

Crocker and *Sheehan* are also unpersuasive. First, there is nothing in the statutory language supporting an exception for "commonly available materials." Second, *Sheehan* implicitly recognizes some limit on this exception, by still requiring possession of the "key components"; it thus requires reading into the statute not only a "commonly available materials" exception, but then a "key components" exception to the exception. Third, both "commonly available materials" and "key components" are amorphous concepts which will create difficult line-drawing problems and lead courts down a slippery slope. The present case is a good illustration of this, for what was missing here were the batteries, which are, on the one hand, "commonly available," but, on the other hand, a "key component." This poses the question of how *Sheehan* would characterize batteries – as not required because they are "commonly available," or required because they are a "key component."[8]

To the extent the statutory language and/or case law leaves doubt, the Court can also look to what the Supreme Court has described as the "venerable rule of lenity," *United States v. R.L.C.*, 503 U.S. 291, 305 (1992). This rule requires that

[8] To the extent this might somehow be viewed as a jury question, there was plain error in the jury instructions which would require a new trial, because nothing in the instructions indicated all "key components" must be possessed. *See* CR 64, at 39, 40, 45, 46-47.

"ambiguities concerning the ambit of criminal statutes should be resolved in favor of lenity to the defendant." *United States v. Wing*, 682 F.3d 861, 874 (9th Cir. 2012). The rule, as eloquently put by Judge Friendly and the Supreme Court, is "rooted in '"the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."'" *R.L.C.*, 503 U.S. at 305 (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), and H. Friendly, *Benchmarks* 209 (1967)). Mr. Kirkland and other defendants should not be required to languish in prison based on ambiguous statutory language which applies only if the courts read language into the statute which is not there.[9]

3. The Sentences on Any Counts Which Remain Standing Must Be Vacated Because They Were Based on a Guideline Range Which Included an Adjustment for Possession of a Destructive Device.

There must also be resentencing on any counts which remain standing. As noted *supra* p. 12, the felon in possession of firearms and felon in possession of explosives counts were "grouped" with the destructive device counts. *See* PSR, ¶ 21 (applying USSG § 3D1.2 and USSG § 3D1.3(a)). There was then a single total punishment imposed for each count based on a single guideline range calculated

[9] Strictly construing the "destructive device" statutes does not mean unlawful conduct with explosives will be completely unconstrained, moreover. As the Second Circuit noted in *Posnjak*, there are a multitude of other regulations and statutes governing conduct with explosives. *See id.*, 457 F.2d at 1120-21. The present case is actually a good illustration of this. Vacating Mr. Kirkland's destructive device convictions will still leave standing his conviction for being a felon in possession of explosives. The only effect on his total sentence will be to eliminate a 2-level offense level increase for possession of a destructive device, as discussed in the following subsection.

for the "group." *See supra* p. 12 (citing USSG § 5G1.2 requirement that total punishment shall be imposed on each count concurrently if total punishment is within statutory maximum). *See also* PSR, at 22 (sentence recommendation of concurrent sentences of 57 months on each count). That guideline range included a 2-level upward adjustment for possession of a destructive device, based on § 2K2.1(b)(3)(B) of the guidelines. *See supra* p. 12 (citing PSR, ¶ 23, and USSG § 2K2.1(b)(3)(B)). Since each sentence was affected by this erroneous adjustment, there must be resentencing on any counts which remain standing.

B. THE DESTRUCTIVE DEVICE CONVICTIONS AND SENTENCE ENHANCEMENT MUST BE VACATED BECAUSE IT WAS PLAIN ERROR TO (1) ALLOW THE COMBINED EXPERT AND PERCIPIENT WITNESS TESTIMONY BY THE BOMB SQUAD OFFICER ABOUT THE ALLEGED DEVICE WITHOUT APPROPRIATE GATEKEEPING AND (2) ALLOW THE TESTIMONY BY THE OFFICER WHO CONDUCTED THE SECOND INTERVIEW OF MR. KIRKLAND THAT HE BELIEVED MR. KIRKLAND MIGHT BE MAKING IMPROVISED EXPLOSIVE DEVICES FOR TERRORIST ORGANIZATIONS.

1. Reviewability and Standard of Review.

As described *supra* pp. 8-9, one of the bomb squad officers gave both expert and percipient witness testimony about the shoebox that was the alleged destructive device. As described *supra* p. 10, the Joint Terrorism Task Force

A P P E N D I X 3

NO. 16-10514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

KENNETH WILLIAM KIRKLAND,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
D.C. NO. 1:15-CR-322-DAD

ANSWERING BRIEF OF THE UNITED STATES

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Judgment was entered on December 5, 2016. ER 2; CR 72. Kirkland filed a timely notice of appeal on December 13, 2016. Fed. R. App. P. 4(b); ER 1; CR 73. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether there was sufficient probable cause for the issuance of a search warrant for Kirkland's residence where, among other evidence, his fingerprint was found inside a house that the owner reported burglarized.
2. Was there plain error with respect to the sufficiency of evidence supporting the jury's verdict that Kirkland possessed component parts that could be readily assembled into a destructive device, where evidence presented at trial indicated that his device was missing only common batteries, and that the device could have been activated in other ways, including by static electricity.

3. Whether the district court plainly erred in allowing Sergeant Sean Pratt, head of the Kern County Bomb Squad, to testify as both a lay and expert witness where the jurors were aware of the witness's dual roles.
4. Whether the district court plainly erred in permitting FBI Task Force Office Joshua Nicholson to explain why he did not record his interview with Kirkland.

BAIL STATUS

Kirkland is serving the sentence imposed in this case. His projected release date is November 30, 2019.

STATEMENT OF THE CASE

I. Procedural History

On November 12, 2015, the grand jury returned a four-count indictment against Kirkland. ER 156–59; CR 1. Kirkland was charged with being a convicted felon in possession of firearms and ammunition (count one), felon in possession of a destructive device (count two), felon in possession of explosives (count three), and possession of a destructive device not registered in the National Firearms Registry (count four). 18 U.S.C. § 922(g)(1); 18 U.S.C. § 842(i)(1); 26 U.S.C. § 5861(d). ER 156–59; CR 1.

Kirkland's trial began on August 30, 2016. CR 54. On September 2, 2016, the jury returned unanimous verdicts finding Kirkland guilty on all counts. CR 59, 60.

On December 5, 2016, Kirkland was sentenced to serve a total of 57 months of imprisonment on each count to be served concurrently. ER 2–3; CR 71, 72.

II. Law enforcement obtained a search warrant for Kirkland's residence.

In September 2015, California City Police Officer Gary Wilson received a report of a burglary at a residence on Nonie Court in California City. ER 152. The following facts regarding Officer Wilson's subsequent investigation were included in Officer Wilson's search warrant affidavit, which was signed by Kern County Superior Court Judge Marcos Camacho on October 10, 2015. ER 149.

On September 5, 2015, Officer Wilson and Sergeant Blanton met with the owner of the Nonie Court Residence. ER 152. The owner explained to the officers that he resided in the Los Angeles area and had last visited the Nonie residence on July 21, 2015. ER 152. The owner explained that his neighbor and friend (hereinafter referred to as "reporting neighbor") contacted the owner by telephone

to advise the owner that several people were trespassing on his property. ER 152. The owner explained to the officers that he had not given anyone permission or access to his residence and he was concerned that these individuals might still be at his residence. ER 152.

The officers immediately went to the Nonie Court residence with the owner. ER 152. There they found various items that did not belong to the owner, including beer cans, pizza, and fresh fruit, which indicated that the residence had been recently occupied. ER 152–53. Novelty items not belonging to the owner were also recovered from inside the residence. ER 152. The officers also found bolt cutters, which the affidavit indicates were not the owner's and were seized as evidence. ER 152–53. Officer Wilson also stated in his affidavit that he found evidence of forced entry to both a sliding glass door leading into the residence and a back door leading into the garage. ER 153.

The owner identified five items that were missing from his residence including a transmission, a generator, a computer, an

adaptor plate and a duffle bag that contained life vests. ER 153. The owner estimated that these items were worth $3,100. ER 153.

Thereafter, Officer Wilson interviewed the reporting neighbor. ER 153. The reporting neighbor stated that he, too, resides out of town and came to visit his property the previous day—September 4, 2015. ER 153. The reporting neighbor stated that he is friends with the owner, so the reporting neighbor checked on the owner's property as well. ER 153. Once there, he saw several beer cans and a barbeque outside of the owner's residence. ER 153. He also saw a white truck parked in the driveway of the owner's residence. ER 153. At 3:00 in the morning on September 5, 2016, the reporting neighbor could hear more than two people talking inside of the owner's residence, and he saw candlelight coming from inside of the residence. ER 153.

The three beer cans that were seized from inside of the owner's residence were dusted for prints. ER 153. On October 7, 2015, Officer Wilson received notification that a fingerprint on the beer can matched that of Kirkland. ER 153. On October 10, Officer Wilson again interviewed the owner, who told Officer Wilson that he did not

know Kirkland and never allowed him onto his property or in his residence. ER 153.

Officer Wilson knew that Kirkland resided at a house on 79th Street, California City from a DMV records check and by Kirkland's recent contact with the California City Police Department on September 28, 2015, during which he provided the address as his residence. ER 151, 153. After his interview with the owner, Officer Wilson drove by the address and saw a white Toyota pickup truck parked in front of Kirkland's residence. ER 153.

III. Kirkland, a convicted felon, possessed firearms, explosives, a destructive device, and a partially-constructed destructive device at his residence.

On October 10, 2015, Officer Wilson obtained a search warrant for Kirkland's residence. ER 149. At the October 11 search of Kirkland's residence, officers found Kirkland asleep in his bedroom with an AR-15 rifle beside his bed, which was loaded with a round in the chamber. SER 24-29. At the foot of Kirkland's bed was another rifle. SER 32. A third rifle was just outside of Kirkland's bedroom door. SER 29. Officers also found the same type of novelty money that was recovered from the Nonie Court address. SER 4. In the

carport, they found numerous detonators contained in a large yellow metal box, at which point they called in the Kern County Bomb Squad. SER 46-47. Sergeant Pratt of the Kern County Bomb Squad responded with his team. ER 91. Sergeant Pratt found an explosive device in a shoebox under Kirkland's bed, as well as dynamite and additional explosives stored in a bag together in his bedroom, and additional dynamite in a trailer on his property. ER 100–01, 110–13, 118–23. Once Sergeant Pratt found and removed the explosive device, Senior Deputy Ethan Plugge continued the search of Kirkland's room. SER 80-83. He found yet another shoebox under Kirkland's bed, this one containing a circuit board, LED lights, a battery box, but no explosive load. SER 83-88.

For safety reasons, the bomb squad destroyed the dynamite and the load portion of the explosive device. ER 111–18, 125–30. Also seized from Kirkland's residence was the ammunition charged in this case. SER 27-39.

Notably, the owner later identified the aforementioned yellow metal box as his own from photographs that Officer Wilson took of it before it was seized. SER 4.

The first device found under Kirkland's bed was a partially constructed improvised explosive device (IED). ER 32. The device contained a switch (the battery box), wires to conduct electricity, and a main charge (shotgun shells and a detonator). ER 33–36, 43–49, 51–56. The detonator found in Kirkland's device was one of many detonators found on his property that day. ER 91–93. Many of the other detonators were found in their original packaging, which contained various warnings on the outside of the box. ER 91–92, 103. These detonators functioned by creating a small explosion when connected to electrical current. ER 105. The warning on the box from which the detonator came stated "Never expose detonators to static electricity or stray current." ER 105. This is because if a detonator is exposed to a sufficient amount of static electricity, it can explode. ER 105. Indeed, detonators are the most sensitive part of the explosives train. ER 105. The packaging also stated "never force a detonator into an explosive," because if one applied a sufficient amount of force or pressure to a detonator, it could also detonate. ER 105–06.

One nine-volt battery attached to the wires of the detonator would suffice to detonate the device. ER 56; SER 95. The device could also have been powered by eight C-cell batteries in its battery box. ER 58. It would have taken Kirkland a matter of minutes to assemble the device into a fully constructed IED. ER 58. If detonated, the device would have launched the birdshot from the shotgun shells. ER 54. This could have resulted in serious bodily injury or death to those standing near it. ER 133.

At the time Kirkland possessed the firearms and destructive device, he was a convicted felon. CR 37.

Kirkland constructed the destructive device to deter a woman with whom he was previously in a relationship from jumping his fence and entering his home via his backyard. ER 72–73; Kirkland interview (3/11/2015) (video recording admitted as Gov Tr. Exs. 31, 36).[1] He made the device in her presence and told her that it was for the people who kept jumping his fence. ER 72. Kirkland hung a line with fishhooks in his backyard to deter her as well. ER 72; Kirkland

[1] The government is concurrently submitting a motion for leave to transmit to the court CDs containing video recordings.

interview (3/11/2015) (video recording admitted as Gov Tr. Exs. 31, 37). Kirkland also made the device for "house protection." SER 62-63; Kirkland interview (3/11/2015) (video recording admitted as Gov. Tr. Ex. 37).

IV. Sergeant Pratt's dual role testimony covered his factual observations at the scene that day, as well as his expert opinions about the dynamite, blasting caps, and the device found there.

At trial, Sergeant Pratt, the sheriff deputy in charge of the bomb squad that responded to Kirkland's residence on October 11, 2015, testified regarding his discovery of explosives and explosive devices at the residence, including that the principal device "had an explosive load" and was "basically put together." ER 82, 91, 126–27. Prior to trial, the government had notified Kirkland that Sergeant Pratt was expected to offer both fact and expert testimony. *E.g.*, ER 146–47. As a result, the parties jointly proposed that the court include in its charge to the jury Model Jury Instruction 4.14A addressing dual role testimony. CR 47 at 15. The court's final instructions to the jury included Model Jury Instruction 4.14A verbatim. SER 101; CR 64 at 31 (Instruction No. 14).

On direct examination, the government established that Sergeant Pratt had examined approximately 75 explosive devices during his 18-year career with the bomb squad. ER 82–85. When the prosecutor sought to explore expert issues with Sergeant Pratt, she frequently flagged her question with the preface "based on your training and experience." For instance, early in the examination, the prosecutor stated, "Now, I'm going to ask you some questions about your training and experience with regard to dynamite." ER 108. When the prosecutor asked Sergeant Pratt to assess the nature of the explosive device he observed at Kirkland's residence, she asked, "Based on your training and experience, what does this device look like to you?" and "Based on your training and experience . . . did you consider this device to be dangerous?" ER 108, 126.

Similarly, when she asked Sergeant Pratt to compare the sophistication of the device to others he had seen, she asked, "Based on other devices you have seen over the course of your 18 years with the Bomb Squad, what did you think of it?" ER 128. Likewise, when the prosecutor asked for Sergeant Pratt's opinion about the "larger-than-expected explosion" he saw when he countercharged the

explosive device at Kirkland's residence, she prefaced the question with "Based on your training and experience." ER 130.

Following the government's direct examination of Sergeant Pratt, Kirkland cross-examined him about his expert opinions, among other subjects. Kirkland first asked Sergeant Pratt about his experience with the Sheriff's Department "as the EOD [explosives ordinance disposal] expert," and then specifically inquired about dynamite, blasting caps, the explosive device at issue, the x-ray images of that device and Sergeant Pratt's analysis of the x-rays, the countercharge of that device, and Sergeant Pratt's assessment that the shoebox device was sophisticated. SER 67-78.

Much of Sergeant Pratt's testimony was consistent with and corroborated by the testimony of two other expert witnesses: FBI Chemist Forensic Examiner Robert Gillette and FBI Explosives Device Handler Travis McCrady. For example, Gillette testified that the device components recovered from Kirkland's residence contained a high explosive residue called nitroglycerin that commonly is found in dynamite and black powder. SER 90-91. McCrady described the device as a "partially constructed improvised explosive device," which

he defined as a "homemade bomb." ER 32–33. These expert witnesses also testified about other subjects previously addressed during Sergeant Pratt's testimony, including the x-ray images of the primary explosive device, the images of shotgun shells contained therein, and the general explosion pattern of shotgun shells. ER 52–54.

V. Officer Nicholson's testimony regarding his unrecorded interview of Kirkland was important to the government's case in light of Kirkland's prior interview, which was recorded and played to the jury before Officer Nicholson testified.

At trial, the government introduced through its first witness (Police Officer Gary Wilson) and played for the jury 10 audio/video-recorded excerpts of Officer Wilson's interview of Kirkland conducted shortly after his arrest on October 11, 2015. SER 47-63. Among other admissions, Kirkland stated that he made the explosive device with shotgun shells to ward off a trespasser and for home protection. ER 72-73; SER 55-56, 59-60; Kirkland interview (3/11/2015) (video recording admitted as Gov Tr. Exs. 28, 31, 36, 37). Five witnesses later, FBI task force officer (TFO) Joshua Nicholson testified that he separately interviewed Kirkland, during which Kirkland admitted

making the explosive device and not connecting it to a power source because he did not want it to blow up. ER 70, 73.

TFO Nicholson did not record his interview with Kirkland. TFO Nicholson testified that because Kirkland did not appear to have ties to terrorist or criminal organizations, he believed Kirkland possibly had made the improvised explosive device for another person or organization. ER 77–78. TFO Nicholson further explained that, based on this assessment, he considered Kirkland a possible candidate to serve as a confidential informant. In the interest of avoiding the risk of injury that could result were any recording of Kirkland's interview inadvertently released, TFO Nicholson chose not to record the interview. ER 77–78.

Immediately following this testimony, Kirkland cross-examined TFO Nicholson and reinforced that Kirkland did not appear to be affiliated with any terrorist organization. ER 78–79. For instance, in closing, even though the government did not refer to TFO Nicholson's reasons for not recording his interview with Kirkland, Kirkland again reinforced that the evidence established Kirkland had no terrorist ties:

> [O]ne thing that's very important, . . . and that is if we think about what TFO Nicholson said yesterday. My client is not connected up with any type of terrorist activity. There is no evidence of group with terrorism. There was no anarchy cook book, no designs items like that that were found in his home that would implicate him or connect him up with any of these individuals.

SER 100.

SUMMARY OF ARGUMENT

This Court should affirm the district court's denial of Kirkland's suppression motion. Kirkland's underlying motion and his appeal understate critically important facts set forth in the warrant's supporting affidavit, which corroborate information provided by two separate witnesses, also included in the affidavit. When applied to relevant Constitutional, Supreme Court, and Ninth Circuit authority, the statements contained in the affidavit justified the issuance of the search warrant. Were this Court to find that the warrant was not supported by sufficient probable cause, it should nevertheless affirm the district court's denial of Kirkland's suppression motion because the warrant was executed in good faith reliance on the issuing judge's probable cause determination.

This Court should also affirm Kirkland's convictions for possession of a destructive device in violation of 18 U.S.C. § 922 (felon in possession) and 26 U.S.C. § 5861(d) (possession of unregistered device). Kirkland possessed a partially assembled device consisting of a switch (battery box), wires to conduct electricity, and a main charge (shotgun shells and a detonator wrapped together in tape). Connection of the detonator wires to a nine-volt battery would have been sufficient to detonate the device. The device could be readily assembled because, with the addition of batteries, Kirkland could have created a live device in a matter of minutes. While law enforcement did not seize batteries from the residence, the absence of such an ubiquitous and accessible item does not remove Kirkland's device from the ambit of the applicable statutes' definitions of destructive device, just as a Molotov cocktail is a destructive device even absent a match. Moreover, the evidence here also indicated that static electricity or aggressive handling could have ignited the device.

Additionally, the district court did not plainly err in allowing Sergeant Pratt to testify as both a lay and expert witness because the

determination of the good faith of Officer Wilson, and demonstrate that the good faith exception applies in this case.

II. This court should affirm Kirkland's destructive device convictions because the evidence presented at trial was sufficient to demonstrate that Kirkland possessed parts that could be readily assembled into a destructive device.

A. Standard of Review

Where a defendant preserves at trial an insufficient evidence argument, this Court reviews a challenge to the sufficiency of the evidence by considering "whether, after viewing the evidence in the light most favorable to the [government], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Kirkland, however, did not object to the sufficiency of the evidence at trial. Thus, this Court reviews the sufficiency of the evidence here "only to prevent a manifest miscarriage of justice or for plain error." *United States v. Kuball*, 976 F.2d 529, 531 (9th Cir. 1992).[2]

[2] To succeed on plain error review, Kirkland "must show (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Zalapa*, 509 F.3d 1060, 1064 (9th Cir. 2007) (internal quotations omitted).

"Reversal of a criminal conviction on the basis of plain error is an exceptional remedy. . ." *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986).

B. The definition of destructive device for counts two and four are identical and encompass a "combination of parts."

In count four, Kirkland was charged with a violation of 26 U.S.C. § 5861(d), which makes it unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The term "firearm" is further defined in 26 U.S.C. § 5845(a) as, among other things, a "destructive device." A destructive device is defined in section 5845(f), in pertinent part, as:

> (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket …, (D) missile …, (E) mine, or (F) similar device;
>
> … and
>
> (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled.
>
> The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon . . .

Kirkland was also charged in count one with a violation of 18 U.S.C. § 922(g)(1)—felon in possession of a firearm. The applicable definition of firearm is set forth in 18 U.S.C. § 921(3) and includes "destructive device." Section 921(4) defines destructive device and is substantively identical to 26 U.S.C. § 5845(f)'s definition of destructive device set forth above.

C. From the testimony at trial, the jury could have reasonably inferred that Kirkland possessed the batteries or a destructive device that could have otherwise easily exploded.

Contrary to Kirkland's argument that there was "no evidence" that he had the batteries that powered his device, (AOB at 18), the jury heard testimony from which they could have inferred that Kirkland possessed the batteries that powered the device. TFO Nicholson testified that during his interview with Kirkland, they discussed the power source to the device. ER 73. Specifically, Kirkland told Nicholson that he did not hook up the power source because he knew that it could be set off by stray microwave electricity. ER 73. Kirkland's statements indicated that he made a conscious choice not to power the device, from which the jury could infer that he had the ability to do so. This is especially true when

what he needed to power the device was something as ubiquitous as a battery.

Additionally, Sergeant Pratt, the responding bomb technician, testified that the detonator found in Kirkland's device creates a small explosion "when you hook it up to electrical current." ER 105. He went on to explain the warning on the box from which the detonator came, which stated "Never expose detonators to static electricity or stray current." ER 105. Sergeant Pratt explained that "if there is enough static electricity applied to it, it can actually cause the cap to detonate and explode." ER 105. Sergeant Pratt further explained that detonators are the "most sensitive part of the explosives train." ER 105. In discussing the box's warning, "never force a detonator into an explosive," Sergeant Pratt stated that if one applied a sufficient amount of force or pressure to a detonator, it could also detonate. ER 105–06. Consequently, there was sufficient evidence for the jury to conclude that this could become a live device even absent the batteries. The jury verdict, therefore, involved no error, let alone a plain one that "seriously affect[ed] the fairness, integrity,

or public reputation of judicial proceedings." *Zalapa*, 509 F.3d at 1064.

D. Kirkland did not have to possess the batteries to possess a destructive device.

Moreover, Kirkland possessed a "destructive device" regardless of whether he possessed the batteries that powered the device. This case is analogous to the myriad of cases holding that a Molotov cocktail consisting of a bottle filled with flammable liquid and a wick constitutes a destructive device.

In *United States v. Simmons*, the Fourth Circuit considered whether a Molotov cocktail was a destructive device if the defendant did not possess a match or lighter to ignite it. 83 F.3d 686, 687 (4th Cir. 1996). There, the defendant had in his pocket a vodka bottle filled with gasoline. *Id.* Protruding from the bottle was a cloth wick, the other end of which was immersed in the gasoline. *Id.* The defendant told federal agents that he had constructed the Molotov cocktail to set a man's car on fire. *Id.* However, the defendant did not possess a match or a lighter. *Id.* The defendant pleaded guilty to possessing a destructive device in violation of 26 U.S.C. §§ 5861(d) and 5871, but reserved the right to appeal the issue of whether the

gasoline-filled glass bottle with a cloth fuse could constitute a destructive device. *Id.*

The Fourth Circuit held that the defendant indeed possessed a destructive device despite his lack of matches or a lighter. *Id.* In support of this conclusion, the Fourth Circuit pointed to the many circuits that have held that a Molotov cocktail consisting of a bottle, gasoline, and a rag is a bomb for purposes of section 5845(f). *Id.* (citing cases). The Fourth Circuit noted that the various courts came to these conclusions "without ever as much as suggesting that a defendant must possess a means by which to ignite the device." *Id.*

Kirkland urges this Court to disregard these cases because matches and lighters are not "part of" a Molotov cocktail. AOB at 20–21. In doing so, Kirkland ignores that matches and lighters, like the batteries in this case, ignite the device. Moreover, like the batteries in this case, lighters and matches are easily obtained. Finally, as the FBI's Explosives and Hazardous Device Examiner, Travis McCrady, testified, Kirkland could have ignited the device by simply attaching it to a nine-volt battery. ER 58. Touching wires to a battery or a lighter to a fuse are comparable. For these reasons,

the Molotov cocktail cases are analogous and relevant to the instant case.

In *United States v. Langan*, the defendant was charged with failing to register a destructive device in violation of 26 U.S.C. § 5861(d), among other crimes, for a pipe bomb that he left at the scene of a bank robbery in which he had participated. 263 F.3d 613, 618 (6th Cir. 2001). The defendant argued that the government failed to prove that the pipe bomb was operable or readily made operable, and therefore did not qualify as a "destructive device" under 18 U.S.C. § 921. *Id.* at 625. There, the Sixth Circuit began its analysis by noting that "[t]o qualify under the statute, we do not require that the destructive device operate as intended." *Id.* "It is sufficient for the government to show that the device was 'readily convertible' to a destructive device." *Id.* The Sixth Circuit went on to hold that "the government need not establish that any particular component be present for a device to qualify as a destructive device. The only requirement is that the device be capable of exploding or be readily made to explode." *Id.* The government's expert testified that it would only take a few seconds to make the device operable. *Id.*

The Sixth Circuit concluded that it was reasonable for the jury to have found that the pipe bomb was indeed a destructive device, which contained an explosive mixture and was capable of explosion. *Id.*

Like the device in this case, and like a Molotov cocktail without a match, the device in *Langan* was not operable as it was assembled. As noted by Kirkland, the defendant in *Langan* would have had to use a tool to make the device operable. AOB at 21. Nevertheless, whether the defendant possessed the tools to strip the wires was not a factor in the Sixth Circuit's conclusion that the device was a destructive device. *See* AOB at 21, n.7 ("*Langan* itself did not actually discuss the absence of pliers.")

Kirkland relies heavily on *United States v. Malone*, 546 F.2d 1182 (5th Cir. 1977), for his position regarding the batteries. AOB at 18–21. There, law enforcement found the following in the defendant's car upon a search incident to his arrest: a spring-top box inside which had been inserted a hand grenade hull, one micro-switch, one electrical solenoid switch, one transistor battery, one small low voltage electrical bulb, glue, tape, small aluminum metals,

nails, waterproofing spray, and one container of Play-Doh modeling compound. *Id.* at 1183. He was convicted of possessing an unregistered firearm (the destructive device as defined by 26 U.S.C. § 5845(f)(3) (combination of parts)) in violation of 26 U.S.C. § 5861(d). *Id.*

At trial, the government's witnesses testified that the materials named in the indictment could be assembled into a destructive device provided that explosive material was obtained and added. *Id.* The witnesses also testified that the materials could be readily assembled to function by the addition of explosive material. *Id.* The indictment did not allege, and the evidence at the trial did not prove, that the defendant was in possession of any explosive charge or detonation device. *Id.* at 1184.

The Fifth Circuit concluded that these component parts did not satisfy the definition of destructive device because "he did not have in his possession all of the component parts from which a destructive device might be readily assembled." *Id.* at 1184. The Fifth Circuit qualified their holding, however:

> We make no attempt here to define what may or may not constitute a "destructive device" or

> its components within the language of the statute. What we do hold is that the complete absence of explosive material would prevent the component parts in the defendant's possession from being a destructive device. Our decision is limited solely to the facts of this case.

Id.

Also noteworthy in *Malone* are the circumstances under which the grenade was discovered. Law enforcement found the device in the defendant's car after they searched the car upon his arrest for credit card fraud. *Id.* at 1183. Unlike Kirkland, the defendant in *Malone* was not surrounded by loaded rifles, sticks of dynamite and detonators, had not admitted to making the device at issue to threaten someone, and the device was not found in his home in which one would presumably have better access to various items (especially commonplace items such as batteries). The defendant in *Malone* was in his car and was arrested for credit card fraud. *Id.* The Fifth Circuit's conclusion that the absence of the actual explosives was enough to remove the remaining component parts from the ambit of section 5861 is not persuasive here.

The district court in the Southern District of Texas came to a similar conclusion about *Malone* in *United States v. Russell*, 468 F. Supp. 322 (S.D. Tex. 1979). There, the defendant sold an undercover agent explosive material (dynamite, which the defendant claimed was C-4), blasting caps, and leg wire. He was charged with possession of a destructive device in violation of 26 U.S.C. § 5861(d), among other crimes. *Id.* at 324–25. Defendant claimed a combination of the items sold could not be "readily assembled" into a destructive device as defined in section 5845(f)(1) because it lacked a power source. In distinguishing *Malone*, the district court noted that the evidence presented at trial indicated that the device could be armed by wiring it to a car battery. *Id.* at 325, 330. Evidence at trial also demonstrated that a bomber would need nothing more than a 1.5 volt battery to set off the device. *Id.* at 330. The district court concluded that, "in such instances, the energy source is really not essential to the device. *Id.* (citing *United States v. Greer*, 404 F. Supp. 1289, 1293 (W.D.Mich. 1975), *affirmed*, 588 F.2d 1151 (6th Cir. 1978) (battery or static electricity could have set off the blasting caps)). The district court went on to note that "the acquisition of a

1.5 volt battery would require no more effort than the acquisition of a match which is the power source of a Molotov cocktail." *Id.* Based on these factors, the district court concluded that the combination of the parts which were sold by the defendant would have and were intended to have created a destructive device that could have been readily assembled. *Id.*

E. The language and purpose of the applicable statutes supports this conclusion.

Kirkland notes that the accompanying machinegun definition in 26 U.S.C. § 5845(b) contains contrasting language that triggers the principle that limiting or broadening language not apply to the destructive device provision. AOB at 18. Even if that is the case, section 5845(b)'s language actually supports the government's position in that, regarding component parts, it states "any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." Here, then, section 5845(b)'s definition of machinegun component parts is arguably narrower than the component parts definition applicable to destructive devices in that the latter does not expressly state that the parts be "in the possession or under the control of a

person." *See* 26 U.S.C. § 5845(f). Consequently, that limiting language should not apply to the definition of a destructive device in section 5845(f).

Additionally, the legislative history behind the applicable statutes containing the definitions of destructive device—26 U.S.C. § 5845(f) and section 18 U.S.C. § 921(4)—also militates in favor of the government's position. These provisions were enacted in 1968 as part of the Omnibus Crime Control and Safe Streets Act and the Gun Control Act. *See* Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 82 Stat. 197, 225–231 (1968), *amended by* Gun Control Act of 1968, Pub. L. No. 90-618, § 82 Stat. 1213, 1214–15, 1230–31 (1968). These acts were an attempt by Congress to "stem the traffic in dangerous weapons being used in an increasing number of crimes involving personal injury." *United States v. Posnjak*, 457 F.2d 1110, 1113 (2d Cir. 1972) (discussing legislative history). Legislative history indicates that explosives with legitimate uses were not the target of the legislation. *Id.* Notably, this Court has determined that a legitimate explosive such as dynamite can be a "destructive device" for purposes of the applicable statutes where

"the nature of the device" and the defendant's "admitted purpose" so indicate. *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971). The instant case is not one in which a defendant was charged with various unassembled explosives that could have otherwise had a legitimate use. Kirkland had already assembled explosives and shrapnel into an anti-personnel device. That his device was missing batteries does not contradict or otherwise offend the intent of the applicable statutes—namely "clearly identifiable weapons which were the cause of increasing violent crime and which had no lawful uses." *Posnjak*, 457 F.2d at 1116.

In sum, Kirkland's device was nearly fully assembled and had no legitimate purpose. ER 58. He made it to threaten a woman and for home protection. ER 72-73; SER 55-56, 59-60; Kirkland interview (3/11/2015) (video recording admitted as Gov Tr. Exs. 31, 36, 37). He did not attach the power source to avoid harming himself. ER 73. Under these circumstances, the fact that law enforcement did not seize batteries from Kirkland's house should not exclude the device from the applicable statutory definitions of "destructive device." Kirkland could still readily assemble the device, even if he had to

drive to the corner store to buy batteries. Moreover, the bomb squad's primary objective in these circumstances is to render the device safe. Under the rule Kirkland proposes, the bomb squad would be required to determine on scene what other parts might be necessary to trigger the device (tools, batteries, etc.), and then to search a residence and seize those additional parts or have other teams re-enter the premises to conduct this search. The bomb squad should not be mandated to determine every conceivable way that a device can be detonated and then search the premises for those parts. This is an overly burdensome requirement and, even in a scene that has been cleared by the bomb squad, still presents a certain element of danger.[3]

III. The district court did not plainly err in admitting Sergeant Pratt's dual role testimony.

Because Kirkland did not object to the district court's jury instruction addressing dual role testimony and did not object

[3] For the same reasons set forth in this section, the destructive device enhancement imposed at sentencing should also be affirmed, as the Sentencing Guidelines adopted the same destructive device definition as that in section 5845(f). U.S.S.G. § 2K2.1(b)(3)(B), Cmt. n.1.

A P P E N D I X 4

CA No. 16-10514

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH WILLIAM KIRKLAND, Defendant-Appellant.	)	(D.Ct. 15-cr-00322-DAD)

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HONORABLE DALE A. DROZD
United States District Judge

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I.

ARGUMENT

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. KIRKLAND'S DESTRUCTIVE DEVICE CONVICTIONS.

1. The Plain Error Standard of Review Does Not Defeat Mr. Kirkland's Sufficiency Claim.

Initially, the government exaggerates the effect of the plain error standard of review on a sufficiency of evidence claim. The one sufficiency of evidence case

the government cites – *United States v. Kuball*, 976 F.2d 529 (9th Cir. 1992)[1] – is an older case which must be read in light of the more recent cases cited in Appellant's Opening Brief. The recent cases recognize the difference between plain error review and ordinary review of sufficiency of evidence claims is "largely academic," *United States v. Pelisamen*, 641 F.3d 399, 409 n.6 (9th Cir. 2011), 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). *See also United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201 (9th Cir. 2000) (citing *Kuball* but going on to recognize qualification in *Vizcarra-Martinez*). The Court reiterated this just 3½ months ago in vacating a solicitation of murder conviction under the plain error standard. *See United States v. Cox*, No. 13-30000, 2017 WL 3722825, at *2 (9th Cir. Aug. 29, 2017) (unpublished) (noting "plain-error review of a sufficiency-of-the-evidence claim is only theoretically more stringent than the standard for a preserved claim," (quoting *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011) (internal quotation marks omitted)), and then finding evidence insufficient).

[1] The other two plain error standard of review cases the government cites are not sufficiency of the evidence cases. *See United States v. Zalapa*, 509 F.3d 1060, 1064 (9th Cir. 2007) (multiplicity claim); *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986) (jury instruction claim).

2. There Was Insufficient Evidence for the Jury to Infer Mr. Kirkland Had the Required Batteries, and the Possibility the Destructive Device Could Have Easily Exploded Even Without Batteries Is Not Enough.

The government's first substantive argument is a factual one – that there was sufficient evidence because the jury could have inferred Mr. Kirkland had batteries, or, in the alternative, the device could have exploded just from static electricity. The evidence cannot be found sufficient on either of these theories, however.

The theory that static electricity could have accidentally triggered the device fails because it ignores the intent requirement. When the government proceeds under the "combination of parts" prong of the destructive device definition, it must show an intent that the combination of parts act as a destructive device. And there was no basis for inferring Mr. Kirkland intended static electricity to trigger the device. Intending to trigger the device in such a random way would have meant Mr. Kirkland had no control over when the device might go off, which would have been extremely dangerous for both him and his family.

As to the government's other theory – that the jury could have inferred Mr. Kirkland had the necessary batteries – the testimony to which the government points – that "he [Mr. Kirkland] said he did not hook up the power source to [the device] because he knows that it could be set off by merely just microwave stray electricity,"[2] ER 73, *cited in* Govt. Brief, at 40 – is far too thin a reed. "The power

[2] This statement also shows a lack of intent to trigger the device through random static electricity, in that it suggests a desire to affirmatively avoid that risk.

source" could refer to batteries Mr. Kirkland intended to buy if and when he decided to fully assemble the device just as easily as it could refer to batteries Mr. Kirkland already had.

It is true "the government does not need to rebut all reasonable interpretations of the evidence that would establish the defendant's innocence." *United States v. Katakis*, 800 F.3d 1017, 1023 (9th Cir. 2015) (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc)). Still, "evidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *Katakis*, 800 F.3d at 1023 (quoting *Nevils*, 598 F.3d at 1167, and *Briceno v. Scribner*, 555 F.3d 1069, 1079 (9th Cir. 2009)). Choosing between the two possibilities here – Mr. Kirkland already having the eight C-cell batteries he needed, *see* ER 35, or Mr. Kirkland planning on purchasing all or whatever additional ones he needed if and when he was ready to fully assemble the device – would have been mere speculation, for there was no basis for inferring one rather than the other.

3. Possession of the Batteries Was Required to Convert the Partially Assembled Device into a "Destructive Device."

a. The case law.

The government's legal arguments also fail. Initially, the government's attempt to analogize the batteries needed for Mr. Kirkland's device to the match or lighter used to light a Molotov cocktail like that in *United States v. Simmons*, 83

F.3d 686 (4th Cir. 1996), fails. The batteries are a component which had to be inserted into the device. Further, the batteries alone would not trigger the device; instead, a switch needed to be triggered by a radio frequency. *See* ER 35-36 (explaining battery box had to be loaded with eight C-cell batteries, two of which would supply power to radio frequency receiver, and circuit within battery box would close and allow remaining batteries to "dump" electricity when antenna picked up radio frequency). It is the radio or other device which would send the radio frequency that is analogous to the match or lighter used to light a Molotov cocktail.[3]

The one other court of appeals case cited by the government – *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001) – is distinguishable because the device there had all the components needed for a pipe bomb, including the pipe; powder confined in the pipe; an electric circuit hooked up to a pager; a switch; and what was missing here, namely, the batteries. *See id.* at 626. All that remained to be done was to recrimp and strip the wires in the device and attach them to the pager which would explode the device when paged. *See id.* In sum, there was an already complete set of components the defendant simply had to finally assemble.

On the other side of the coin are the cases cited in Appellant's Opening Brief. The government's attempt to distinguish *United States v. Malone*, 546 F.2d 1182 (5th Cir. 1977), on the ground the defendant there "was not surrounded by

[3] There was also testimony the device could be triggered by attaching a different type of battery directly to the detonator, *see* ER 58, but this could not be intended because it would cause an immediate explosion which would kill or injure whoever was attaching the battery. In any event, even a battery of this sort is a physical component attached to the device, not an outside lighter, match, or radio frequency.

loaded rifles, sticks of dynamite and detonators, had not admitted to making the device at issue to threaten someone, and the device was not found in his home in which one would presumably have better access to various items," Govt. Brief, at 47, ignores the fact that absence of intent was not what the holding in *Malone* turned on. The government also ignores the other cases preceding and following *Malone* – *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972); *United States v. Blackburn*, 940 F.2d 107 (4th Cir. 1991); and *United States v. Hamrick*, 995 F.2d 1267 (4th Cir. 1993), *rev'd on other grounds by evenly divided court*, 43 F.3d 877 (4th Cir. 1995) (en banc). Those cases state that "[a]ll of the necessary components 'from which a destructive device may be readily assembled' must be possessed in order to possess a 'destructive device' under subparagraph (3)," *Posnjak*, 457 F.2d at 1116; "[a] defendant must possess *every* essential part necessary to construct a destructive device," *Blackburn*, 940 F.2d at 110 (emphasis in original) (citing *Malone* and *Posnjak*); and"[t]he language of the statute and our prior precedents make it clear that a defendant must be in possession of all of the necessary component parts to be convicted under section 5845." *Hamrick*, 995 F.2d at 1271.

b. The statutory language, legislative history, and purpose.

Neither does the statutory language nor the legislative history support the government's interpretation. The government's attempt to read a negative pregnant into the use of the words "possession or control" in the definition of "machinegun" and the absence of those words in the definition of "destructive

device" ignores the overarching provision which incorporates the definition provisions – 26 U.S.C. § 5861. The pertinent provisions of § 5861 require that the defendant "receive or possess" the machine gun or destructive device. 26 U.S.C. § 5861(b), (c), (d), (h), (i), (k). What the different language in the definition of "machinegun" potentially adds is an expansion beyond actual possession to include "under . . . control."[4]

The government also ignores additional legislative history. It is true Congress wanted to "stem the traffic in dangerous weapons being used in an increasing number of crimes involving personal injury." Govt. Brief, at 50 (quoting *Posnjak*, 457 F.2d at 1113). But Congress also wanted to be cautious in reaching commercial explosives which have legitimate purposes in addition to potentially illegitimate ones. *See Posnjak*, 457 F.2d at 1115-16 (noting congressional discussion of "specific[ ] exclu[sion] of items . . . which would be used in commercial construction or business activities" and legislative history "suggesting strongly . . . that Congress was concerned . . . with clearly identifiable weapons which were the cause of increasing violent crime and which had no legitimate uses"). This balancing is reflected in the inclusion without limitation of destructive devices that have no commercial use – such as bombs, grenades, certain rockets and missiles, mines, and large-caliber weapons such as bazookas, mortars, and anti-tank guns, *see Posnjak*, 457 F.2d at 1115; 26 U.S.C. § 5845(f)(1), (2) – and the inclusion of explosives having a commercial use only when they are "'converted' into a destructive device . . . by way of 'design or

[4] The court would then need to reconcile this with the § 5861 requirement of "receive or possess," but that is a question not presented here.

intent,'" *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., p. 47 (1968)). And in the case of a "combination of parts," Congress chose to draw the line by requiring possession of all the parts, so intent would be clear. *Posnjak*, 457 F.2d at 1116 ("All of the necessary components 'from which a destructive device may be readily assembled' must be possessed in order to possess a 'destructive device' under subparagraph (3)."); *see, e.g., Oba*, 448 F.2d at 894 (seven sticks of dynamite wrapped in copper wire and equipped with fuse and blasting caps).

Finally, the government grossly overstates the case when it suggests the defense position would make enforcement impracticable because "the bomb squad would be required to determine on scene what other parts might be necessary to trigger the device (tools, batteries, etc.), and then to search the residence and seize those additional parts" and that "[t]his is an overly burdensome requirement and, even in a scene that has been cleared by the bomb squad, still presents a certain element of danger." Govt. Brief, at 52. For a truly dangerous defendant who is on the verge of finally assembling his device, missing components such as batteries would likely be very near the partially constructed device. Even if those components were elsewhere in the house, it would not be dangerous to search for such non-explosive components. And a truly dangerous defendant likely would not go completely free even if the officers did not find such components. The Second Circuit noted in *Posnjak* that there are a multitude of other regulations and statutes governing conduct with explosives, *see id.*, 457 F.2d at 1120-21, as Mr. Kirkland's case illustrates. His conviction for being a felon in possession of explosives will remain standing, and the only effect on his sentence will be to

eliminate a 2-level increase in his guidelines offense level. *See* Appellant's Opening Brief, at 23-24. That is actually not inappropriate when he had not taken the final steps in assembling the device.

B. IT WAS PLAIN ERROR AFFECTING MR. KIRKLAND'S SUBSTANTIAL RIGHTS TO ALLOW THE UNBIFURCATED DUAL EXPERT/PERCIPIENT WITNESS TESTIMONY AND THE TESTIMONY MR. KIRKLAND MIGHT BE MAKING IMPROVISED EXPLOSIVE DEVICES FOR TERRORIST ORGANIZATIONS.

1. It Was Plain Error for the District Court to Allow the Unbifurcated Dual Expert/Percipient Witness Testimony.

As noted in Appellant's Opening Brief, allowing a witness to testify as both an expert and percipient witness, while not categorically prohibited, is problematic. If it is allowed, the distinction between expert and percipient witness testimony must be made clear. The government's argument there was enough done in the present case is unpersuasive.

a. Insufficiency of the general jury instruction.

First, the jury instruction given by the district court in the midst of all the final instructions at the end of the trial was insufficient. In the cases about jury instructions making the distinction between expert and percipient witness