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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENNIS MAHON, Defendant-Appellant.	No. 19-16147 D.C. Nos. 2:17-cv-02031-DGC 2:09-cr-00712-DGC-1 District of Arizona, Phoenix ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dennis Mahon,

Petitioner,

v.

United States of America,

Respondent.

No. CV-17-02031-PHX-DGC (JFM)

No. CR-09-00712-PHX-DGC

ORDER

On April 10, 2019, the Court denied Dennis Mahon's petition for habeas corpus relief. Doc. 56. Mahon has appealed, and the Court of Appeals has asked the Court to determine whether a certificate of appealability should be granted. Docs. 58, 59. For the following reasons, the Court will deny the certificate.

Rule 11(a) of the Rules Governing Section 2255 Cases provides that the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *See* Fed. R. App. P. 22(b); *see also* 28 U.S.C. § 2253(c)(1). The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To meet the "threshold inquiry" on debatability, the petitioner "'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; *or* that the questions are adequate to deserve encouragement to proceed further.'" *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alteration and emphasis in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Even if a question is well settled in our circuit, a constitutional claim is debatable if another circuit has issued a conflicting ruling. *See id.* at 1025-26. "[T]he showing a petitioner must make to be heard on appeal is less than that to obtain relief." *Id.* at 1025 n.4 (citations omitted); *see also Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("a COA does not require a showing that the appeal will succeed").

The background of this case and Mahon's arguments are set out in the Court's April 10, 2019 order denying his § 2255 petition. *See* Doc. 56. In sum, Mahon asserted ten grounds for relief, but raised only four objections to Judge James F. Metcalf's Report and Recommendation ("R&R"). Docs. 31, 49, 52. Mahon objected to the R&R's rejection of his claims that: (1) appellate counsel was ineffective in not appealing the Court's ruling denying his motion to suppress statements of himself and his co-defendant; (2) appellate counsel was ineffective in failing to appeal the Court's denial of his motion to dismiss Count 3 based on entrapment; (3) trial counsel was ineffective in withdrawing the jury instruction on entrapment; and (4) appellate counsel was ineffective in failing to appeal the Court's application of a 12-level sentencing enhancement for terrorism. Doc. 56 at 3. The Court's rulings on these issues do not warrant a COA.

1. As to the Court's denial of the motion to suppress, Mahon has failed to show that reasonable jurists would disagree or that the issues deserve further consideration. *See Lambright*, 220 F.3d at 1025. The law governing whether an officer's statements or actions constitute the functional equivalent of interrogation is well-settled, and relevant Ninth Circuit cases make clear that the agents' actions in this case – explaining the charges that led to Mahon's arrest and the investigations that were underway, and then placing him and

his brother in a van with recording equipment – did not amount to the functional equivalent of interrogation. *See* Doc. 56 at 7. As the Court's order explained:

> "[W]hen an officer informs a defendant of the circumstances which contribute to an intelligent exercise of his judgment" including "the circumstances of his arrest," such statements are "exclude[d] from the definition of interrogation [as] words or actions 'normally attendant to arrest and custody.'" *Moreno-Flores*, 33 F.3d at 1169 (citing *Innis*, 446 U.S. at 301). "The standard for determining whether an officer's comments or actions constitute the 'functional equivalent' of interrogation is quite high." *United States v. Morgan*, 738 F.3d 1002, 1006 (9th Cir. 2013). Even if the officers' statements about the evidence, other raids, and other persons of interest "may have struck a responsive chord [with Defendants], or . . . constituted 'subtle compulsion,'" without more, such statements are "insufficient to find that they were the functional equivalent or interrogation." *Moreno-Flores*, 33 F.3d at 1169; *see also Morgan*, 738 F.3d at 1006 (citing *Innis*, 446 U.S. at 303).
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> As noted above, the officers engaged in no questioning or psychological ploys intended to elicit incriminating responses. *See Innis*, 446 U.S. at 528. Thus, the wiring of the van and mere hope that Defendants would make voluntary statements does not amount to the functional equivalent of interrogation, because "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Mauro*, 481 U.S. at 529; *see also United States v. Hernandez-Mendoza*, 600 F.3d 971, at 977 (8th Cir. 2010).

Id.

Mahon's often general objections identified no contradicting circuit law on point, his arguments about coercive circumstances found no support in law or fact, and he failed to show a substantial likelihood that a different result would have occurred if appellate counsel had appealed the Court's order. *Id.* at 5-10 (citing *Clark v. Arnold*, 769 F.3d 711, 725 (9th Cir. 2014)). The Court also concludes that no reasonable jurists could disagree that Supreme Court and Ninth Circuit precedent precluded Mahon's argument that the Confrontation Clause barred his brother's non-testimonial statements. *Id.* at 11-13.

2. No reasonable jurists could disagree that clear disputes of fact precluded dismissal of Count 3 based on entrapment. *See* Doc. 56 at 13-20; *see also Slack*, 529 U.S.

at 484. Mahon failed to identify "undisputed evidence making it patently clear that an otherwise innocent person was induced" by government agents to commit an illegal act, nor that there was a substantial likelihood of a different result on appeal. *Id.* at 15, 20 (quoting *United States v. Skarie*, 917 F.2d 317, 320 (9th Cir. 1992)).

3. As to trial counsel's decision to withdraw the jury instruction on entrapment, Mahon's objection was not sufficiently clear or specific for the Court to determine which part of the R&R's reasoning he objected to. Doc. 56 at 21. Mahon's arguments failed to make "a substantial showing of the denial of a constitutional right" about which reasonable jurists could disagree. *See* 28 U.S.C. § 2253(c)(2). There were sound reasons for withdrawing the entrapment instruction. *See* Doc. 56 at 20 ("an entrapment defense would have allowed the prosecution to introduce adverse evidence of Mahon's predisposition, including materials from his farm, evidence of his connection to other bombings, and evidence of his military service"). Given the "wide latitude" afforded trial counsel in making tactical decisions, the Court cannot conclude that reasonable jurists would debate whether trial counsel's strategic decision constituted ineffective assistance. *See id*. at 20-21 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

4. Mahon also failed to state specific objections to the R&R's reasoning on the 12-level sentencing enhancement for terrorism under U.S.S.G. § 3A1.4. *Id*. at 21-22. Such a general objection fails to demonstrate debatability and is inadequate to deserve further proceedings. *See Lambright*, 220 F.3d at 1025.

IT IS ORDERED that a certificate of appealability (Doc. 58) is **denied**.

Dated this 20th day of June, 2019.

David G. Campbell
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Dennis Mahon,

Petitioner,

v.

USA,

Respondent.

NO. CV-17-02031-PHX-DGC

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this court; defendant's motion pursuant to 28 U.S.C. 2255 to vacate, set aside or correct a sentence is denied and the civil action opened in connection is hereby dismissed.

Brian D. Karth
District Court Executive/Clerk of Court

April 10, 2019

By s/ Rebecca Kobza
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dennis Mahon, Movant/Defendant, v. United States of America, Respondent/Plaintiff.	No. CV-17-02031-PHX-DGC (JFM) No. CR-09-00712-PHX-DGC **ORDER**

Dennis Mahon has filed an amended petition under 28 U.S.C. § 2255 to vacate his convictions and set aside or correct his sentence. Doc. 31. Judge James F. Metcalf issued a Report and Recommendation ("R&R") recommending the Court deny the petition. Doc. 49. Mahon filed an objection, and the government responded. Docs. 52, 55. The Court will accept the R&R and deny the petition.

I. Background.

On February 26, 2004, the director of Scottsdale's Diversity Office opened a package addressed to him, triggering a pipe bomb explosion. The director suffered severe trauma, required multiple surgeries and skin grafts, and nearly lost a finger. The blast injured two other employees, shattered windows, collapsed a wall and ceiling, and blew a hole in the counter where the package sat. Months before the explosion, Mahon had left a voicemail message with the Diversity Office, identifying himself as "Dennis Mahon of the White Aryan Resistance of Arizona." Mahon's message used racial epithets and complained about the Office's outreach efforts. He stated: "The White Aryan Resistance

is growing in Scottsdale. There's a few white people who are standing up. Take care." *See United States v. Mahon*, 793 F.3d 1115, 1117-18 (9th Cir. 2015) (Mahon's direct appeal to Ninth Circuit).

After a multi-year undercover investigation, law enforcement identified evidence of Mahon's participation in the bombing. He was charged with and convicted of three counts: (1) conspiracy to damage buildings and other real property by means of explosive in violation of 18 U.S.C. §§ 844(i), (n); (2) malicious damage of a building by means of explosive in violation of § 844(i); and (3) distribution of information related to construction of explosives in violation of § 842(p)(2)(A). He received a 40-year sentence on Counts 1 and 2, and a concurrent 33-month sentence on Count 3. Doc. 49 at 2-3.

Mahon asserted ten grounds for relief in his § 2255 petition (Doc. 31), but raises only four objections to the R&R, each asserting ineffective assistance of counsel (Doc. 52).

I. Legal Standards.

A. R&R Standard of Review.

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). "[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). District courts are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1).

B. Ineffective Assistance of Counsel.

"To establish ineffective assistance of counsel under *Strickland*, a prisoner must demonstrate both: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense." *Miles v. Ryan*, 713 F.3d 477, 486 (9th Cir. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 688-93 (1984)). Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and attorneys are afforded "wide latitude . . . in making tactical

decisions." *Strickland*, 466 U.S. at 689. The reasonableness of counsel's performance is judged under an objective standard. *United States v. Davis*, 36 F.3d 1424, 1433 (9th Cir. 1994).

"A defendant is prejudiced by counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Clark v. Arnold*, 769 F.3d 711, 725 (9th Cir. 2014) (quoting *Strickland*, 466 U.S. at 694). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome' of a proceeding." *Id.* Mahon "need not prove 'counsel's actions more likely than not altered the outcome,' but rather he must demonstrate that '[t]he likelihood of a different result [is] substantial, not just conceivable.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011)). "[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal." *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

II. Discussion.

Mahon objects to Judge Metcalf's findings that: (1) appellate counsel was effective despite not appealing the Court's ruling denying his motion to suppress his statements and co-defendant's statements; (2) appellate counsel was effective despite failing to appeal the Court's denial of his motion to dismiss Count 3 based on entrapment; (3) trial counsel was effective despite withdrawing the jury instruction request on entrapment; and (4) appellate counsel was effective despite failing to appeal the Court's application of a 12-level enhancement for terrorism. Doc. 52 at 1-10.

A. Ground 2A: Motion to Suppress Recorded Statements in Police Van.

Mahon argues that appellate counsel was ineffective for failing to appeal the Court's denial of his motion to suppress his and his co-defendant's statements recorded after their arrest. Doc. 52 at 2.

1. Factual Findings.

In reviewing Mahon's pretrial motion, the Court observed the following events from

audio and video taken by law enforcement on the morning of defendants' arrest from 6:51 a.m. to 9:02 a.m., and three other audio clips that day. *See* Doc. 49 at 22-23 (citing the Court's order in CR-09-0712-PHX-DGC ("CR Doc.") at 613).

After his arrest, Mahon was placed in a police van at 6:52 a.m., removed from the van at 6:54:40 a.m., and returned to the van at 6:56:33 a.m. The van was wired for audio and video recording. Mahon was shown the indictment and warrant by Special Agent Green and then given *Miranda* warnings in the van by Special Agent Hager at 7:05 a.m. After his rights were read, Mahon was asked "Do you understand?" He replied in a conversational tone: "The small talk is over. I can't say anything more – except for who is praying for the damn humidity to quit?" Mahon made "small talk" with law enforcement, but no officers questioned him about the issues in the case and he volunteered no such information. Mahon's brother and co-defendant, Daniel Mahon, was given *Miranda* warnings at approximately 6:58 a.m. and placed in the van at 7:09 a.m. Asked whether he understood his rights, Daniel said "I understand." He did not state that he was invoking his rights.

Defendants were alone in the van between 7:11 a.m. and 7:13 a.m., and after 7:14 a.m. Officers were present both inside and outside the van before 7:11 a.m. and between 7:13 and 7:14 a.m. After 7:14 a.m., officers opened the door from time to time to check on Defendants, to escort Daniel out to talk with Agent Moreland, to respond to a request from Mahon to use the restroom, and to turn on the air conditioning at Daniel's request. Defendants did not request to be held outside the vehicle, nor did they complain of discomfort other than warmth, which appeared to be remedied immediately after Daniel requested that the air conditioning be turned on.

During the contacts with law enforcement while in the van, Defendants were asked if the house contained any explosive devices that might harm officers and Mahon said no. Defendants were also asked whether the barn was safe, to which they replied that there were no explosives but that there were bat feces that could be virulent and agents probably should wear gas masks. The tone of these brief encounters was not threatening.

Defendants expected that the van was wired for recording. At 7:11:12 a.m., Mahon remarked that they were probably being recorded, and later that they were probably being videotaped. Defendants nonetheless conversed freely, discussed their parents and what they saw outside the windows, expressed frustration with the raid, reviewed potentially incriminating items on the computer and the property (e.g., soft porn, supremacist literature, black powder for a pistol Mahon had owned, weapons and ammunition, etc.), and reassured each other multiple times that they had no involvement with the Scottsdale bombing. They also made statements of retribution against law enforcement for the raid and expressed regret for not having had a "shootout."

Mahon instructed Daniel at least twice about what to do when interrogated: ask for a lawyer and state that he has nothing to say, regardless of accusations. Shortly thereafter, at 8:49 a.m., Daniel was retrieved from the van to talk with Agent Moreland. Upon returning, Mahon asked Daniel if he did as instructed. Daniel said that he did not ask for a lawyer because he was not asked questions, and that he remained silent. The video provided to the Court does not show what happened after Mahon spoke with Agent Moreland, nor any statements made by Defendants after the van left the property.

Two audio clips contained conversations between Defendants and Agent Moreland. The conversations occurred separately for each Defendant, outside of the van. Moreland informed Daniel and Mahon of the charges and evidence against them, told them that they likely would not want to talk with him right away, told them about raids occurring at the property of other individuals Defendants knew (including Tom Metzger, an alleged white supremacist leader), informed Defendants that Metzger likely would abandon them, and informed Mahon that he would likely have no friends after this incident.

2. Analysis.

"A defendant who is in custody must be given *Miranda* warnings before police officers may interrogate him. Once such warnings are given and the defendant invokes his right to remain silent, the admissibility of statements obtained thereafter depends upon whether the defendant's right to cut off questioning was 'scrupulously honored.'" *United*

States v. Moreno-Flores, 33 F.3d 1164, 1168-69 (9th Cir. 1994) (quoting *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)). *Miranda* applies to custodial interrogations, *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980), but it does not require suppression of voluntary statements made by a defendant in custody if his statements are not the product of post-invocation interrogation, *Mosley*, 423 U.S. at 102. "Interrogation" refers both to direct questioning and its "functional equivalent" – "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *See Innis*, 446 U.S. at 229-301; *Moreno-Flores*, 33 F.3d at 1169. Whether conduct is the functional equivalent of direct questioning is an objective inquiry – the officers' subjective intent is relevant but not dispositive. *Moreno-Flores*, 33 F.3d at 1169.

The Court's order found that Mahon invoked his right to silence at 7:05 a.m. CR Doc. 613 at 5. The inquiry is then – as the R&R and Mahon agree – whether the totality of circumstances amounted to the functional equivalent of interrogation. Docs. 52 at 3; 49 at 32. Mahon asserts that appellate counsel was deficient under the first *Strickland* prong because a "reasonable probability exists" that the Ninth Circuit would have found the Court erred and held that the investigators' actions amounted to the functional equivalent of interrogation. Doc. 52 at 2. He points to three circumstances: (1) investigators "baiting" defendants and "priming the pump" with their statements; (2) officers placing defendants in a hot van for two hours; and (3) the fact that the van was wired. Doc. 52 at 2-4.

a. Officers' Statements to Defendants.

The R&R found that, under some circumstances, interactions with non-police third parties may arise to the functional equivalent of interrogation when police orchestrate the contact using compelling influences or psychological ploys. Doc. 49 at 45-49. The R&R based this finding on "the rule to be distilled" from *Arizona v. Mauro*, 481 U.S. 520 (1987), and other cited cases. Judge Metcalf then concluded that "a highly plausible argument" existed that Agent Moreland manipulated Mahon's co-defendant into acting as an interrogator, amounting to the functional equivalent of interrogation. Doc. 49 at 49-54.

Mahon does not object to the R&R's conclusion that Agent Moreland manipulated Mahon's co-defendant to act as an interpreter. But as discussed further below, Mahon objects to the R&R's finding that the Ninth Circuit would have nonetheless affirmed the Court's order under a clear error standard. The Court will accordingly review the R&R's finding and Mahon's arguments about his interactions with the agents.

As to the first circumstance which "prim[ed] the pump," Mahon points to agents confronting Defendants with evidence against them, mentioning other raids occurring, and posing questions aimed "to let the brothers know they were being accused of serious crimes, should be worried about their futures, and may want to discuss how to defend themselves." Doc. 52 at 3.

Agent Moreland informed Defendants about the charges and evidence against them, said that they would likely not want to speak with him right away, mentioned other raids occurring, and told them that Metzger and others would likely abandon them. The officers' statements did not amount to the functional equivalent of interrogation, and the Court disagrees with the R&R to the extent it found otherwise. "[W]hen an officer informs a defendant of the circumstances which contribute to an intelligent exercise of his judgment" including "the circumstances of his arrest," such statements are "exclude[d] from the definition of interrogation [as] words or actions 'normally attendant to arrest and custody.'" *Moreno-Flores*, 33 F.3d at 1169 (citing *Innis*, 446 U.S. at 301). "The standard for determining whether an officer's comments or actions constitute the 'functional equivalent' of interrogation is quite high." *United States v. Morgan*, 738 F.3d 1002, 1006 (9th Cir. 2013). Even if the officers' statements about the evidence, other raids, and other persons of interest "may have struck a responsive chord [with Defendants], or . . . constituted 'subtle compulsion,'" without more, such statements are "insufficient to find that they were the functional equivalent or interrogation." *Moreno-Flores*, 33 F.3d at 1169; *see also Morgan*, 738 F.3d at 1006 (citing *Innis*, 446 U.S. at 303).

Nor did the officers' questions about whether the house contained harmful explosive devices and whether the barn was safe constitute the functional equivalent of interrogation.

Mahon states that "[t]he questions were not purely 'directed at safety' just because the danger of bat guano was mentioned." The Court does not agree. Defendants' responses – about bat feces and that the officers should wear masks – were unrelated to any potentially incriminating evidence of the Scottsdale bombing, and indicate that they understood the questions to concern officer safety. The officers asked narrow questions about harmful devices in the barn and house. Such specific, safety-oriented questions demonstrate no knowledge that their inquiries would elicit incriminating responses and are the type of questions normally attendant to arrest and custody. *Cf. United States v. Reilly*, 224 F.3d 986, 990, 992-93 (9th Cir. 2000) (pre-*Miranda* warning question "Where is the gun?" as defendant reached for his waistband was not investigatory or designed to elicit incriminating evidence).

b. Conditions of the Van.

Mahon asserts that the R&R "discounts the impact of the conditions and circumstances of being locked in a hot police van without water for an extended time." He also notes that Defendants were handcuffed for two hours and asserts the agents knew such conditions were likely to elicit incriminating responses. Doc. 52 at 3-4. The Court disagrees. As the R&R notes, Mahon's arguments about the van conditions are unsupported by the evidence. *See* Doc. 49 at 40-42. The video excerpts show that Defendants were seated in separate seats, at least 18 inches apart, freely changed positions, and were able to cross and uncross their legs and turn to observe events outside. Defendants did not complain to each other or the officers that they were uncomfortably cramped. The officers started the air conditioning as soon as Defendants complained about the heat and provided water bottles to them. Mahon was removed promptly to use the restroom when he requested. And Defendants being handcuffed for two hours is simply a condition normally attendant to arrest. Mahon's general objection cites no other evidence or authority showing that the van atmosphere was a "compelling influence[]" and "psychological ploy[]" designed to elicit incriminating statements. Doc. 52 at 3.

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c. Wiring of the Van.

The R&R first finds that "[a]t most, the presence of [the van's] recording equipment permits an inference that the agents hoped to garner evidence," which is insufficient to constitute deliberate elicitation. It then concludes, however, that "the recording was expected by defendants, arguably making their time in the van a continuing 'interaction' with law enforcement." And that "[h]ad [Defendants] not been aware of the recording equipment, then from their perception . . . they would not have had the opportunity to respond to 'interrogation' while in the van." Doc. 49 at 42-43.

Mahon makes no clear objection to this portion of the R&R, and he mischaracterizes the R&R's conclusion on another issue as support. *See* Doc. 52 at 4 (citing Doc. 49 at 45 (R&R discussing whether Mahon's statements to Daniel constitute statements to the agents, citing *Mauro*)). In any event, the Court finds that the wiring of the van did not rise to the functional equivalent of interrogation and declines to adopt the R&R to the extent it concluded otherwise. As noted above, the officers engaged in no questioning or psychological ploys intended to elicit incriminating responses. *See Innis*, 446 U.S. at 528. Thus, the wiring of the van and mere hope that Defendants would make voluntary statements does not amount to the functional equivalent of interrogation, because "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Mauro*, 481 U.S. at 529; *see also United States v. Hernandez-Mendoza*, 600 F.3d 971, at 977 (8th Cir. 2010).

Mahon's citation to *Mauro* is unavailing. In that case, the Supreme Court found no interrogation when an officer sat in a room with a tape recorder and listened to defendant speak with his wife. The officer asked no questions about the crime or defendant's conduct, and his allowing defendant to see his wife was not a psychological ploy that could constitute interrogation. *See* 481 U.S. at 527-30. The Supreme Court noted that the purpose of *Miranda* is to "prevent[] government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Id.* at 529-30. The Court finds even less of a coercive police presence here

than in *Mauro*. No officer was present in the van, and Mahon was posed no questions. He spoke freely on a range of topics despite speculating repeatedly that Defendants were being recorded.

3. Functional Equivalent of Interrogation Summary.

The R&R concluded that "based on the contacts by [Agent] Moreland with [Daniel], and the open video surveillance in the van," Mahon "was subject through [Daniel] to the functional equivalent of interrogation." Doc. 49 at 53-54. The R&R finds, however, that because the Ninth Circuit would have reviewed the Court's factual findings for clear error, Mahon's appellate counsel could have reasonably concluded the claim was not likely to succeed and was not deficient under the first *Strickland* prong. *Id.* Mahon objects that the Ninth Circuit would have reviewed the Court's ruling as a mixed question of law and fact. And he asserts that even under a clear error standard, it is reasonably probable the Ninth Circuit would have reviewed the facts differently.

Whether the "government's questioning was an 'interrogation' for *Miranda* purposes is a mixed question of law and fact," which the Ninth Circuit reviews de novo. *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006). But the Ninth Circuit "review[s] the district court's underlying findings of fact for clear error." *Id.*; *see also United States v. Barnes*, 895 F.3d 1194, 1199 (9th Cir. 2018). As discussed, the Court finds that none of Mahon's objections and asserted coercive circumstances support a finding of the functional equivalent of interrogation as a matter of law or fact, and will not adopt the R&R's contrary conclusion. For this reason, appellate counsel was reasonable in deciding to not appeal the Court's ruling. And Mahon has failed to demonstrate "that 'the likelihood of a different result [was] substantial, not just conceivable,'" had appellate counsel appealed the Courts' order. *Clark*, 769 F.3d at 725 (quoting *Harrington*, 562 U.S. at 111-12).

B. Ground 2B: Motion to Preclude Daniel's Statements in Van.

Over Mahon's objection at trial, the Court admitted certain statements by Daniel which were recorded in the police van after arrest. Mahon asserts that appellate counsel

was ineffective for failing to appeal the Court's order denying his motion to suppress the statements as violative of the Sixth Amendment's Confrontation Clause. Doc. 52 at 5. The R&R found that Mahon's appellate counsel reasonably did not appeal the Court's order because Daniel's statements were non-testimonial and not barred by *Bruton*, and that any error would have been harmless because Daniel's statements were innocuous to Mahon. Doc. 49 at 55-66. Mahon objects, asserting that because the statements were not made in furtherance of a conspiracy a reasonable probability exists the Ninth Circuit's decision in *Larson* would have precluded the statements, and the Court's error was not harmless. Doc. 52 at 6.

The R&R and Mahon agree that the statements were non-testimonial, and neither the R&R nor the Court's prior order found that Daniel's statements in the van were made in furtherance of a conspiracy. *See* Docs. 49 at 55-66; 1300 at 3.[1] Thus, the sole issue is whether appellate counsel was prejudicially deficient in failing to appeal the Court's order and argue that *Bruton* – through *Larson* – precluded Daniel's non-testimonial statements under the Sixth Amendment.

The Supreme Court held in *Bruton* that a defendant's Sixth Amendment right to confrontation is violated by the admission of a non-testifying co-defendant's confession which implicates him. 391 U.S. 123, 135-36 (1968). Where such testimonial evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

In *Crawford*, the Supreme Court acknowledged that the Sixth Amendment's "Confrontation Clause [applies] only to testimonial statements, leaving the remainder [of non-testimonial statements] to regulation by hearsay law." *Id.* at 61. The Court noted that its analysis cast doubt on a prior holding rejecting that notion, but stated that it did "not definitely resolve whether [the prior holding] survive[d]" *Crawford* because the statements

[1] To the extent the Court admitted at trial Daniel's non-testimonial statements made in furtherance of a conspiracy, Mahon has not objected to such evidence and has waived the issue.

at issue were clearly testimonial. *Id.* The Court went on, however, to conclude that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68.

In *Davis v. Washington*, the Court clarified the scope of the Confrontation Clause:

> A critical portion of [the *Crawford*] holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

547 U.S. 813, 821 (2006) (citation omitted). A year later, the Court again stated that "[u]nder *Crawford* . . . the Confrontation Clause has no application to [nontestimonial statements] and therefore permits their admission even if they lack indicia of reliability." *Whorton v. Bockting*, 549 U.S. 406, 420 (2007).

The Supreme Court's precedent is clear. The Ninth Circuit has also repeatedly recognized that non-testimonial statements do not implicate the Confrontation Clause. *See, e.g., Nelson v. Mcewen*, 593 Fed. App'x 688, 688 (9th Cir. 2015) ("Nontestimonial statements do not implicate the Confrontation Clause."); *United States v. Joseph*, 465 Fed. App'x 690, 694 (9th Cir. 2012) (same); *Valdivia v. Schwarzenegger*, 623 F.3d 849, 852 (9th Cir. 2010) (same); *Moses v. Payne*, 555 F.3d 742 (9th Cir. 2009) (same); (*Delgadillo v. Woodford*, 527 F.3d 919, 926-27 (9th Cir. 2008) (same); *United States v. Sine*, 493 F.3d 1021, 1035 n.11 (9th Cir. 2007) (same); *cf.* 5 J. Weinstein & M. Berger, *Weinstein's Federal Evidence*, § 802.05[3][c] (Matthew Bender 2d ed. 2011) ("If the hearsay statements in question are non-testimonial in nature, the Confrontation Clause does not apply at all.").

Mahon cites a footnote in *United States* v. *Larson*, 460 F.3d 1200 (9th Cir. 2006),

as support for his claim. Doc. 52 at 5. In dictum, the court stated that if a co-defendant's statements were not "by a coconspirator, most likely [*Bruton*] and its progeny [would] bar its use in the joint-trial setting." *Larson*, 460 F.3d at 1212 n.10. But the Ninth Circuit subsequently reheard *Larson* en banc and clarified its adoption of the previous panel's opinion, citing the governing Supreme Court precedent.

> The Supreme Court has since clarified, however, that *Crawford* "eliminat[es] Confrontation Clause protection against the admission of unreliable out-of-court non-testimonial statements" and that "the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability." Adopting the portions of the three-judge panel opinion that concluded that the out-of-court statements by Komeotis and Laverdure were made in furtherance of the conspiracy and were nontestimonial, 460 F.3d at 1212-13, we hold that under *Crawford*, Defendants' Confrontation Clause rights were not violated by the admission of these statements.

United States v. Larson, 495 F.3d 1094, 1099 n.4 (9th Cir. 2007) (citing *Whorton*).

Although *Larson* dealt with non-testimonial statements made in furtherance of a conspiracy, it recognized – as Supreme Court and numerous other Ninth Circuit decisions had – that *Whorton* clarified the scope of the Confrontation Clause after *Crawford*. Nontestimonial statements do not implicate the Confrontation Clause, and Daniel's statements in the van were not testimonial. Supreme Court and Ninth Circuit precedent entirely preclude any reasonable probability that appellate counsel would have been successful in appealing the Court's order. *See Harrington*, 562 U.S. at 111-12; *Clark*, 769 F.3d at 725. The Court declines accordingly to address Mahon's remaining arguments.

C. Ground 8: Motion to Dismiss Based on Entrapment.

1. Background.

Count 3 of the Superseding Indictment charged that Mahon had "taught and demonstrated the making and use of an explosive and destructive device, and distributed information pertaining to in whole and in part the manufacture and use of an explosive and destructive device." *See* Doc. 49 at 83. The following is the factual basis for Count 3.[2]

[2] In deciding Mahon's motion before trial, the Court heard testimony from Rebecca

During the government's investigation of Defendants, it used an attractive younger woman, Rebecca Williams, as a confidential informant to befriend Defendants and elicit statements from them. Williams told Defendants a fabricated narrative in which her cousin's husband was sexually molesting the couple's children. Williams told Mahon that she intended to stop the molester by hurting him, expressed serious grief and anger about the situation, and Mahon clearly believed her story. CR Doc. 664 at 1-4. Through most of the video clips provided by defense counsel (Doc. 467, Ex. B & C), Mahon tried to discourage Williams from seeking to harm the molester and repeatedly urged her to speak with a lawyer about the situation. He told her she did not want to risk going to jail, and he offered to call and threaten the molester. Williams persisted in her determination to inflict harm on the molester, and only then did Mahon agree to help. Count 3 alleges that Mahon subsequently taught Williams how to make explosive and destructive devices, how to blow up a house using tools and a propane tank, how to construct a package pipe-bomb, and then mailed her literature on the use of explosives for purpose of killing, injuring, or intimidating the fictional molester. *Id.* at 4.

Before trial, Mahon moved to dismiss Count 3 based on entrapment. *See* Doc. 49 at 88; CR Docs. 479, 576, 579. The Court heard evidence over two days and denied the motion. CR Doc. 664 at 15-17. The Court held that "[e]ven if it could be concluded that Ms. Williams provided the inducement necessary for the first element of entrapment, the second element is subject to factual dispute." CR Doc. 664 at 16. Appellate counsel did not appeal the Court's ruling.

The R&R discussed in detail the communications between Mahon and Williams, and concluded that Mahon's entrapment claim would have failed and that appellate counsel was not ineffective. Doc. 49 at 84-88, 103. Mahon objects that "[m]ore than a reasonable probability exists" that the Ninth Circuit would have found the Court erred and vacated the

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Williams and from Agent Moreland, and reviewed exhibits submitted with the briefing (CR Docs. 467, 479, 524, 547, 576, 579, 602), videotapes of conversations between Williams and Mahon on February 1 and 2, 2005, exhibits received in evidence during the evidentiary hearing, and grand jury testimony included in a supplemental memorandum (CR Doc. 602).

conviction on Count 3, specifically objecting to the R&R's analysis of the Ninth Circuit's factors for determining predisposition. Doc. 52 at 9-10.

2. Analysis.

An entrapment defense includes two elements: (1) government inducement of the crime, and (2) the absence of predisposition on the part of the defendant. *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994); *see also United States v. Poehlman*, 217 F.3d 692, 697 (9th Cir. 2000). The focus is on the defendant's subjective predisposition. Where the government has induced an individual to break the law and entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime before being approached by government agents. *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992); *see also Peohlman*, 217 F.3d at 697-98.

The inducement element arises when the conduct of a government agent creates a substantial risk that an otherwise law-abiding citizen will be persuaded to commit a crime. *Davis*, 36 F.3d at 1430. The predisposition element considers whether the defendant was inclined to commit the crime before having any contact with government agents. *Poehlman*, 217 F.3d at 703. Courts generally review five factors to evaluate predisposition: (1) the character and reputation of the defendant, (2) whether the government made the initial suggestion of criminal activity, (3) whether the defendant engaged in the activity for profit, (4) whether the defendant showed any reluctance, and (5) the nature of the government's inducement. None of the factors controls, but "the most important is the defendant's reluctance to engage in criminal activity." *Davis*, 36 F.3d at 1430.

The issue of entrapment is generally left for the jury to decide as part of determining the defendant's guilt or innocence. *See Mathews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1248 (9th Cir. 1997); *Davis*, 36 F.3d at 1430 (citing cases). Before trial, "[t]o be entitled to acquittal as a matter of law on the basis of entrapment [a defendant] must point to 'undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act' by government agents." *United States v. Skarie*, 971 F.2d 317, 320 (9th Cir. 1992); *see also United States*

v. Sandoval-Mendoza, 472 F.3d 645, 649 (9th Cir. 2006).

a. Mahon's Character and Reputation.

The R&R found that Mahon's lack of a criminal record was insufficient to show no predisposition and that it "may show nothing more than success at evading prosecution." Doc. 49 at 100. The R&R concluded that Mahon's character and reputation were "of a self-avowed bomber, who regularly encouraged others to employ violent means against their opponents. *Id.* In his objection, Mahon emphasizes his lack of a prior criminal record and asserts that he had no reputation as a bomber, "but as someone that encouraged others." He also asserts that no proof existed that "he truly committed any of the bombings about which he bragged to Williams." Doc. 52 at 8.

Mahon's assertions are unsupported. He cites no undisputed evidence with respect to his character and reputation. As the Court previously noted, the record included evidence of Mahon's alleged involvement in the Scottsdale Diversity Office bombing and his allegiance to groups that advocated violence. At a minimum, a factual dispute existed as to Mahon's character and reputation for developing plans to harm others and building bombs. *See* CR Doc. 664. This factor weighs in favor of a predisposition.

b. Initial Suggestion of Criminal Activity.

The R&R noted that Williams initiated discussions about taking physical action against the fictional molester, but Mahon first suggested using a gas tank to cause an explosion to harm him. Doc. 49 at 100. The R&R also noted that while Williams continued to press a plan to cause the molester physical harm, it was Mahon who first suggested building a bomb. *Id.* Mahon does not specifically object to these findings nor cite a basis for a different conclusion. Doc. 52 at 8. He merely recounts the R&R's findings and asserts that the factor weighs in his favor because he was not the first to suggest criminal activity. True, it was Williams who first suggested criminal activity generally, but Mahon was first to suggest the activities for which he was eventually charged in Count 3 – teaching and providing information to Williams about constructing a bomb. The charged conduct was Mahon's idea, not Williams'. The Court agrees with the R&R that this factor weighs

in favor of predisposition.

c. For Profit.

The R&R noted, and Mahon agrees, that the evidence does not show Mahon engaged in criminal activity for financial profit. Docs. 49 at 100-01; 52 at 8. Rather, Mahon appears to have been motivated by his romantic feelings for Williams and his racist views. This factor weighs against predisposition.

d. Reluctance.

The R&R concluded the following. Mahon showed little reluctance, and his only reluctance was to using violence for personal problems rather than racial causes. He was cunning and careful not to incriminate himself. He was mistrustful of others, evidenced by couching his instructions to Williams about constructing a bomb as "hypothetical" and "for information" only. With very little response from Williams, Mahon progressed quickly from the idea of shooting the molester to – eight and a half minutes later – explaining how to blow up the molester's house with a gas tank and then to discussing bombs the next day. The R&R found that a jury could have reasonably concluded this fast-paced discussion was born of a predisposition to resort to explosive measures, and that any seeming reluctance was simply Mahon's wariness about exposure for the Scottsdale bombing or potential harm to Williams. Doc. 49 at 102.

Mahon objects to the finding that he demonstrated only little reluctance. He cites his repeated attempts to talk Williams out of using violence, telling her to contact a lawyer, to notify the police, or to let him call and threaten the molester. He asserts that caution about incriminating himself is not relevant to a finding of reluctance. And although he mentioned the gas tank early in his relationship to Williams, he states that "many months of inducement" passed before he gave her information to build a bomb, which is the conduct charged in Count 3, not merely discussing the idea. Doc. 52 at 8-9.

At various times in the video excerpts, Mahon expressed hesitation about helping Williams for reasons other than reluctance to commit crimes. He stated: "I get involved in the racial causes, not personal problems like yours. But nothing bothers me more than a

. . . child abuser. I hate him. I just wanna kill him. They need to be killed." *See* Doc. 49 at 84. And he also expressed concern about Williams being apprehended and imprisoned beyond her child bearing years. *See id.* at 85 (discussing their conversation). Mahon's "fear of apprehension . . . does not constitute lack of predisposition to become involved in criminal activity." *United States v. Brandon*, 633 F.2d 773, 778 (9th Cir. 1980). A factual dispute existed as to whether Mahon's caution and his alternative solutions posed to Williams were due to reluctance to engage in criminal activity or merely mistrust, fear of apprehension, or concern for Williams' safety. Mahon has not shown, as a matter of undisputed fact, that his caution was based solely on reluctance to engage in criminal activity.

Moreover, "[d]espite the fact that [Mahon] sometimes displayed reluctance to go through with the plan" at the beginning of his conversation with Williams, "the jury could well have concluded that his reluctance was not sufficiently strong to warrant a favorable finding on the third factor." *United States v. McClelland*, 72 F.3d 717, 723 (9th Cir. 1995). Once Mahon began describing setting up a propane gas bomb and constructing a package bomb, he discussed his suggestions in detail and "with relish and expertise, providing technical advice . . . while boasting of his abilit[ies]" in such a way that supports lack of reluctance. *United States v. So*, 755 F.2d 1350, 1354 (9th Cir. 1985).

Mahon asserts he was "subjected to many months of inducement before capitulating to what Williams" and the government wanted him to do. Doc. 52 at 9. And perhaps "[h]e equivocated and waffled and hesitated" in his initial conversations with Williams. *McClelland*, 72 F.2d at 723. But he was not subjected to two and a half years of inducement like in *Jacobson v. United States*, 503 U.S. 540, 549 (1992), where the government could not prove that defendant's "predisposition was independent and not the product of the attention that the Government had directed at [him]" over two years. Rather, a jury could have interpreted Mahon's early and detailed suggestion of constructing a bomb as demonstrating a predisposition to such ideas, and found that he posed the idea and eventually taught Williams how to construct explosive devices with little reluctance for

engaging in criminal activity. *See United States v. Jones*, 231 F.3d 508, 518 (9th Cir. 2000) (jury may draw reasonable inferences to determine explanation for defendant's reluctance). A factual dispute existed and "[t]he credibility of [Mahon's] explanations [was] a matter for the jury to determine." *United States v. Gurolloa*, 333 F.3d 944, 956 (9th Cir. 2003). This factor weighs against Mahon.

e. Nature of Government's Inducement.

The R&R found that the government "purposefully, thoughtfully, and resourcefully plied [Mahon] with an attractive, sympathetic, and flirtatious younger woman with similar life views, and a sad story designed to appeal to [Mahon's] heroic self image." But the R&R concluded that the inducement was not extreme and the weight of this factor was limited because Williams only invited and did not discourage Mahon's interest, and did not engage in or promise sexual or romantic conduct. Doc. 49 at 102-03. Mahon objects that the inducement was extreme, citing Williams' exotic dancing background, "revealing" clothing, suggestions of forthcoming sexual conduct, and her spending the night in the same motel room with him. Doc. 52 at 9.

"Analysis of the fifth factor – the nature of the inducements – is the most difficult." *McClelland*, 72 F.3d 717. "The pressure employed by [Williams] was [arguably] more serious than mere solicitation" to the extent Williams used Mahon's romantic interest in her to initiate conversations which resulted in the charged conduct. *See id.* But the frequency and effect of Williams' inducements on Mahon were factual determinations that a jury could have reasonably resolved against Mahon, finding that he was predisposed regardless of his interest in Williams. Moreover, Williams employed no threats or cash incentives, and "'[s]uggestions and solicitations do not appear to constitute the sort of inducement that satisfies this element of the entrapment defense.'" *Id.* (citation omitted). The record supports that Mahon was sincerely taken by and sympathetic to Williams. But the fact that he was willing to assist her in harming another individual "leads to the inference that [Mahon] was willing to" take extreme measures to gain her approval and progress towards a relationship, supporting an inference of predisposition. *See Reynoso-*

Ulloa, 548 F.2d at 1338. "The defense of entrapment, while protecting the innocent from Government creation of crime, is unavailable to a defendant who, [concerned with his own motivations and] unconcerned about breaking the law, readily accepts a propitious opportunity to commit an offense." *Id.* Williams played her part well, but given the evidence as a whole, the Court cannot find as a matter of undisputed fact that the government's inducements were so strong that a reasonably jury could not have found predisposition under this factor.

3. Entrapment Conclusion.

The R&R concluded that lack of profit motive and the nature of inducement weighed in favor of Mahon, but that viewing the evidence in a light most favorable to the prosecution, the Ninth Circuit would have had no basis for reversing the Court's order. Doc. 49 at 103. As discussed above, while the record does not support that Mahon had a profit motive, the other four factors weigh against him. Mahon cites and the record reveals no "undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act by government agents" – the standard for pretrial dismissal based on entrapment. *Skarie*, 971 F.2d at 320. Mahon has not demonstrated that the likelihood of a different result on appeal is substantial, not just conceivable. *Harrington*, 562 U.S. at 111-12.

D. Ground 7: Withdrawal of Jury Instruction on Entrapment.

Mahon's § 2255 motion argued that trial counsel was deficient for withdrawing the request for a jury instruction on entrapment. Doc. 52 at 10. The R&R concluded that trial counsel made a reasonable tactical decision because an entrapment defense would have allowed the prosecution to introduce adverse evidence of Mahon's predisposition, including materials from his farm, evidence of his connection to other bombings, and evidence of his military service. The R&R found this decision especially reasonable given that the entrapment defense pertained to Count 3, where the evidence was stronger and a conviction more likely notwithstanding the defense. The rebuttal evidence might have been "particularly damning" as to Counts 1 and 2, for which there was less evidence, a

higher chance of acquittal, and a risk of higher sentences if Mahon was convicted. The R&R further concluded that even if trial counsel erred in withdrawing the instruction, there was no reasonable probability that the result would have been different because the evidence strongly supported Mahon's predisposition. Doc. 49 at 108-09.

Mahon objects to the R&R's conclusion that "the possibility of introduction of rebuttal evidence made the decision to forego the jury instructions a reasonable tactical decision." Doc. 52 at 10. But he fails to explain why trial counsel's decision was unreasonable.[3] Mahon's objection is not sufficiently clear or specific for the Court to determine which part of the R&R's reasoning he objects to. *See Thomas*, 474 U.S. at 149. In any event, the Court concludes that trial counsel was not ineffective. When reviewing a *Strickland* ineffective assistance claim, the Court must give counsel "wide latitude . . . in making tactical decisions." *Strickland*, 466 U.S. at 689. Counsel could have reasonably weighed the benefit of an entrapment defense to Count 3 against the risk of adverse rebuttal evidence for Counts 1 and 2, and determined that the risk outweighed the benefit. Trial counsel's representation did not "amount[] to incompetence under 'prevailing professional norms,'" *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690), and Mahon has not shown a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

E. Ground 10: Sentencing Enhancement.

At sentencing, the Court applied a 12-level enhancement for terrorism under U.S.S.G. § 3A1.4. Appellate counsel did not appeal the enhancement. The R&R found that counsel could have reasonably concluded that the Ninth Circuit would have joined the Fifth Circuit in finding that "[a]ll that section 3A1.4 requires for an upward adjustment to apply is that one of the enumerated offenses was 'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,'" and that an intent to influence municipal government is sufficient. *See* Doc. 49

[3] Mahon also asserts generally that he was not predisposed so counsel's error was prejudicial, but as discussed above, sufficient evidence existed of Mahon's predisposition and trial counsel could have reasonably found the defense futile.

at 117-19 (citing *United States v. Harris*, 535 F.3d 767, 773-74 (5th Cir. 2005); *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) ("absent a strong reason to do so, we will not create a direct conflict with other circuits"); *United States v. Alexander*, 287 F.3d 811, 819-20 (9th Cir. 2002) (analyzing whether "government officer or employee" in U.S.S.G. § 3A1.2 was limited to federal employees and finding the term unambiguous, giving the term its plain meaning – "the officials collectively comprising the governing body of a political unit and constitute the organization as an active agency" – and affirming defendant's enhancement for crimes against state employees)).

Mahon objects, but he asserts only that the "issue was ripe for appeal, and . . . a reasonable probability exists that [the Ninth Circuit] would have agreed that it is [] not federal terrorism to attack a municipal or state building under the statute." Doc. 52 at 10. Mahon fails to clearly object to specific portions of the R&R's reasoning. And his general assertions fails to meet his burden of showing ineffective assistance of counsel and prejudice by demonstrating that a substantial likelihood exists that the Ninth Circuit would have concluded differently. *Strickland*, 466 U.S. at 694.

IT IS ORDERED:

1. Judge Metcalf's R&R (Doc. 49) is accepted as set forth in this order.

2. The Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 31) is **denied**.

3. The Clerk of Court shall terminate this action.

Dated this 10th day of April, 2019.

David G. Campbell
Senior United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Dennis Mahon, Movant/Defendant -vs- United States of America, Respondent/Plaintiff.	CV-17-2031-PHX-DGC (JFM) CR-09-0712-PHX-DGC **Report & Recommendation on Motion to Vacate, Set Aside or Correct Sentence**

I. MATTER UNDER CONSIDERATION

Movant, following his conviction in the United States District Court for the District of Arizona, filed through counsel an Amended Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on March 21, 2018 (Doc. 31). On June 11, 2018 Respondent filed its Response (Doc. 44) and Exhibits (Docs. 45, 47). Movant filed a Reply on July 12, 2018 (Doc. 48).

The Movant's Motion is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 10, Rules Governing Section 2255 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

In disposing of Movant's direct appeal, the Ninth Circuit summarized the facts as follows:

> Scottsdale created the Diversity Office to, among other things, promote the city as a "tourist destination"…[and was housed] in the city's Human Resources building.
>
> * * *
>
> On February 21, 2004, a Scottsdale employee found a box,

> addressed to the director of the Diversity Office, in a library carrel. After sitting behind the library circulation counter for a few days, the box made its way to the Diversity Office. On February 26, 2004, the director opened the box, which triggered a massive pipe bomb explosion. He suffered severe trauma, requiring multiple surgeries and skin grafts, and nearly lost a finger. Two other employees endured injuries, including shrapnel in an eye. The powerful blast shattered windows, blew a hole in the counter upon which the box rested, and caused a wall and the ceiling to collapse.
>
> A few months earlier, Mahon left a voicemail message with the Diversity Office. He identified himself as "Dennis Mahon of the White Aryan Resistance of Arizona," used racial epithets, and complained about the Diversity Office's outreach efforts. He concluded his call by stating: "The White Aryan Resistance is growing in Scottsdale. There's a few white people who are standing up. Take care." Based in part on that voicemail, law enforcement initiated a multi-year undercover investigation, which provided overwhelming audio, video, forensic, and circumstantial evidence that Mahon participated in the bombing of the Diversity Office.

(CR Doc. 1864, Amend. Opin. 10/29/15.)[1]

B. PROCEEDINGS AT TRIAL

On August 11, 2010, Movant and his brother, Daniel Mahon, were named in a Superseding Indictment (Attachment R). Movant was charged with: Count 1, conspiracy to damage buildings and property by means of explosive; Count 2, malicious damage of building by means of explosive; and Count 3, distribution of information to the confidential informant related to construction of explosives. Daniel Mahon was charged only with Count 1.

Movant and co-defendant proceeded to trial on January 10, 2012. (CR Doc. 1804 Attach. R.T. 1/10/12.)

The Government presented overwhelming evidence that Movant was a white supremacist, who believed that strategically directed violence, such as bombing officials, was appropriate and necessary to preserving the kind of country he wanted the United States to become. He associated with others of similar beliefs, and advocated those

[1] Docket entries in the underlying criminal case, CR-09-0712-PHX-DGC are referenced herein as "CR Doc. ___." Attachments to the Response, Doc. 44, are referenced herein as "Att. ___." The DVDs of trial exhibits, Doc. 47, filed in support of the Response are referenced herein as "DVD, Trial Exhibit ____."

beliefs publicly and privately. The Government also presented strong evidence that Movant made admissions, or boasts, about conducting bombings, and even that he made statements to the informant that could be taken as admissions of being connected with the Scottsdale bombing. But at the same time, Movant alleged to the informant that the Scottsdale police had committed the bombing.

Movant was convicted on February 24, 2012 on all three charges. On May 22, 2012 Movant was sentenced to concurrent sentences of 40 years on Counts 1 and 2, and 33 months on Count 3. (Attach. S, Judgment.)

Co-defendant was acquitted. (R.T. 2/24/12, CR Doc. 1813 at 4462.)

C. PROCEEDINGS ON DIRECT APPEAL

Movant filed, through counsel, a direct appeal, raising claims that the statutes underlying Counts 1 and 2 exceeded the commerce power, cross-examination of a governmental informant was improperly restricted, the informant was paid for a conviction, there was insufficient evidence on Count 1, a jury instruction on unanimity should have been given, Count 3 and portions of Count 1 should have been dismissed because of outrageous government conduct, the base sentencing level was improperly based on attempted murder, and the trial court improperly denied a motion to dismiss based on a sealed, *ex parte* hearing. (Attach. T, Opening Brief.)

On October 20, 2015, the Ninth Circuit Court of Appeals issued an Amended Opinion addressing the commerce clause claims, and a separate Memorandum Decision addressing the other claims. Movant's convictions and sentences were affirmed. (CR Doc. 1864.)

D. PRESENT MOTION TO VACATE

Original Motion – Movant then filed through counsel an original Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on June 23, 2017 (Doc. 1). Movant's original Motion asserted the following ten grounds for relief:

(1) trial counsel failed to present an adequate **entrapment defense** regarding Count Three;
(2) trial counsel withdrew a request for a **jury instruction on entrapment** and/or failed to properly preserve the issue by filing a motion under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal on Count Three based on entrapment or a lack of sufficient evidence;
(3) trial counsel failed to move to dismiss Counts One and Two based on misleading **grand jury** testimony, trial and appellate counsel failed to report to Movant the relevant content of the grand jury transcripts, and appellate counsel failed to raise the issue and seek dismissal;
(4) appellate counsel failed to appeal the Court's denial of **motions to dismiss Count Three** based on entrapment or a lack of sufficient evidence;
(5) appellate counsel failed to appeal the Court's denial of Movant's **motion to suppress** statements based on alleged *Miranda* violations and the Court's denial of Movant's motion to preclude "introduction of non-testimonial statements of . . . co-conspirators in a joint trial";
(6) appellate counsel failed to appeal the Court's ruling granting the government's motions to preclude Movant's proposed uses of **polygraph** evidence and evidence of a refusal to take a polygraph test;
(7) appellate counsel failed to appeal the Court's ruling denying Movant's request to present evidence of the absence of an indictment against two claimed **co-conspirators**;
(8) appellate counsel failed to appeal the Court's denial of Movant's request for sanctions against the government for notifying a **confidential informant** that the "reward was not contingent upon getting guilty verdicts in the case";
(9) appellate counsel failed to appeal the Court's six-level enhancement based on a finding that "the **victims were 'officials'** with the government"; and
(10) appellate counsel failed to appeal the Court's twelve-level enhancement for **terrorism**.

(Order 6/28/17, Doc. 3 at 1-2 (emphasis added).) The Court ordered service and an answer (*id.* at 3), and set a briefing and motions schedule (Order 7/5/17, Doc. 5).

Motion to Unseal – Movant then filed a Motion to Set Aside Briefing Schedule (Doc. 6) and Motion to Obtain Sealed Documents (Doc. 7), seeking to obtain various documents under seal and/or filed ex parte. The record in the criminal case is expansive, consisting of some 1800 docket entries, some 600 of which are sealed, and 300 of which were filed ex parte. The extensive use of sealed and ex parte records resulted from issues of ongoing criminal investigations, discovery matters reflecting trial strategy, sensitive personal information, and, somewhat uniquely, concerns over trial counsel's attorney-client privilege with regard to a client other than Defendant.

The Court conducted a review of the criminal case docket and provided each of the interested parties (Movant, Respondent, and Trial Counsel) with redacted dockets of the records to be denied to the other parties, to insure that any record which had not been properly identified as ex parte in the Court's docket could be so marked and excluded from disclosure. The Order provided that distribution of the unsealed records was limited, including limitations on the provision of certain "Trial Counsel Only" records to Movant's 2255 counsel only (*i.e.* without distribution to Movant). (Order 10/17/17, Doc. 19; Sealed Order 10/17/17, Doc. 20.) Upon resolution of remaining issues, the Court then directed the limited unsealing of the records, that trial counsel make designated records available to Movant's 2255 counsel, and set a revised deadline for motions to amend the Motion. (Order 11/15/17, Doc. 23.) Trial counsel was eventually unable to provide certain records, and the Court directed the Clerk of the Court to make those available to Movant's 2255 counsel. (Order 2/22/18, Doc. 28.)

Amended Motion – On March 21, 2018, Movant filed a Motion to Amend (Doc. 29), which was granted on the basis that it was an amendment of right under Federal Rule of Civil Procedure 15(a). The Court declined, however, to make any advance ruling on the timeliness of any new claims, but did order that the amended motion be deemed filed as of March 21, 2018. (Order 3/22/18, Doc. 30.) Accordingly, Movant filed his Amended Motion to Vacate (Doc. 31), asserting the following ten grounds for relief:

(1) appellate counsel was ineffective with regard to denial of the motion to dismiss based on **lost and destroyed evidence**;

(2) appellate counsel was ineffective with regard to denial of the **motion to suppress** based on: (a) *Miranda* violations; and (b) non-testimonial statements of co-conspirators;

(3) appellate counsel was ineffective with regard to the preclusion of **polygraph** evidence;

(4) appellate counsel was ineffective with regard to exclusion of evidence of

failure to indict **co-conspirators**;

(5) appellate counsel was ineffective with regard to denial of the motion for sanctions based on payments to the **confidential informant** based on conviction;

(6) trial counsel was ineffective with regard to presentation of an **entrapment** defense to Count 3;

(7) trial counsel was ineffective for withdrawing the request for a **jury instruction on entrapment**;

(8) appellate counsel was ineffective with regard to denial of the **motion to dismiss Count 3** for insufficient evidence;

(9) appellate counsel was ineffective with regard to the sentencing enhancement based on finding the **victims were "officials"** with the government; and

(10) appellate counsel was ineffective with regard to the sentencing enhancement for **terrorism**.

Response - On June 11, 2018 Respondent filed its Response (Doc. 44) and an additional sealed Exhibit (Doc. 45). On June 25, 2018, Respondent filed two DVDs of trial exhibits (Doc. 47). Respondent argues that Ground 1 is a new claim barred by the statute of limitations, and all the claims are without merit.

Reply - Movant filed his Reply on July 12, 2018 (Doc. 48). Movant argues that Ground 1 is timely under 28 U.S.C. § 2255(f)(4) (newly discovered facts), and his statute was equitably tolled, or the amendment relates back to the filing of the original Motion. Movant argues the merits of Grounds 1, 2, 3, 7, 8 and 10. Movant does not reply on Grounds 4, 5, 6, or 9.

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III. APPLICATION OF LAW TO FACTS

A. TIMELINESS

Respondent argues Ground One (IAAC re Lost Evidence) is barred by the statute of limitations. (Response, Doc. 44 at 16.)

1. One Year Limitations Period

As part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress provided a 1-year statute of limitations for all applications for motions to vacate filed pursuant to 28 U.S.C. § 2255. The statute of limitations applicable to habeas proceedings by federal prisoners has been codified at 28 U.S.C. § 2255(f), which generally provides that motions to vacate filed beyond the one year limitations period are barred and must be dismissed. *Id.* The one-year statute of limitations under AEDPA applies to each claim in a habeas corpus application on an individual basis, as opposed to the application as a whole. *Mardesich v. Cate*, 668 F.3d 1164, 1170 (9th Cir. 2012).

2. Conviction Final - § 2255(f)(1)

A federal habeas petitioner's time to file under 28 U.S.C. §2255 generally begins to run on "the day on which the judgment of conviction becomes final." 28 U.S.C. §2255(f)(1).[2] Although §2255 does not define "final", the Supreme Court has applied its ordinary standard of finality. "Finality attaches when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003). "As the Supreme Court has explained, '[b]y 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally

[2] In addition to the "impediment" and "newly discovered facts" provision discussed hereinafter, later commencement times can also result from newly recognized rights. *See* 28 U.S.C. § 2255(f)(3). Movant does not assert this section applies to Ground 1.

denied.'" *United States v. LaFromboise*, 427 F.3d 680, 683 (9th Cir. 2005), *amended*, 2005 WL 3312694 (9th Cir. Dec. 8, 2005) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987)).

Here, Movant filed a direct appeal, and the judgment on appeal was entered on October 20, 2015, when the Ninth Circuit Court of Appeals issued its Amended Opinion and Memorandum Decision (CR Doc. 1864). Petitioner then filed a petition for certiorari in the United States Supreme Court, which was denied on June 27, 2016. (Amended Motion, Doc. 31 at 3; Response, Doc. 44 at 16.) Accordingly, Petitioner's conviction became final on that date, his one year began running the next day, June 28, 2016, and one year later **expired on Tuesday, June 27, 2017**.[3]

Movant's original Motion to Vacate (Doc. 1) was filed on June 23, 2017 and was thus timely. However, his Amended Motion to Vacate was not filed until March 21, 2018 and under the normal rules of 28 U.S.C. § 2255(f)(1) would be untimely.

3. Relation Back – Rule 15(c)

Federal Rule of Civil Procedure 15(c), made applicable to habeas proceedings by § 2242, Federal Rule of Civil Procedure 81(a)(2), and 2255 Rule 12, provides that amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings "ar[i]se out of the [same] conduct, transaction, or occurrence." Rule 15(c)(2). Relation back does not occur merely because the same conviction is being attacked. Rather, it "depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005) (applying Rule 15(c)(2) to state prisoner's habeas

[3] For purposes of counting time for a federal statute of limitations, the standards in Federal Rule of Civil Procedure 6(a) apply. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Rule 6(a)(1)(A) directs that the "the day of the event that triggers the period" is excluded. *See also Patterson*, 251 F.3d at 1246 (applying "anniversary method" under Rule 6(a) to find that one year grace period from adoption of AEDPA statute of limitations, on April 24, 1996, commenced on April 25, 1996 and expired one year later on the anniversary of such adoption, April 24, 1997).

petition).

Here, Movant's original Motion generally asserted the same claims as now asserted in the following grounds: Ground 2 (IAAC re Motion to Suppress) in original Ground 5; Ground 3 (IAAC re Polygraph) in original ground 6; Ground 4 (IAAC re Co-Conspirators) in original ground 7; Ground 5 (IAAC re Motion for Sanctions) in original ground 8; Ground 6 (IATC re Entrapment) in original ground 1; Ground 7 (IATC re Entrapment Instruction) in original ground 2; Ground 8 (IAAC re Count 3) in original ground 4; Ground 9 (IAAC re Sentencing/Victims) in original ground 9; Ground 10 (IAAC re Sentencing/Terrorism) in original ground 10. The core operative facts of these grounds were raised in the original Motion. Thus, Respondent makes no argument that Grounds 2 through 10 of the Amended Motion are untimely,

However, Movant's Amended Motion adds in Ground 1 a claim regarding the denial of the motion to dismiss based on lost and destroyed evidence. Those operative facts were not alleged in the original Motion. Movant argues that the amendment should nonetheless relate back because it is based on the same "appeal and the failure to raise arguments that were clearly superior to the arguments raised on appeal." This theory was rejected by the Ninth Circuit in *Schneider v. McDaniel*, 674 F.3d 1144 (9th Cir. 2012). In *Schneider*, the petitioner argued that an amended claim of ineffective assistance of appellate counsel related back to an original claim based on different issues. The district court reasoned:

> In truth, petitioner is arguing that the assertion of any claim of ineffective assistance of appellate counsel based upon the failure to raise an issue or issues on direct appeal thereafter supports the relation back of any and every claim of ineffective assistance of appellate counsel that petitioner thereafter may decide to raise. A holding that relation back is available in that circumstance would stand the Supreme Court's decision in *Mayle* on its head.

Id. at 1151. The Ninth Circuit agreed that the petitioner's "argument would eviscerate *Mayle* with respect to claims of ineffective assistance of appellate counsel," and that the amended claim did not relate back.

Movant similarly asks this court to focus not on the facts of the underlying claim,

but upon the signing of the opening brief, when appellate counsel effectively says "these are the only claims that should be presented." Such an approach condenses the appellate advocacy process into a single decision. In reality, however, it is a series of decisions about: what and how to investigate, whether an arguable legal basis for the claim exists, whether the claim is likely to be successful, and whether that likeliness is comparatively high enough to deserve a place in the brief. To condense all those decisions into one ignores the underlying import of the pleading rules to "provide 'fair notice of what the plaintiff's claim is and the grounds upon which it rests'." *Mayle*, 545 U.S. at 655. It may be a notch above the approach rejected in *Mayle* of focusing on the conviction being attacked, but it still would provide no notice to a Respondent of the nature of the claim being asserted.

Accordingly, Ground 1 does not relate back.

Therefore, under the rule of 28 U.S.C. § 2255(f)(1), Grounds 2 through 10 are timely, and Ground 1 is untimely.

4. Impediment to Filing - § 2255(f)(2)

Section 2255(f)(2) provides a later commencement for the statute of limitations of "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action."

In his Reply, Movant argues that the prison restrictions on his access to his legal file "potentially invoke § 2255(f)(2) as a ground for timely filing" of Ground 1. (Reply, Doc. 48 at 28.) Movant points to the size of the record in this case and argues "that he did not have complete access to his legal materials, as the prisons in which he was housed following his conviction did not permit him to have his entire file." (*Id.*)

But, this argument ignores that Movant was represented in preparing and presenting his original Motion. He makes no argument that counsel could not obtain access to the necessary materials.

Moreover, even if the prison policy could be shown to have caused the delay, for an impediment to result in a delayed start it must be a violation of the Constitution or some federal law. *See Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000) (prison lockdown not shown to be "an unconstitutional impediment" and thus did not trigger § 2255(f)(2)). Movant proffers nothing to show that the prison policy was such a violation, as opposed to, for example being based on a legitimate penological objective.

Accordingly, Movant has failed to show that § 2255(f)(2) applies.

5. Newly Discovered Facts - § 2255(f)(4)

Section 2255 provides for a later commencement of the statute of limitations of "the date on which the *facts* supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4) (emphasis added).

Respondent argues that § 2255(f)(4) cannot render Ground 1 untimely because, even though the motion to dismiss based on lost or destroyed evidence which is the basis for Ground 1) was sealed, a redacted version was publicly available and contained the gravamen at the dispute at the heart of Ground 1. (Response, Doc. 44 at 16-17.)

Movant replies:

> While Mahon may have known about the motion to dismiss [based on lost and destroyed evidence] and the district court's ruling at issue (and related documents) leading up to trial, he was not aware of any significance for the purposes of a § 2255 motion. This is why he hired counsel. Once Mahon was incarcerated, he had no ability to posses[s] his entire file, and he did not have a copy of the motion in question (or related responses and orders)—whether sealed or otherwise.

(Reply, Doc. 48 at 26.)

Movant's contention ignores that he was not proceeding *pro se* in filing his original Motion. While Movant's ability to possess his file may have been limited, his counsel's ability was not (ignoring for the moment the sealing issue). Nor was Movant reliant upon his own understanding to ascertain the significance of the facts.

That Movant (or even his counsel) did not appreciate the legal significance of the facts is irrelevant. "[P]aragraph four of § 2255[(f)] is only triggered when a defendant discovers facts, not the legal consequences of those facts." *U.S. v. Pollard,* 161 F.Supp.2d 1, 10 (D.D.C. 2001). *See also Barreto-Barreto v. U.S.,* 551 F.3d 95, 100, n. 4 (1st Cir. 2008) ("the discovery of a new legal theory does not constitute a discoverable 'fact' for purposes of § 2255(f)(4)"); *Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001) ("Time [for state prisoner's federal habeas petition] begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.").

Finally, Movant does not offering anything to show that his discovery of the facts of his claim in Ground 1 was hindered by the sealing of various trial records. Movant confirms that the Motion to Dismiss Based Upon Lost or Destroyed Evidence (CR Doc. 648) is the core of Ground 1. (Reply, Doc. 48 at 26, n.1.) Respondent points out that a redacted copy of this motion was filed at CR Doc. 614, and argues that it was sufficient to alert Movant to his claim. In his Reply, Movant offers nothing to show that information only available in the sealed motion was necessary to alert him to the facts of his claim in Ground 1.

Moreover, § 2255(f)(4) is concerned with the discovery of "facts," not evidence. Movant proffers nothing to show that the facts underlying Ground 1 were not known to him since the time of trial.

Accordingly, Movant is not entitled to a delayed start of his limitations period under 28 U.S.C. § 2255(f)(4) for Ground 1.

6. Equitable Tolling

Movant argues that "equitable tolling principles should apply to allow the claim to proceed" and asserts that the documents underlying Ground 1 were not accessible to Movant because of the prison restrictions, were not provided by trial counsel to Movant's counsel, and ultimately were obtained by Movant's counsel from the Court

after trial counsel failed to provided them in a December 18, 2017 response to the Court's Order on unsealing records. (Reply, Doc. 48 at 29.)

In *U.S. v. Battles*, 362 F.3d 1195 (9th Cir. 2004), the Ninth Circuit held the statute of limitations under 28 U.S.C. § 2255 may be equitably tolled. However, to be entitled to such tolling, Movant must "demonstrate that 'extraordinary circumstances beyond [his]control [made] it impossible to file a petition on time and the extraordinary circumstances were the cause of his untimeliness.'" *Id.* at 1197 (quoting *Laws v. LaMarque*, 351 F.3d 919, 922 (9th Cir. 2003)).

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005). "A petitioner must show that his untimeliness was caused by an external impediment and not by his own lack of diligence." *Bryant v. Arizona Atty. Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.' " *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.)).

While Movant's arguments suggest that he and counsel were working to pursue Movant's claims, they do not show diligence, extraordinary circumstances, nor that the circumstances rendered a timely filing impossible.

Although Movant and 2255 counsel appear to have been working to discover claims, Movant's assertions of diligence do not show that Movant's 2255 counsel reviewed the publicly available trial court record, and do not explain the failure to do so, nor explain why such a review would not have revealed Ground 1. While a process of seeking records from trial counsel is not unreasonable, in the face of the statute of limitations and delays from sealing concerns, diligence would have called for a full review of the publicly available record.

Nor do Movant's assertions show that a timely filing was rendered impossible by

extraordinary circumstances. Again, Movant's complaints about prison restrictions ignore that he was represented by counsel not subject to such restrictions. The complaints about the motion to dismiss not being provided by trial counsel ignore the publicly available record. For example, Movant does not suggest that trial counsel misrepresented that the entire trial record had been provided, misleading Movant and his 2255 counsel into failing to review the publicly available docket and record.

Having failed to show diligence, extraordinary circumstances, or impossibility of a timely filing, Movant is not entitled to equitable tolling.

7. Actual Innocence

To avoid a miscarriage of justice, the habeas statute of limitations in 28 U.S.C. § 2244(d)(1) does not preclude "a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013). To invoke this exception to the statute of limitations, a petitioner "'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This exception, referred to as the "*Schlup* gateway," applies "only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *Id.* at 1936 (quoting *Schlup,* 513 U.S. at 316). *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933 (2013) (applying "new evidence" standard to claim of actual innocence to avoid habeas statute of limitations).

Although Movant generally professes his innocence, he has not offered any new evidence of his actual innocence.

8. Conclusion re Timeliness

Based on the foregoing, Movant's original Motion was timely under 28 U.S.C. § 2255(f)(1). Grounds 2 through 10 relate back to the original Motion, but Ground 1 does

not. Movant has failed to show that he is entitled to a later start time under § 2255(f)(2) or (4) or a basis for equitable tolling or a finding of actual innocence. Accordingly, Ground 1 is barred by the statute of limitations and must be dismissed with prejudice.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

All of Movant's grounds for relief are based on claims of ineffective assistance of either trial or appellate counsel. Generally, such claims are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on such a claim, Petitioner must show: (1) deficient performance - counsel's representation fell below the objective standard for reasonableness; and (2) prejudice - there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88. Although the petitioner must prove both elements, a court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. *Id.* at 697.

There is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance and that, under the circumstances, the challenged action might be considered sound trial strategy. *U.S. v. Quinterro-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995), *cert. denied*, 519 U.S. 848 (1996); *U.S. v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991). The court should "presume that the attorneys made reasonable judgments and decline to second guess strategic choices." *U.S. v. Pregler*, 233 F.3d 1005, 1009 (7th Cir. 2000).

An objective standard applies to proving such deficient performance, and requires a petitioner to demonstrate that counsel's actions were "outside the wide range of professionally competent assistance, and that the deficient performance prejudiced the defense." *United States v. Houtcens*, 926 F.2d 824, 828 (9th Cir. 1991) (quoting *Strickland*, 466 U.S. at 687-90). The reasonableness of counsel's actions is judged from counsel's perspective at the time of the alleged error in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *Strickland*, 466 U.S.

at 689.

It is clear that the failure to take futile action can never be deficient performance. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.1996); *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012). "The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel." *Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982).

Moreover, "[t]he law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether." *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) (citations omitted).

Indeed, Movant acknowledges that "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997). (*See* Reply, Doc. 48 at 4 (quoting *Smith* and *Pollard*).)

"Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). "A brief that raises every colorable issue runs the risk of burying good arguments-those that, in the words of the great advocate John W. Davis, 'go for the jugular' - in a verbal mound made up of strong and weak contentions." *Jones*, 463 U.S. at 753.

Movant goes awry – intermingling the standard for deficient performance and the standard for prejudice – when he argues that "counsel is ineffective for failing to raise an[ ] issue that would have succeeded within a reasonable probability." (Reply, Doc. 48

at 4-5.) While prejudice (that is, a different, *i.e.* successful, outcome) need only be shown to a reasonable probability, ineffectiveness also requires a showing of deficient performance, which is not met by merely showing that counsel made errors resulting in a loss, but requires a showing that counsel's performance was "unreasonable." "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

> The proper standard for attorney performance under the first prong of the *Strickland* test is "that of reasonably effective assistance." "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Mann v. Ryan, 828 F.3d 1143, 1152 (9th Cir. 2016) (quoting *Strickland*).

In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court acknowledged the uphill battle of attacking appellate counsel's selection of issues under this objective standard:

> In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See, e.g., Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Robbins, 528 U.S. at 288.

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C. GROUND 1 – IAAC RE LOST EVIDENCE

The undersigned has concluded hereinabove that Ground 1 is barred by the applicable statute of limitations. As an alternative basis for relief, the undersigned addresses (as did Respondent) the merits of Ground 1.

1. Parties Arguments

Motion – In Ground 1, Movant argues that appellate counsel was ineffective when he "failed to appeal the district court's denial of trial counsel's motion to dismiss the indictment based upon the unavailability of lost and destroyed evidence that tended to show that persons other than Mahon were guilty of planning and executing the bombing." (Amended Motion, Doc. 31 at 5.)

Response – Respondent argues that appellate counsel was not ineffective because the claim was without merit because: (a) the motion to dismiss was rendered moot by subsequent disclosures; (b) the motion was effectively denied without prejudice to refiling after the new disclosures could be reviewed; and (c) because there was no objection the review would have been for plain error, and no plain error could be shown. (Response, Doc. 44 at 19-20.)

Reply – Movant replies that Respondent fails to show that the purportedly lost or destroyed evidence was actually contained in the subsequent disclosures. (Reply, Doc. 48 at 30-31.)

2. Factual Background

On September 29, 2010, Movant filed a redacted[4] Joint Motion to Dismiss Based Upon Lost or Destroyed Exculpatory Evidence, arguing that some 16 categories of evidence had been lost or destroyed by the government, and the evidence "relate[s] mainly to other suspects in the bombing." (Attach. X, CR Doc. 614; *id.* at 12.)

[4] An unredacted version was eventually filed under seal at Doc. 648.

On November 4, 2010, the government filed a Motion to Continue Hearing, seeking to delay the hearing on the motion to dismiss and asserting that "nine boxes of transcripts, tapes, and files relating to the Postal Service 22 investigation of this case" had recently been received by the prosecution. The motion argued that "[s]everal documents that form the basis of Defendant's Motion to Dismiss for Lost Evidence are contained in these boxes." (Attach. Y, CR Doc. 713.) The government represented that the materials were being prepared for disclosure, and advised:

> The government met with defense counsel on this date and notified them of these boxes. The prosecution and defense have conferred and will request that this Court postpone the substantive hearing regarding Defendant's Motion to Dismiss for Lost Evidence. The parties request the Court maintain the current November 9, 2010 hearing date, at which time the defense will inform the Court of its initial position regarding the Motion and the posture of the case.

(*Id.* at 5.)

The parties appeared at the schedule hearing, and defense counsel for Movant (Ms. Williams) agreed "with the idea that your motion based on lost or destroyed evidence needs to be postponed until you've had a chance to review what's in the boxes." (Attach. Z, CR Doc. 728, R.T. at 4.) Counsel for co-defendant argued that because the government conceded that only some of the missing categories had been found "the motion remains ripe," but admitted that the defense could not yet tell what categories had been found. Nonetheless, co-defendant's counsel declined to argue the motion and have it ruled on at that time. (*Id.* at 5.)

The Court did go on to address the defense's separate (but related) motion to dismiss based on the delay in disclosure of the nine boxes. The defense argued that in light of the volume of materials being belatedly disclosed, the impending trial date would prevent a fair trial.

The Court ruled:

> It is clear to me that the defense's motion to dismiss this case on the basis of lost or destroyed evidence has been eclipsed by this development, because it appears there is a good likelihood that some of the material that was claimed in that motion to be lost or

> destroyed was not lost or destroyed and is in these boxes.
>
> So we're going to have to readdress that motion on the basis of what is found in the boxes. And I think what we're going to have to do is have the defense refile the motion addressing what you believe to be lost or destroyed after you've had the opportunity to review these boxes.
>
> I think the current briefing is obsolete in light of this development. And so I am not going to rule on that motion, but I think I'm going to terminate it and ask you to refile it after you review the boxes so that it's focused on what really is lost or destroyed.

(*Id.* at 36-37.) The Court went on to deny as unsupported by the law Movant's motion to dismiss based on delay in disclosures, and set a new hearing to address any necessary delay in the trial. (*Id.* at 37, *et seq.*) The Court summarized:

> So I am not going to dismiss the case on the basis of what has happened up to this point, nor am I going to move the trial date yet. What I want to do is this. I want to give the defense about two weeks to look through these boxes. And then we're going to come back and have a conference and talk about what you have found.
>
> And the questions that will be addressed when we get back together are obviously can we still start trial on January 11th as we're planning? And if not, why not. And I'll need some specific explanations as to why not.
>
> A second question will be what motions does the defense believe are warranted on the basis of what you have found in the boxes? Do you, for example, believe that you should refile the motion based on lost or destroyed evidence? Do you believe you have found other grounds for seeking dismissal under the kinds of standards that I've just outlined.

(*Id.* at 39-40.) In the Court's written Case Management Order No. 7, the Court summarized the November 9, 2010 hearing:

> 1. Defendants' motion to dismiss based on lost or exculpatory evidence (Docs. 614, 648) has been eclipsed by the government's recent disclosures and will be denied without prejudice. Defendants may refile the motions after they have reviewed the recent disclosures and identified information that remains lost or destroyed.

(Attach. BB, CR Doc. 731, Order 11/12/10 at 1.)

At the subsequent hearing, the defense described ongoing efforts to review the nine boxes of materials and reported:

> Ms. Cisneros is working on the - - has been handling the motion to dismiss for lost and destroyed evidence. That, of course, has been set aside until we finish the review. She will be continuing to work on that. We believe that motion will be reurged, but we' re not in a position to stand here and say, okay, we've been through

> everything, we know of these ten items in the motion, six of them are in the boxes. We're not in a position to say that. We have -- based on what we have seen, we believe that motion will be reurged.

(Attach. CC, CR Doc. 763, R.T. 11/23/10 at 15.)

No subsequent motion to dismiss based on lost or destroyed evidence was filed.

Appellate counsel did not raise this issue on appeal. (*See generally* Attach. T, Opening Brief.)

3. Application of Law to Facts

The substance of Movant's claim in Ground 1 is that appellate counsel should have challenged on appeal the trial court's denial of the motion to dismiss based on lost or destroyed evidence. However, that motion was not denied on the merits, but was denied without prejudice as premature in light of the belated disclosures, and in the face of concessions by defense counsel that they were not prepared to proceed on the motion. The ruling was, in essence, simply a scheduling order.

Movant proffers no reason to conclude that this ruling by the court was erroneous. And, because trial counsel did not refile the motion, the court never addressed the merits of the motion.

Accordingly, any challenge by appellate counsel to the denial of the motion to dismiss would have been futile, and failure to pursue it cannot be ineffective assistance. *Sexton* 679 F.3d at 1157.

Therefore, even if deemed timely, Ground 1 must be denied as without merit.

D. GROUND 2A – IAAC RE *MIRANDA* MOTION TO SUPPRESS

1. Parties Arguments

Motion – In Ground 2A, Movant argues that appellate counsel was ineffective when he "failed to appeal the district court's denial of Mahon's motion to suppress statements based upon *Miranda* violations while in custody in a police van after arrest." (Amended Motion, Doc. 31 at 6-7.)

Response – Respondent argues appellate counsel was not ineffective because the motion had no merit because Movant's in-custody statements were not the result of interrogation or a functional equivalent of interrogation, the statements were voluntary and made without a justified or actual expectation of privacy. Moreover, any error was harmless because Movant fails to identify improperly admitted incriminating statements and there was other evidence of guilt. (Response, Doc. 44 at 21-23.)

Reply – Movant replies that the *Miranda* claim has merit because the conditions of custody (hot and cramped van, wired for audio and video recording, and discussion about the evidence against defendant) were the functional equivalent of interrogation. (Reply, Doc. 48 at 10-14.)

2. Factual Background

Relying on *Miranda*, the defendants filed motions to suppress the audio and video recordings of them at the time of arrest when they were held in the agents' van while their farm was searched. (CR Doc. 446, Mot. Suppress by Co-Defendant; CR Doc. 481, Mot. Suppress.)

In disposing of the motions, the trial court made the following findings about the audio and video recordings proffered by the prosecution:

> The parties have provided the Court with law-enforcement video taken from 6:51 a.m. to 9:02 a.m. on the morning of June 25, 2009, along with three audio clips from the same day. The following is a summary of what the Court observed on the audio and video exhibits.
>
> Following his arrest, Defendant Dennis Mahon was placed in a police van at 6:52 a.m., was removed from the van at 6:54:40 a.m., and was returned to the van at 6:56:33 a.m. The van had been wired for audio and video recording. Dennis was given *Miranda* warnings in the van by Special Agent Hager at 7:05 a.m., after he was shown the indictment and warrant by Special Agent Green. After his rights were read, Dennis was asked "Do you understand?" He replied in a conversational tone: "The small talk is over. I can't say anything more - except for who is praying for the damn humidity to quit?" He continued engaging in "small talk" with law enforcement, but was not questioned by officers with regard to the issues in this case and did not volunteer information to the officers on those issues.
>
> Defendant Daniel Mahon was given *Miranda* warnings at approximately 6:58 a.m., before he was placed in the van at 7:09

> a.m. He responded, "I understand" when asked whether he understood his rights. He did not state that he was invoking his rights. Defendants were alone in the van between 7:11 a.m. and 7:13 a.m., and after 7: 14 a.m.
>
> Officers were present both inside and outside the van before 7:11 a.m. and between 7:13 and 7:14 a.m. The only encounter with officers in the van after 7:14 a.m. was when officers would open the door from time to time to check on Defendants, to escort Daniel out to talk with Agent Moreland, to respond to a request from Dennis to use the restroom, and to turn on the air conditioning at Daniel's request. Defendants did not request to be held outside the vehicle, nor did they complain of discomfort other than warmth, which appeared to be remedied immediately after Daniel requested that the air conditioning be turned on.
>
> During these contacts with law enforcement while in the van, Defendants were asked if the house contained any explosive devices that might harm officers, to which Dennis said no. Defendants were also asked whether the barn was safe, to which both replied that there were no explosives but that there were bat feces that could be virulent and agents probably should wear gas masks. The tone of these brief encounters was not threatening.
>
> The fact that the van was wired for audio and video recording was expected by Defendants. At 7:11:12 a.m., Dennis remarked to Daniel that they were probably being recorded and later that they were probably being videotaped. Defendants nonetheless conversed freely, described what they saw outside the van windows, talked about their parents, expressed frustration with the raid, reviewed what items could have been on the computer and on the property that might be incriminating (e.g., soft porn, supremacist literature, black powder for a pistol Dennis had owned, weapons and ammunition, etc.), reassured each other multiple times that they had nothing to do with the Scottsdale bombing, and the like. They also made statements of retribution against law enforcement for raiding their property and expressed regret for not having had a "shootout."
>
> Dennis instructed Daniel at least twice about what to do when interrogated: ask for a lawyer and state that he has nothing to say, regardless of accusations. Shortly thereafter, at 8:49 a.m., Daniel was retrieved from the van to talk with Agent Moreland. Upon returning, Dennis asked Daniel if he uttered the words that Dennis instructed him to say. Daniel mentioned that he did not ask for a lawyer because he was not asked questions; he said he remained silent. The video excerpts provided to the Court do not show what happened after Dennis talked with agent Moreland, nor any statements made by Defendants after the van left the property.
>
> Two of the audio clips contain conversations between Defendants and Agent Moreland. The conversations occurred separately for each Defendant, outside of the van. Moreland informed Daniel and Dennis of the charges and evidence against them, told them that they likely would not want to talk with him right away, told them about raids that were occurring at the property of other individuals Defendants knew (including Tom Metzger, an alleged white supremacist leader), informed Defendants that Metzger likely would abandon them, and informed Dennis that he likely would not have any friends after this incident.

(Attach. FF, CR Doc. 613, Order 9/29/10 at 1-3.) The trial court further concluded that

Movant's response to Speciala Agent Hager "was sufficiently clear to constitute an unambiguous invocation. Thus, Dennis's right to remain silent attached at 7:05 a.m." (*Id.* at 5.)

The parties proffer nothing to suggest these findings were erroneous. Except as rejected or supplemented hereinafter, the undersigned adopts these findings.

In response to the motion to suppress, the Government argued that co-defendant spoke with Agent Moreland outside the van between 8:49 a.m. and 8:57 a.m., and Movant was escorted from the van at 9:24 A.M. to talk to Agent Moreland. (CR Doc. 537, Govt. Response to Mot. Suppress at 4.)

The audio clip revealed the following interchange between Agent Moreland and co-defendant:

> S/A TRISTAN MORELAND: Okay, uh…this is S/A Moreland, the following is gonna be, uh…me discussing things with Daniel Mahon on the, uh… date of the warrant.
>
> * * *
>
> S/A TRISTAN MORELAND: You Daniel?
>
> DANIEL MAHON: Sure.
>
> S/A TRISTAN MORELAND: Okay. You guys can leave him here. //Hey, I'll be good.
>
> DANIEL MAHON: //Yeah, I may not know about, anybody gonna come.
>
> S/A TRISTAN MORELAND: //Yeah, go ahead…//go on…
>
> DANIEL MAHON: //No, but I'm just getting ready to…fall down here.
>
> S/A TRISTAN MORELAND: My name's Tristan Moreland.
>
> DANIEL MAHON: Mmm-hmm…
>
> S/A TRISTAN MORELAND: I'm the…Case Agent if you will on this whole…incident here. The show…the debacle…if you wanna call it that. Uhm…look I'm not, I'm not gonna interview ya', I really don't-don't have any questions for you. I just want you to hear me out because I'm gonna explain what's gonna happen, the-…kind of the process…for you guys…uhm… I'm out of Phoenix, Arizona, I've been investigating the Logan Bombing since the day it occurred.
>
> DANIEL MAHON: Mmm-hmm…
>
> S/A TRISTAN MORELAND: You guys were my primary suspects from the beginning of the case.
>
> DANIEL MAHON: Mmm-hmm…
>
> S/A TRISTAN MORELAND: I presented the case to a Grand Jury in Phoenix, uh… your brother and you were indicted on three (3) counts, uhm…I'm not interested in talking to you right now, okay? I just wanna explain things to you.
>
> DANIEL MAHON: Mmm-hmm…
>
> S/A TRISTAN MORELAND: You're gonna be brought in

front of a magistrate here, uh…in Rockford.

DANIEL MAHON: Mmm-hmm…

S/A TRISTAN MORELAND: Uhm…they'll give you an initial appearance, uh… probably between sometime…tomorrow and Monday or Tuesday they'll have what's called a removal hearing. It has to do with…identity. Are you the person that's been indicted, and they'll have probably a detention hearing.

DANIEL MAHON: Mmm-hmm…

S/A TRISTAN MORELAND: And if you're held…then you'll be transferred out to Arizona.

DANIEL MAHON: Mmm-…

S/A TRISTAN MORELAND: Okay?

DANIEL MAHON: My son's there…I can see my son again.

S/A TRISTAN MORELAND: Oh, good, yeah, in Chandler. Uh…Willie.

DANIEL MAHON: Yeah.

S/A TRISTAN MORELAND: Yeah. Uhm…and then you'll be brought in front of the Judge there, the same kind of thing will go on, okay? Now…I know virtually everything in this case already, okay? My interest, I'm gonna tell you right now is Tom Metzger. I'm pretty sure that he green lighted this bombing…I know that Dennis helped make the bomb…I don't really care whether you were specifically the one that…that put it in the library or he did…uhm…I've got the recording of the…the call that Dennis made to Logan's office, I've got virtually every step of this case…the bomb…the description of it, who put it together, how it's put together, buying all the parts separately and all that stuff. I know all that…

DANIEL MAHON: Mmm-hmm…

S/A TRISTAN MORELAND: Uhm…I know about all the hard drive stuff, the computer stuff, the conversation with Metzger. I've been listening to your phones for several months off and on over the years, I've wire-tapped you, I've wire-tapped Dennis, I wire-tapped //Tom Metzger.

DANIEL MAHON: //Yeah, so-so…found a note, probably about that.

S/A TRISTAN MORELAND: Okay. So…uhm…there's not a whole lot I don't know, but let me tell you this. Your minimum mandatory, if you're convicted is seven (7) years. You're looking up to forty (40) on one of the counts, okay? That's based on what's been indicted right now. I don't expect you guys to talk to me, I know your history with Tom, I know where everything lies. But, I'm telling you, he's gonnna abandon you guys…he's not gonna…

DANIEL MAHON: Well, he was never my friend anyway.

S/A TRISTAN MORELAND: //I know, but…

DANIEL MAHON: //He was my brother's friend there.

S/A TRISTAN MORELAND: He's gonna leave you hanging, trust me. I know how he works and he's gonna be…you're gonna be on your own…we're raiding his house right now. Okay? He's…seventeen thousand ($17,000) dollars in cash he had on him. I guarantee you, none of that money's gonna go toward your attorneys or your attorney fees, and he ain't gonna friggen talk to you, so…all I'm telling you is…you may not have a lot of friends, but if there's ever a time that you wanna sit down and you want me to listen, I'll be glad to talk to you guys. I can't promise you anything as far as what I can do for you…there were injuries,

uhm…and we have to deal with victim's rights and all these other crazy things, but I-…you know, I get everything about you guys, there's virtually nothing I don't know about you guys. Uh…and I just wanted you to know where I'm coming from, be straight up with you, uh…about the whole incident, uh…trying to think if there's anything else I-…I wanted you to, uh…be aware of. Oh, Mr. Kountze, uh…the Garhare [SP?] brothers, Tina Higgins, all of them, all of this stuff is going on all over the country right now, McLaughlin down in…in Springfield…uh…Sawyer, Waddell, it goes on and on and on…so…uhm…//that's, uh…

DANIEL MAHON: //Get, get Sawyer not to drink so much, he'd probably talk.

S/A TRISTAN MORELAND: (CHUCKLES) Yeah. Well…

DANIEL MAHON: (CHUCKLES)

S/A TRISTAN MORELAND: Uhm…look, I don't know everything, but at some point, if you-…I'm gonna be here at least, probably 'til Monday, 'til your initial hearing's, uhm…they'll get you to...you know, attorney's down here in Rockford later on today and you can start talking to them about what you might wanna say, but for right now…do you need anything? You guys getting water…you getting //to the bathrooms, okay…

DANIEL MAHON: //Yeah…I'm fine.

S/A TRISTAN MORELAND: …we're gonna get you going here in a little bit, uhm…

DANIEL MAHON: No problem.

S/A TRISTAN MORELAND: Something I'm forgetting…uhm…oh…Mr. Joos property is also being raided right now down in, uh…Missouri, uhm…that's another issue that I'd like to talk to you about is this guy Coombs, if there's anything you might have to tell me about where that gentleman might be that-that shot the state trooper. I'd like to know about that, uhm…

DANIEL MAHON: Charles Kountze?

S/A TRISTAN MORELAND: No-no…Charles Kountze up in Michigan is //being raided, I'm talking about Timothy Coombs…

DANIEL MAHON: //Uh…I-don't-…

S/A TRISTAN MORELAND: The friend of Mr. Joos that shot the state trooper back in nineteen ninety-four (1994). Alright, that-that's…things of interest to me. Uhm…again my name's Tristan…and…if you need to talk to me…

DANIEL MAHON: Uh…uh…

S/A TRISTAN MORELAND: …just tell somebody.

DANIEL MAHON: …alright.

S/A TRISTAN MORELAND: Okay?

DANIEL MAHON: Eh…

S/A TRISTAN MORELAND: Alright, bye. (SHUFFLING SOUND)

S/A TRISTAN MORELAND: I'm gonna have them, uh…put you back. Tell Dennis I'll be with him in a few minutes. Make a couple of phone calls and… (PAUSE)

S/A TRISTAN MORELAND: You'll, uh…put him back. I'm gonna make three (3) or four (4) phone calls and then I'll talk to his brother.

UNKNOWN MALE: Sure.

(CR Doc. 537, Govt. Response to Mot. Suppress, Attachment A.)

A little later, the following interchange occurred between Agent Moreland and Movant:

> S/A TRISTAN MORELAND: I told Daniel same thing I'm gonna tell you. Uhm… this isn't a good situation for you guys. I'm just gonna be straight up with you. I got you cold. Uhm…we got DNA, I realize you guys are twins. We gotta deal with that issue, uhm…one of you… pushed your finger into the switch…in the glue, some little fucking piece of shit got in there somehow, probably off the glove, I don't know, we spend a hundred thousand (100,000) dollars to pull the DNA, uhm…I know about the phone call you made to Logan's office in September of O three ('03). That's what tipped me off to you guys. Uh…
>
> DENNIS MAHON: Who's Logan?
>
> S/A TRISTAN MORELAND: Uh, he's the victim of the-the…bombing in Scottsdale.
>
> DENNIS MAHON: Hmm…
>
> S/A TRISTAN MORELAND: So…uhm…like I told Daniel, I spent, uh…two (2) years doing wiretaps, we are…we're raiding Tom Metzger's house right now. I've got Tom Metzger's e-mails to the reporter; uh…the day before the bomb was planted in the library and…uh…
>
> DENNIS MAHON: Library?
>
> S/A TRISTAN MORELAND: Yeah, that's where it was planted. I don't know…
>
> DENNIS MAHON: I never been to the-…
>
> S/A TRISTAN MORELAND: …no, I didn't say you have…I-I-I don't know if your brother told you the truth about where he put the bomb or what he did with it, but he didn't get it in the mail like he thought he was going to, so…eh- …let me, let me tell you what's going on, okay… tomorrow…uh…or today, actually, you'll get your initial-initial appearance, okay? Then you'll be brought back to Phoenix, uh…well, no, back-up… Monday they'll probably schedule what's called a removal hearing, here in Rockford, that's where it's…it's kind of an identity hearing or…a lot of people call it extradition hearing. That same time, uh…you'll have a detention hearing, uhm…here in Rockford…and then if you're…found to be the person that's indicted in Arizona, there's a three count indictment out there against you and your brother and it's essentially a conspiracy to bomb facilities and commerce which…obviously dates back in time, and then…all the way forward to now. Uh…as you know, I think you've been show the search warrant we're looking for…things that'll link you, both to the Scottsdale bombing and other incidents.
>
> DENNIS MAHON: Yeah, I understand some law enforcement, yes.
>
> S/A TRISTAN MORELAND: Well, I-I-I know, I know…you-you're very sharp guy. So, that-…
>
> DENNIS MAHON: …no, I'm pretty stupid.
>
> S/A TRISTAN MORELAND: Well…
>
> DENNIS MAHON: I'd be rich.
>
> S/A TRISTAN MORELAND: …we all are stupid in some ways and we're brilliant in others, so, you-you've-you have a lot of skills, uh…sometimes I think you got a little off with… where you

applied 'em, but nevertheless…uhm… you're not gonna have any friends after this. I know that peo-...people are gonna say, "Oh, Tom's gonna do this, Tom's gonna do that." We're raiding his house right now, he just walked out the door, we had to let him go because we don't have an arrest warrant, he had seventeen thousand ($17,000) dollars in cash on him, uh-…him and Mary, uhm… but we're not done with him. We do plan to indict him, uh…like I said, I-I…I got his e-mails where he told the reporter, uh…that wrote the Aryan Fest Article, which is…I know, what kind of…kicked this thing off…uhm…I put the bomb all back together, I haven't figured out where all the parts came from, but…I realize how sharp you guys are with buying 'em, you know, at different places and not-…not doing things, uh…like other people do, so…I can live with that, uh…I'm looking for paperwork to link you to the note…in the bomb, uh…as you know, uh…I'm looking for the electric matches, the igniters, the wires, the things like that, so…uh…the hard drive on the computer, I mentioned, we'll be taking that, imaging that. I'm also, uh…raiding Robert Joos house, uh…he's in custody and under arrest. He was also charged with, uhm…he's a felon in possession of firearms and he's also been charged with teaching, uh…terrorist bombings, it's…//essentially…

DENNIS MAHON: //Really?

S/A TRISTAN MORELAND: …yeah, uhm…so…he-he kind of…did himself a favor and taught me how to bomb a building in, uh…Phoenix, so…uhm…so he's been indicted for that and, uh…they're pulling some guns out of his property. I don't know what else, but they're…

DENNIS MAHON: You ever been on his property?

S/A TRISTAN MORELAND: Oh, yes, several times.

DENNIS MAHON: And you're gonna have to have about ten thousand (10,000) men to cover everything down there.

S/A TRISTAN MORELAND: Well, it's not ten thousand, but I do have a few hundred down there, right now.

DENNIS MAHON: Yeah, good luck.

S/A TRISTAN MORELAND: They're doing all the caves…uhm…

DENNIS MAHON: You tell 'em to be very careful…

S/A TRISTAN MORELAND: Oh, we were…

DENNIS MAHON: …'cause they're-they're booby-trapped. //Just telling you.

S/A TRISTAN MORELAND: //Oh, all of them? Okay, I'll…I better call down there. //Now, he…

DENNIS MAHON: //Yeah, I don't wanna see you guys get hurt.

* * *

S/A TRISTAN MORELAND: …now here's…I know today is probably not the time that you're gonna wanna talk to me, okay?

DENNIS MAHON: No, I'm not gonna say anymore unless I have an attorney.

S/A TRISTAN MORELAND: I-I understand. Uhm…what I'm interested in is a couple of things. Think about this, don't make any more statements if you're telling me you want an attorney. I'm just telling you that…we're interested in finding Mr. Coombs who you may have known as James Wilson, for the shooting of the state trooper, when Robert was arrested back in the- …ninety-four ('94).

DENNIS MAHON: I have //no idea who that is.

S/A TRISTAN MORELAND: //Just…okay, that's fine.
DENNIS MAHON: Eh…I heard about it in the news…
S/A TRISTAN MORELAND: Okay, and, uh…and //obvious-…
DENNIS MAHON: //How's April, how's April doing?
S/A TRISTAN MORELAND: She's doing good. Yeah, yeah…she's doing good.
DENNIS MAHON: I never did trust you.
S/A TRISTAN MORELAND: That's alright.
DENNIS MAHON: I didn't…I never trusted Becka either.
S/A TRISTAN MORELAND: You know what…we didn't trust you either. (CHUCKLES)
DENNIS MAHON: But you don't know…you know who I am.
S/A TRISTAN MORELAND: //I know who you are.
DENNIS MAHON: //I'm, a…I'm an open book, I'm not hiding anything.
S/A TRISTAN MORELAND: No, I understand, okay.
DENNIS MAHON: Yeah.
S/A TRISTAN MORELAND: So, uhm…if you have any questions for me, feel free to ask me, otherwise, uhm…I'm just gonna get you transported here in a few minutes down to the Rockford jail.
DENNIS MAHON: Alright.
S/A TRISTAN MORELAND: I'll be seeing you, uhm…probably at the hearings, if not today, uh, at the removal hearing and then, uh… I'll definitely be seeing you back in Phoenix, uhm…and we'll go from there. Okay?
DENNIS MAHON: Okay. See, you were too good to be true.
S/A TRISTAN MORELAND: Well, I tried, //but I'm not, I'm not a pro' like you, bud.
DENNIS MAHON: //You're too good to be-…no, you…no-no…uh you… came out of nowhere and Becka never could tell me how you made a living. And-and a red flag went up, and Becka…a red-red flag about her, too, 'cause she could never tell me how she made a living.
S/A TRISTAN MORELAND: I know.
DENNIS MAHON: Okay, well…I'm-I'm…that's all I gotta say without an attorney and, now…uh…I'm gonna plead not guilty and //I'm…
S/A TRISTAN MORELAND: //I understand. Yeah, that's…
DENNIS MAHON: …and we'll have…we'll have our day in court.
S/A TRISTAN MORELAND: …absolutely, okay? So…
DENNIS MAHON: Very good.
S/A TRISTAN MORELAND: …if you need anything, let me know, we'll get you going here soon. Uhm…bathroom, water, things like that. Did you guys get anything to eat this morning?
DENNIS MAHON: No, I just…fast for, four (4) or five (5) days.
S/A TRISTAN MORELAND: Okay.
DENNIS MAHON: I'm a diabetic.
S/A TRISTAN MORELAND: Okay, uhm… I don't know how they do it down there, but I'll make sure that if you guys do want to eat, that we get you some food before we put you in the jail, 'cause I don't know what they're feeding, and all they do here,

> so…uhm…if you need to speak to me…let me know.
> * * *
> DENNIS MAHON: Back in the car?
> S/A TRISTAN MORELAND: Yeah-yeah…we'll do that and we'll get, like I said, we'll get you going here in about half an hour.
> (PAUSE / NO CONVERSATION)
> (SHUFFLING SOU[N]D)
> (END OF RECORDING)

(CR Doc. 537, Govt. Response to Mot. Suppress, Attachment B.) Movant was returned to the van at 9:33. (*Id.* at 4.)

The court trial concluded, that any post-invocation statements were not the result of the functional equivalent of interrogation, rejecting Movant's reliance on conditions in the van, the wiring for recording, and Agent Moreland's independent discussion with each defendant. (*Id.* at 3-7.) With regard to the interactions with Moreland, the court found:

> Finally, Agent Moreland's statements to Defendants outside the van were not the functional equivalent of interrogation. Moreland told Defendants about the evidence against them and about other raids occurring that morning, but such statements arc "normally attendant to arrest and custody." *Moreno-Flores*, 33 F.3d at 1168-69. Even if his comments struck a responsive chord with Defendants, that did not make their subsequent statements to each other in the van the functional equivalent of interrogation. *Id.* at 1169-70. Moreover, Defendants did not appear to interpret Moreland's statements as interrogation, nor did they appear to have been coerced into making incriminating statements. In fact, upon Daniel's return from talking with Moreland and recounting Moreland's statements to Dennis, they both reassured each other that they had nothing to do with the Scottsdale bombing and then returned to their previous banter. What is more, Agent Moreland specifically told each Defendant that he may not want to talk with Moreland at that time and that not talking was acceptable.

(*Id.* at 7.) Accordingly, the motion to suppress was denied. (*Id.*.)

Portions of the video from the van were admitted into evidence at trial, without objection, as Trial Exhibit 221. (CR Doc. 1807, R.T. 1/13/12 at 697-699; DVD Trial Exhibit 221.) The admitted portions covered the following time spans: 7:10-7:13 (Exhibit 221, Clip 1); 7:36-739 (Clip 2); 9:00-9:01 (Clip 3); 9:01-9:02 (Clip 4); 9:02-9:04 (Clip 4a); and 9:04-9:09 (Clip 5). At least portions of the video were published and played for the jury during testimony (CR Doc. 1808, R.T. 1/17/12 at 788).

The portions of the admitted conversation in the van progressed from what the

warrant said was being searched for, to theories on what bombing was being referenced and who might have been involved in it, and the disposal of black powder from a cannon, (DVD Trial Exhibit 221 at Clip 1), why the bomb squad was present, Movant wishing he had gotten his "literature out", whether co-defendant's car was searched, who should be contacted, an explosives officer, whether gun powder would be found, various items being searched (bicycles, water heaters, ammo cans), their right to have ammo, having someone present to watch the search, (DVD Trial Exhibit 221 at Clip 2).

After co-defendant met with Agent Moreland, the videos showed conversation between the defendants about various witnesses identified by Moreland, including Kountze, Steve Sawyer (and whether he had any information), and Robert Joos, (DVD Trial Exhibit 221 at Clip 3), conversations about Kountze needing to get a gun, and that he would laugh, the difficulty of searching property with the caves and Joos "doesn't have a peer," the "ADL" put them up to it (DVD Trial Exhibit 221 at Clip 4), whether "something good would come out of it," that he thought the time would have come sooner, that the "letter" Movant wrote was written in Arizona and was therefore not interstate, that they had done anything at the Scottsdale library, that the victim was at City Hall not the library, and they hadn't been to the library and didn't know where it was (DVD Trial Exhibit 221 at Clip 4a), that the search wasn't producing anything, that all they ever had there was "some literature once in awhile," contacts with Steve Sawyer, the presence of other officers, the potential for media coverage, that only that it was "just one man fighting back a little bit, and they just can't handle it, not one little bit," it was Phoenix, Arizona, only Movant was involved in the "letter," what Moreland had said about which of them built the bomb, that there would be video cameras at the library, that it was city hall not the library where "it went off." (DVD Trial Exhibit 221 at Clip 5.)

The prosecution relied on the video in closing argument to show a conspiracy between the defendants and other non-informants, and consciousness of guilt:

MR. BOYLE:

> * * *
> Another action. This idea of the farm.
> (Video played.)
> MR. BOYLE: Because he says three months ago –
> (Video played.)
> MR. BOYLE: "Three months ago I told you, get rid of the stuff." That's why it wasn't there.
> Dennis talking about Daniel's explosives.
> (Video played.)
> * * *
> MR. BOYLE:
> * * *
> Consciousness of guilt. Exhibit 221.
> (Video played.)
> MR. BOYLE: They knew. They knew. They knew this day was coming for them.
> Dennis insisting city building --
> (Video played.)

(CR Doc. 1811, R.T. 2/21/12 at 4405-4406). (The prosecution also relied on the video in arguments on trial motions (CR Doc. 1816, R.T. 1/19/12 at 1178; CR Doc. 1823, R.T. 2/2/12 at 2825).)

3. Application of Law to Facts

"A defendant who is in custody must be given *Miranda* warnings before police officers may interrogate him. Once such warnings are given and the defendant invokes his right to remain silent, the admissibility of statements obtained thereafter depends upon whether the defendant's right to cut off questioning was "scrupulously honored." *United States v. Moreno-Flores*, 33 F.3d 1164, 1168–69 (9th Cir. 1994). "[I]f the individual…indicates in any manner that he does not wish to be interrogated, the police may not question him." *Miranda v. Arizona*, 384 U.S. 436, 445 (1966)

Here, there is no disagreement that Movant was taken into custody, was given his *Miranda* warnings, and invoked his right to remain silent before any of the admitted van video. The disputes involve whether Movant has shown admission of his post-invocation statements, whether those statements resulted from interrogation (or its functional equivalent) after he invoked his *Miranda* rights, and whether any error was harmless.

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a. Admission of Incriminating Evidence Not Alleged

Respondent argues any error was harmless because "Movant does not identify any incriminating statements he allegedly made in the van that were introduced against him at trial." (Response, Doc. 44 at 23.) Movant does not address this contention, but doubles down on his arguments about whether the evidence was admissible.

In *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), the Court concluded that a violation of *Miranda* is subject to harmless error analysis. And, where suppressible evidence is never introduced, there is no basis for a finding that harm resulted from the error. *See United States v. Shetler*, 665 F.3d 1150, 1156 n. 2 (9th Cir. 2011) ("any error with respect to [unintroduced statements] was harmless beyond a reasonable doubt"). *See also United States v. Spence*, 703 Fed. Appx. 121, 124 (3d Cir. 2017) (unpublished decision) (denial of motion to suppress harmless where evidence not introduced); *United States v. Whitmore*, 386 Fed. Appx. 464, 471 (5th Cir. 2010) (unpublished decision) (same).

But, approaching the issue from the harmlessness angle is problematic where, as here, the defendant simply fails to allege the offending evidence has been introduced.[5] This is so because the burden of proof on harmlessness lies with the prosecution, not the defendant. *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) ("The State bears the burden of proving that an error passes muster under [the harmlessness] standard.") Thus, by relying on harmlessness, Respondent is in the unfortunate position of proving a negative from a very large transcript. However, because Respondent has not even affirmatively asserted that the offending evidence was not introduced, the Court cannot simply rest upon Movant's failure to rebut the assertion.

Moreover, harmlessness is not the proper focus on this issue, because it is the use

[5] Perhaps Respondent simply asserts a failure to allege that the offending evidence that was introduced was incriminating. While the van video may not have been the perfect smoking gun, the record makes clear that the prosecution relied on it to establish Movant's guilt, and as discussed hereinafter, the undersigned cannot conclude that it was harmless evidence.

of the improper evidence which gives rise to a *Miranda* claim, not simply the underlying police misconduct[6] or the denial of a motion to suppress.[7] "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Indeed, *Miranda* did not direct the issuance of suppression orders by courts, but restricted the prosecution's evidentiary admissions. "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.* at 479. The right is not exclusion, but non-admission. Thus, a suppression order is not a constitutional right. A suppression order is simply the means to resolving prior to trial whether evidence is admissible, *e.g.* an effort to avoid mistrials or reversals when the prosecution introduces offending evidence.

Therefore, by failing to allege the admission of offending evidence (rather than simply its gathering or the denial of a suppression order), Movant arguably simply fails

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[6] *See* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 Mich. L. Rev. 907, 908 (1989) ("evidence obtained from a *Miranda* violation is (or ought to be) excluded because use of that evidence compromises the defendant's procedural right not to be compelled to be a witness against himself" not because of the police misconduct).

[7] One exception may be where a defendant asserts his decision to plead guilty was prompted by the improper denial of a motion to suppress. *See United States v. Lustig*, 830 F.3d 1075, 1086 (9th Cir. 2016) ("the relevant question in the conditional plea context is whether the erroneous suppression ruling could have affected Lustig's decision to plead guilty"). *But see United States v. Mikolon,* 719 F.3d 1184, 1189 (10th Cir. 2013) (declining to find guilty plea resulted from denial of motion because government had stipulated it would not seek admission of the statements at trial). In that situation, the "use" of the evidence by the prosecution is its persuasive effect on the defendant rather than the jury. Here, however, Movant did not plead guilty but instead proceeded to trial. Thus, the prosecution must have "used" the evidence to persuade the jury rather than just Movant.

to make out his claim that a *Miranda* violation occurred.

Nonetheless, the record is clear that the purportedly offending evidence was introduced and relied on by the prosecution as incriminating evidence. Accordingly, the undersigned proceeds to address its admissibility.

b. Other Evidence - Harmlessness

Respondent argues that any error from admission of evidence from the van recording was, in any event, harmless because of the volume of other evidence against the defendants.

Here, because the claim is one of ineffectiveness on direct appeal, the proper standard for harmlessness is that applicable on direct appeal, *i.e.* is the one prescribed in *Chapman v. California*, 386 U.S. 18 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. *See Davis v. Ayala,* 135 S. Ct. 2187, 2197 (2015) (distinguishing between standard on direct appeal, and standard on collateral review). Moreover, that determination must be made with the realization of the potent effect of a defendant's confession. "The prejudice from a defendant's confession cannot be soft pedaled. A confession is like no other evidence; it may be the most damaging evidence that can be admitted against a defendant." *Jones v. Harrington*, 829 F.3d 1128, 1142 (9th Cir. 2016) (quotations, alterations and citations omitted).

To resolve the harmful effect of a wrongly admitted statement, the court considers the "strength of the prosecution's case without the erroneously admitted evidence." *Jackson v. Conway*, 763 F.3d 115, 141 (2d Cir. 2014). "We assess the importance of the wrongly admitted evidence by considering (1) the prosecutor's conduct with respect to the evidence, (2) whether the evidence bore on an issue plainly critical to the jury's decision, and (3) whether the evidence was material to the establishment of the critical fact, or whether it was instead corroborated and cumulative." *Id.* (quotations omitted).

Here, the Ninth Circuit summarized on direct appeal that there was

"overwhelming audio, video, forensic, and circumstantial evidence that Mahon participated in the bombing of the Diversity Office."[8] (CR Doc. 1864, Amend. Opin. 10/29/15.) But, this determination was not being made without reference to the van video.

By sheer volume, most of the other evidence presented at trial was most applicable to the conspiracy charges, and revealed Movant's activities as a white supremacist terrorist and purported bomber, his knowledge of bomb making (generally reflected in publicly available books), and his delight in the occurrence of the Scottsdale bombing.

The evidence showing Movant's connection with the Scottsdale bombing was more limited, and generally consisted of:

(1) A vaguely threatening telephone message left by Movant for Logan almost five months before the bombing, identifying himself as "Dennis Mahon of the White Aryan Resistance of Arizona," pointing out that Scottsdale was "98 percent white," and complaining about the "rich white people" and their celebration of Mexican heritage week. He concluded "Anyway, we've got a lot of support. The White Aryan Resistance is growing in Scottsdale. There's a few white people who are standing up. Take care." (DVD, Trial Exhibit 171; R.T. 2/1/12, Doc. 1822 at 2727.)

(2) Movant's residence in Arizona at the time of the bombing and the phone used by him and co-defendant being present in the Tempe and Mesa (but not Scottsdale), Arizona on the day of the bombing. (R.T. 1/31/12, Doc. 1821A at 2533-2535; Attach. I, Plaintiff's Exhibit 214.)

(3) On February 21, 2004, the day the bomb was found in the Scottsdale library, Movant mailed to his father his last will and testament with references to

[8] Presumably, the reference to forensic evidence is the evidence presented about the attempts to reconstruct the bomb, and the connection to Movant's descriptions of the bomb. There was not, for example, any inculpating fingerprint or DNA evidence, nor even evidence connecting Defendant to the actual components in this bomb.

his racist beliefs and having "fought…to my last breath." (R.T. 2/21/12, Doc. 1811 at 4273-4274; Attach. G, Plaintiff's Exhibit 161, Will and Envelope.)

(4) Movant's admission to the CI about his involvement with the Scottsdale bombing, albeit claiming that it was limited to teaching some Scottsdale police officers (who he claimed sent the bomb) how to make the bomb, and referencing that they used a "5"x1" pipe bomb," details about the Scottsdale bomb not released to the public. (DVD, Trial Exhibit 195, Video 2/3/05 at 18:48:15, *et seq.*; R.T. 1/18/12, Doc. 1815 at 1016.)

(5) Movant's knowledge of Edmund Burke, who was the purported signer of the note in the bomb. (DVD, Trial Exhibit 1105, Video 2/1/05; Attach. E, Plaintiffs' Exhibit 110.)

(6) Movant stating (while he, co-defendant, and the CI) were driving past the bombing site "I didn't plant the bomb, I helped make it." (DVD, Trial Exhibit 181, Video 5/1/7 at 15:46:30, *et seq.*)

(7) Movant's confessions of expecting to be prosecuted or convicted which occurred after the collection of DNA samples from the defendants. (DVD, Trial Exhibit 156, Audio 5/24/08; R.T. 1/18/12, Doc. 1815, at 1084.)

(8) A common error between the victim's address on the bomb package label (3939 North 75th Street) and the identification by co-defendant of the 3939 building as Scottsdale City Hall (during their drive by with the CI) employing a similar mistaken identification of the streets. (R.T. 1/24/12, Doc. 1818 at 1697-1698; DVD, Trial Exhibit 195, Video 2/3/05.)

The prosecution presented no DNA evidence, no eyewitness accounts, no direct connections to bomb components, etc. which would have showed Movant's participation in the bombing. On the other hand, the prosecution also offered substantial evidence that Movant was well versed in covering his tracks, (e.g. buying components from different and dispersed locations while in disguise, wearing gloves while handling the bomb to prevent leaving evidence, falsifying return addresses, never talking about specifics of his

activities but only in generalities, not talking over the phone about his activities, etc. (*See e.g.* DVD, Trial Exhibit 193, Video 2/2/05.)

It is true that much of the incriminating evidence resulting from the van video was largely on issues about which there was overwhelming other evidence, *i.e.* the defendants' general activities as part of the conspiracy as white supremacist terrorists. Where constitutional error impinges only upon issues on which the prosecution's case is otherwise unchallenged, the error is harmless. *See Neder v. United States*, 527 U.S. 1, 19 (1999) (omission of element from jury instructions harmless error, where that element was uncontested).

But it also included statements relevant to Movant's involvement in the Scottsdale bombing, including Movant's admission to sending a "letter," that it was sent to City Hall not the Scottsdale library, and that "it went off" at City Hall. This evidence went far beyond any other evidence connecting Movant to the Scottsdale bomb. His admissions to the CI were limited to instructing police officers to build the bomb, and were at least plausibly characterized as bragging in pursuit of Movant's romantic attraction to the CI. But the CI was not in the van. And the jury could have reasonably inferred that the "letter" that "went off" was the bomb sent to the Scottdale Diversity Office.

Here, the prosecutor directly relied on the van video in seeking a conviction, the evidence effectively squelched the defense's explanation for Movant's admissions to only indirect connections with the bombing as an instructor, and was material to the most hotly litigated and factually disputed critical fact: Movant's direct involvement in the construction and delivery of the Scottsdale bomb. *See Jackson*, 763 F.3d at 141. Under those circumstances, appellate counsel could not have reasonably concluded that the appellate court was likely to find the admission of the van video evidence harmless beyond a reasonable doubt.

Of course, the viability of this claim would depend at the outset on the inadmissibility of the van video.

c. Interrogation

With regard to the admissibility of the evidence, Movant properly summarizes the meat of Ground 2A: "The question is whether he was interrogated when he made statements to his brother while in a police van after arrest." (Reply, Doc. 48 at 11.) Movant argues that the conditions in the van were the functional equivalent of interrogation. (*Id.*) Respondent counters that the trial court properly concluded they were not. (Response, Doc. 44 at 21-23.)

Miranda placed limits on the use of statements stemming from "custodial interrogation" conducted in violation of its prescriptions. 384 U.S. at 444. Fourteen years later, in *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court addressed the term "interrogation" and found that it includes conduct "that did not involve express questioning," such as:

> the use of line-ups in which a coached witness would pick the defendant as the perpetrator… to establish that the defendant was in fact guilty as a predicate for further interrogation…the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution…[or] the use of psychological ploys, such as to posit the guilt of the subject, to minimize the moral seriousness of the offense, and to cast blame on the victim or on society.

446 U.S. at 299 (quotations and citations omitted).

The Court opined:

> that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

446 U.S. at 300–01. The Court cautioned that "this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police," but only applies if the police "should have known [their actions] were reasonably likely to elicit an incriminating response."

Because Plaintiff's ground for relief is that appellate counsel should have raised this claim on appeal, the merits of his *Miranda* claims must be measured in light of the standard applicable on appeal for such claims.

> We use the clearly-erroneous standard to review the district court's determination of whether police conduct subsequent to arrest constitutes "interrogation." On this crucial factual determination which must be made in light of all the circumstances in the case, we will not lightly substitute our judgment for that of the district judge, who can better evaluate the facts and the often conflicting inferences that may be drawn therefrom.

United States v. Thierman, 678 F.2d 1331, 1334 (9th Cir. 1982) (citations omitted).

Under the "clearly erroneous standard," if the district court's account of the evidence is plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently. *United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003).

Thus, Movant bears the very substantial burden of convincing this Court that appellate counsel could not have reasonably concluded that the court of appeals would likely decide that the trial was not clearly erroneous in determining Movant was not interrogated.

At trial and here, Movant points to three actions by law enforcement they should have known would result in incriminating responses: being put in a hot and cramped van, the van was wired for audio and video recording, and the interactions with the agents.

(1). <u>Hot Cramped Van</u>

Movant attempts to make much of the conditions in the van. But the video belies the contention that the conditions were such that law enforcement should have known incriminating responses would result.

In the context of examining the voluntariness of statements, in *Brooks v. Florida*, 389 U.S. 413 (1967), the Supreme Court found conditions of confinement to be coercive.

The Court opined:

> For two weeks this man's home was a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate. For two weeks he subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water. For two full weeks he saw not one friendly face from outside the prison, but was completely under the control and domination of his jailers. These stark facts belie any contention that the confession extracted from him within minutes after he was brought from the cell was not tainted by the 14 days he spent in such an oppressive hole.

389 U.S. at 414–15. In contrast, in *Derrick v. Peterson*, 924 F.2d 813, 819 (9th Cir. 1990), *overruled by United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014), four hours alone in a police car was not found coercive.

Here, the van was a common mini-van with Movant and co-defendant seated in the second row. The only alteration to the van visible is a security mesh behind the front row seats. While handcuffed with their hands in front, the defendants had sufficient freedom of movement to lean around to peer out the vehicle windows, drink the bottles of water provided to them, and to physically interact with each other. As of the end of the video clips admitted at trial, the defendants had been placed in the van for roughly two hours (6:51 a.m. to 9:09 a.m.) during which time the video was recorded (and any admitted statements made). While two hours sitting in the middle row of a mini-van is not necessarily one of the most pleasant experiences of life, it is one to which millions of people regularly submit themselves and their children.

Nor was the heat a significant factor. While the arrest occurred in June, it also occurred on a farm in Illinois (not in the deserts of Arizona), and early in the morning (6:52 a.m.). While, with the humidity on which Movant commented, it may not have been entirely comfortable in the van, Movant proffers nothing to show that it was sufficiently uncomfortable to have elicited a confession. Indeed, when the defendants did complain, the officers promptly engaged the air conditioning. Movant does not show that the incriminating statements were made prior to air conditioning being provided, or that there was any reason to conclude that the defendants would have felt under threat of having the air conditioning stopped. To the contrary, the officers appeared solicitous of

the defendants' comfort by providing them with air conditioning, water, and access to the restroom when requested.

While the defendants' movements were restricted, *i.e.* by being handcuffed and placed in the van, those conditions were "those normally attendant to arrest and custody." While continuing such conditions for a long duration might eventually become so onerous that one should anticipate incriminating statements simply to be relieved of such conditions, the short time involved and minimal discomfort here would not lead to that conclusion.

In sum, there was simply nothing about the conditions in the van to justify a determination that the agents should have known the conditions would have been likely to result in the defendants making incriminating statements.

(2). Video Recording

Movant points to the fact that the van was wired to record audio and video.

At most, the presence of such recording equipment permits an inference that the agents hoped to garner evidence. But, "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Arizona v. Mauro*, 481 U.S. 520, 529 (1987).

Moreover, "[t]he test is an objective one…and thus the subjective intent of the police, while relevant, is not conclusive." *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981). The simple "act of leaving the appellants alone in [a police] vehicle, with a recording device activated, was not the functional equivalent of express questioning…[even though the officer] may have expected that the two men would talk to each other if left alone, but an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response." *United States v. Hernandez-Mendoza*, 600 F.3d 971, 977 (8th Cir.), *as amended* (July 7, 2010), *opinion amended on denial of reh'g*, 611 F.3d 418 (8th Cir. 2010). *See also United States v. Swift*, 623 F.3d 618, 623 (8th Cir. 2010) (relying on *Hernandez-Mendoza*); *United States v. Bailey*, 831 F.3d 1035, 1038 (8th Cir. 2016) (no interrogation from leaving defendant "in the squad

car near the alleged crime scene with the video-recording device turned on").

Movant proffers nothing to suggest that the presence of recording equipment amounted to "compelling influences" or "psychological ploys" that the agents should have reasonably known would result in an incriminating response. *Arizona v. Mauro*, 481 U.S. 520, 529 (1987). "In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards:* preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Id.* at 529–30.

What is relevant is that the recording was expected by defendants, arguably making their time in the van a continuing "interaction" with law enforcement. Had the co-defendants not been aware of the recording equipment, then from their perception (which is the relevant point of view), they would not have had the opportunity to respond to "interrogation" while in the van.

(3). Interactions with Agents

Finally, Movant points to evidence that while they were in the van agents "would interrupt and ask the brothers questions such as whether the house contained any explosive devices that might harm officers and whether the barn was safe, " and that "Agent Moreland told Mahon and his brother about the evidence against them and about other raids occurring that morning." (Reply Doc. 48 at 12-13.) Movant argues this was effectively priming the pump.

(a). *Contacts Prior to Moreland Interview*

Movant points to the various contacts by agents other than Agent Moreland. Movant fails to show how these amounted to interrogation.

Miranda does not protect against "limited and focused inquiries [which] were necessarily 'attendant to' the legitimate police procedure, and were not likely to be

perceived as calling for any incriminating response." *Pennsylvania v. Muniz*, 496 U.S. 582, 605 (1990) (instructions re sobriety tests and confirmation of understanding them). Thus, the courts have recognized that interrogation generally does not result from "routine booking procedures", although if "the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply." *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983). "The test is objective. The subjective intent of the agent is relevant but not conclusive. The relationship of the question asked to the crime suspected is highly relevant." *Id.*at 1280 (citations omitted).

The contacts related to Movants' comfort were not coercive or inquisitive in nature. Movant fails to explain how accommodating water, air conditioning and restroom needs should be foreseen as resulting in incriminating statements. Rather, these were legitimate parts of the arrest process, and were not likely to result in incriminating statements.

The contacts related to the searches were appropriately incidental to the arrest and search, with a purpose of protecting the officers. To the extent that some potential could have existed for incriminating evidence to have been discovered, *e.g.* if co-defendants had reported a booby trap bomb to investigators, which later was tied to the Scottsdale bomb, the conclusion might be different. But no such evidence was revealed. The defendants apparently recognized that the questions were directed at safety, referencing danger from bats instead. Moreover, the courts have routinely recognized exceptions to the *Miranda* framework for officer safety (albeit generally in relation to pre-*Miranda* warning questions) where the questions "relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with a weapon." *United States v. Reilly*, 224 F.3d 986, 992 (9th Cir. 2000).

Movant's argument thus seems to be that it was simply the persistent nature of the contact. At some point, any repeated conduct, like the drip-drip-drip of the fabled "Chinese water torture" might cause a suspect to crack, and thus be a functional equivalent of interrogation. *Cf. Ashcraft v. State of Tenn.,* 322 U.S. 143, 150 (1944)

(confession coerced where defendant interrogated continuously for 36 hours by relays of officers). But here, the contacts reported were for legitimate purposes, and spread over several hours. While the effects might have become annoying, particularly given the stress inherent in the surrounding circumstances of arrest, the undersigned cannot conclude that a reasonable officer should have known that such contacts alone were likely to result in incriminatory statements.

(b). *Agent Moreland Discussions*

Finally, Movant relies on the interactions between Agent Moreland and the defendants, where Moreland "primed the pump" with evidence (real and fictional) against the defendants. Movant alleges the agents placed "the brothers together in the van after setting forth the incriminating evidence and turning on recording devices." (Reply, Doc. 48 at 13.)

The record reflects that the interactions between Agent Moreland and co-defendant occurred between 8:49 a.m. and 8:57 a.m., and between Agent Moreland and Movant occurred between 9:24 a.m. and 9:33 a.m. (CR Doc. 537, Gov't Response to Motion to Suppress at 4.) The latest video clip from the van ended at 9:09:13. (DVD, Trial Exhibit 222, Clip 5.) Thus the only interaction that could have resulted in the evidence introduced at trial would have been the one with co-defendant.

Officers Not Present - The undersigned notes that the statements made in the van video were not made to the agents, but to co-defendant. It has been suggested that an intent to respond to police (as opposed to a third party) is necessary to an interrogation, but that, as in *Mauro*, this can be met where "the police maintained a presence with a tape recorder operating." LaFave, et al., *The "functional equivalent" test*, 2 Crim. Proc. § 6.7(a) (4th ed.).

But here, Movant and believed that he was (and in fact was) being surveilled by the video camera in the van. Thus, not only did he remain in a "police-dominated atmosphere," but could have felt "compelled to speak [through the video] by the fear of

reprisal for remaining silent or in the hope of more lenient treatment should he confess." *Illinois v. Perkins*, 496 U.S. 292, 296-297 (1990).

Interactions Through Co-Defendant – The undersigned also notes that in the time frames covered by the admitted videos, Agent Moreland did not directly interact with Movant. As a general rule, "[b]y custodial interrogation, [the Supreme Court] mean[t] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444 (emphasis added). If the suspect is not subjected to "official" interrogation, however, the Fifth Amendment is not implicated. *See Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("It is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation.").[9]

"That a statement is 'volunteered' in response to questions or compelling influences emanating from private or other nongovernmental sources does not change this analysis. Again, the issue in *Miranda* and its descendants is whether particular actions *by the police*, either express questioning or its functional equivalent, constitute interrogation." *United States v. Kimbrough*, 477 F.3d 144, 150 (4th Cir. 2007) (emphasis in original).

Nonetheless, under certain circumstances, interactions with third parties may result in "the functional equivalent" of police interrogation. In *Arizona v. Mauro*, 481

[9] In *Perkins*, the Supreme Court concluded that an undercover agent who posed as an inmate did not need to give *Miranda* warnings to another inmate before asking questions that could elicit incriminating responses. The Court reasoned that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying Miranda," because "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate," and "[w]hen a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking." 496 U.S. at 296. But *Perkins* addressed only the question whether *Miranda* warnings needed to have been given, not whether a post-warning invocation could be violated by continued interrogation. Moreover, in *Perkins*, the "undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation." *Id.* at 294. Thus there was "no reason to assume [as *Miranda* requires] the possibility that the suspect might feel coerced." *Id.* at 299. In contrast, here, Movant was in custody on the same offenses that the purported "interrogation" was directed at proving.

U.S. 520 (1987), the Court was faced with post-invocation incriminating statements made by the defendant to his wife during the arrest process, when police agreed to let them talk, albeit with an officer present. The Court concluded there was no interrogation. But in doing so, the Court observed that the officers had attempted to dissuade the wife from talking to Mauro, had an officer in the room for legitimate security reasons, and "was not subjected to compelling influences, psychological ploys, or direct questioning." *Id.* at 528-529. The Court also had observed: "There is no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements." *Id.* at 528.

In *Kimbrough*, the Fourth Circuit could identify no case finding the functional equivalent of interrogation from "statements or confessions elicited through private questioning." 477 F.3d at 150. But the cases they did locate revealed fairly innocuous involvement by officials, or no involvement at all:

> *See, e.g., Mauro*, 481 U.S. at 525, 107 S.Ct. 1931; *United States v. Alexander*, 447 F.3d 1290, 1295–96 (10th Cir.2006) (statement to FBI admissible where prison officials placed suspect's friend in adjoining cell and friend encouraged confession, but officials "did not develop the planned encounter, nor suggest any techniques to help [the friend] convince [the suspect] to provide a statement to the FBI"); *Whitehead v. Cowan*, 263 F.3d 708, 719 (7th Cir.2001) (statements admissible when suspect's roommate urged his confession because police neither directed the roommate's questioning nor engaged in a ploy to elicit the confession); *United States v. Gaddy*, 894 F.2d 1307, 1309–11 (11th Cir.1990) (defendant's aunt, who was a police officer, acted as a private citizen in encouraging him to speak to investigating officers); *Snethen v. Nix*, 885 F.2d 456, 459–60 (8th Cir.1989) ("coercion" by defendant's mother led him to make inculpatory remarks, which were not suppressed); *see also United States v. Romero*, 897 F.2d 47, 52–53 (2d Cir.1990) (questioning by emergency room nurse); *United States v. Borchardt*, 809 F.2d 1115, 1119 (5th Cir.1987) (same); *United States v. Pullen*, 721 F.2d 788, 790–91 (11th Cir.1983) (questioning by bank employees).

Kimbrough, 477 F.3d at 150. The Fourth Circuit found such innocuous involvement in the case before it, where the suspect's mother was shown the drugs in the family basement, and was then allowed to communicate with the suspect in the presence of the police. *Id.* "In sum, Ms. Kimbrough, not the police, initiated the exchange with

Appellee." *Id.* at 152. *See also Snethen v. Nix*, 885 F.2d 456, 458 (8th Cir. 1989) (mother asked to speak with suspect before taken back to jail, and afterwards suspect confessed).

The rule to be distilled from these cases is thus: If the actions of third parties which prompt the defendant's post-invocation statements were not orchestrated by the police, then there is no police action to be deemed interrogation and raise a Fifth Amendment concern. But if the third parties are acting at the direction of, or by the manipulation of, the police, then statements from such directed or manipulated conduct amounts to interrogation if the police should know they are reasonably likely to elicit an incriminating response from the suspect.

The rub lies in distinguishing if the third party actions are directed or manipulated by the police.

On the one hand, if there is an express or even "tacit agreement, discussion, or understanding between the police officers and" the third party to "ask questions or attempt to elicit incriminating information, *Kimbrough*, 477 F.3d at 151, then there is police action subject to *Innis*. In that instance, the third party is acting as a knowing agent of the police. *See United States v. Bailey*, 831 F.3d 1035, 1038 (8th Cir. 2016) (no evidence third party "was acting in concert with the police").

Next to such a knowing agency is the unknowing agency, where the third party has not agreed to elicit information, but was manipulated by the police into doing so. In *Mauro*, the Court observed: "Nor is it suggested—or supported by any evidence—that Sergeant Allen's decision to allow Mauro's wife to see him was the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." 481 U.S. at 527.

It is clearly not enough that the police merely permit the third party to interact with the defendant, even if the resulting incriminatory statements are foreseeable. *See Mauro*, 481 U.S. at 530 ("Police departments need not adopt inflexible rules barring suspects from speaking with their spouses."). *See also Whitehead v. Cowan,* 263 F.3d

708, 719 (7th Cir. 2001) ("A police awareness that suspects sometimes confess after they speak with close friends or family does not mean this court should adopt a rule that encourages police to bar friends or family members from seeing a suspect.").

But if police have gone beyond simply permitting the contact, and even beyond "the 'subtle compulsion' that [the Court] held not to be interrogation in *Innis*," *Mauro*, 481 U.S. at 529, and instead have employed "compelling influences, [or] psychological ploys," in orchestrating contact with the third party, *id.*, then such contact may amount to the functional equivalent of interrogation.

Manipulation of Co-Defendant - Here, the evidence arguably shows that Agent Moreland went beyond merely permitting contact between co-defendant and Movant, and used a psychological ploy to manipulate co-defendant into acting as his interrogator.

Arguably, the evidence shows that Moreland did so by seeding co-defendant with not just the bare charges or evidence against the defendants, but with suggestions that the brothers should turn on Metzger and their other associates and cut a deal. "My interest, I'm gonna tell you right now is Tom Metzger," co-defendant was facing "up to forty (40) [years] on one of the counts," and that Metzger was "gonnna abandon you guys…leave you hanging." Even though Metzger had "seventeen thousand ($17,000) dollars in cash …none of that money's gonna go toward your attorneys or your attorney fees." Moreland proffered "you may not have a lot of friends, but if there's ever a time that you wanna sit down and you want me to listen, I'll be glad to talk to you guys. I can't promise you anything as far as what I can do for you… but I-…you know, I get everything about you guys, there's virtually nothing I don't know about you guys." Moreland then offered a shotgun of names of their associates, including Kountze, Sawyer, and Joos, and then told co-Defendant to tell Movant "I'll be with him in a few minutes" and announced "I'll talk to his brother." (CR Doc. 537, Govt. Response to Mot. Suppress, Attachment A.)

It is at least arguable that Moreland anticipated that in light of this conversation, the relationship between the co-defendants and the circumstances of their custody, co-

defendant would report to Movant the results of the interview with Agent Moreland, and that the two would be influenced to discuss the allegations.

Thus, Moreland arguably manipulated co-defendant into acting as his agent in seeking to evoke incriminating statements from Movant.

Objective Expectation of Incrimination – Even if co-defendant acted as Moreland's agent, *Miranda* is only violated if co-defendant's subsequent actions should have reasonably been anticipated to result in incriminating statements by Movant.

In *Innis*, the Court found that when officers were transporting a suspect in a murder involving a shotgun, they engaged in a short post-invocation conversation about a school for handicapped children in the area, and the potential the children would find the shotgun and be injured. The defendant then volunteered that he would show them where the shotgun was hidden. At the scene, he was again advised of his rights, but replied that he wanted to "get the gun out of the way because of the kids in the area in the school," and revealed its location. 446 U.S. at 294-295. The Court concluded that while the defendant may have been subjected to "subtle coercion," they could not find "the officers should have known that the respondent would suddenly be moved to make a self-incriminating response," and thus the defendant had not been interrogated. *Id.* at 303. "That the officers' comments struck a responsive chord is readily apparent…[and] the respondent was subjected to 'subtle compulsion.' But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Id.* "The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.* at 301.

Thus, the Fourth Circuit has opined that "the *Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges." *United States v. Payne*, 954 F.2d 199, 202 (4th Cir. 1992).

The court summarized:

> We thus reject appellant's argument that statements by law enforcement officials to a suspect regarding the nature of the evidence against the suspect constitute interrogation as a matter of law. It simply cannot be said that all such statements are objectively likely to result in incriminating responses by those in custody. The inquiry mandated by *Innis* into the perceptions of the suspect is necessarily contextual, and whether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue. As a result, substantial deference on the question of what constitutes interrogation must be paid to the trial courts, who can best evaluate the circumstances in which such statements are made and detect their coercive aspects.

Payne, 954 F.2d at 203 (citation omitted).

The contextual nature of the inquiry is reflected in disparate results reached in the case law. *See Acosta v. Artuz*, 575 F.3d 177, 191-192 (2nd Cir. 2009) (cataloging cases from other circuits regarding provision of evidence as interrogation); and Nissman and Hagen, *Confronting the Suspect with Evidence*, Law of Confessions § 5.9 (2d ed.) ("A few courts have found that talking about the evidence can be interrogation, even where the officer asks no questions. However, the majority of cases have gone the other way.").

In *United States v. Moreno-Flores*, 33 F.3d 1164 (9th Cir. 1994), the court found no functional equivalent of interrogation where arresting agents told the defendant "that the agents had seized approximately 600 pounds of cocaine and that Moreno–Flores was in serious trouble." *Id.* at 1169 The court opined: "The fact that [the descriptions of incriminating evidence] may have struck a responsive chord, or even that they may have constituted 'subtle compulsion' is insufficient to find that they were the functional equivalent of interrogation." *Id.* at 1169–70.

In *United States v. Crisco*, 725 F.2d 1228 (9th Cir. 1984), the court found no interrogation where the arresting agent responded to the defendant's question about the basis for the arrest by recounting the agent's meeting with the defendant "'for the purpose of seeing $60,000 that I was going to use to buy a kilo of cocaine.'" *Id.* at 1232. The *Crisco* court reasoned "when an officer informs a defendant of circumstances which contribute to an intelligent exercise of his judgment, this information may be considered

normally attendant to arrest and custody." *Id.* at 1232.

In *U.S. v. Thierman*, 678 F.2d 1331 (9th Cir. 1982), the court found no interrogation from officers referencing to each other "the need to involve [the defendant's] girlfriend," even though the defendant had been diligent about trying to protect implicated family and friends, and the officer admitted to trying to get the defendant to respond. The court noted that concern about family and friends being involved was not a peculiar susceptibility, the defendant was intelligent and shrewd, had been consistently offering limited assistance to investigators, and after the officer's statement had undertaken to negotiate a deal before finally confessing.

In *Shedelbower v. Estelle*, 885 F.2d 570 (9th Cir. 1989), the court concluded: "Although the police did falsely tell Shedelbower that he had been identified by the rape victim, the totality of the circumstances compels the conclusion that Shedelbower's taped confession was not the product of that falsehood, and that he was fully aware of the nature and consequences of his actions." *Id.* at 574.

On the other hand, in *Orso*, on which Movant relies, the Ninth Circuit found an interrogation from detailed discussions of evidence and false evidence:

> During the car ride, and without giving the *Miranda* warnings, Inspector Galetti engaged Orso in several minutes of detailed discussion regarding the evidence against her, the witnesses against her, and the statutory penalties for the crime of which she was suspected. Indeed, he went so far as to make up some of the evidence which he said existed against her. Although Inspector Galetti testified that he preceded his comments by admonishing her not to speak, we are persuaded that he should have known that it was reasonably likely his comments would cause her to respond. It is hard to see any purpose for the long and detailed discussion in the car, especially his false statement of the evidence against Orso, other than to elicit incriminating responses from her.

United States v. Orso, 266 F.3d 1030, 1033–34 (9th Cir. 2001), *abrogation on other grounds by Missouri v. Seibert*, 542 U.S. 600 (2004) *recognized in United States v. Williams,* 435 F.3d 1148, 1161 (9th Cir. 2006). *Cf. United States v. Pheaster*, 544 F.2d 353, 368 (9th Cir. 1976) (in a pre-*Innis* case, no interrogation where statements made after "an objective, undistorted presentation of the extensive evidence against him,

particularly the positive identification of his fingerprint").

The conclusion to be reached from a survey of the cases is that noted by the Fourth Circuit in *Payne*, that context matters.

In the context of this case, *Orso* is particularly instructive, and suggests it is at least arguable that a reasonable police officer should have known it was reasonably likely that his conversation with co-defendant would have resulted in incriminating responses from Movant. Not only did Moreland review the evidence, but he exaggerated it and made a point of sowing seeds of suspicion about the defendants' friends, the specter of favorable treatment for helping Moreland pursue Metzger, and repeatedly offering to talk, and then sending co-defendant back into the van with Movant.

(4). Conclusion re Interrogation

In sum, there is a highly plausible argument, based on the contacts by Moreland with co-defendant, and the open video surveillance in the van, that Movant was subjected through co-defendant to the functional equivalent of interrogation.

But, the question here is not how the undersigned might have ruled in the first instance (or even how, on reconsideration, this court might rule), but on the likely result before the Ninth Circuit Court of Appeals. Because that court would have addressed the trial court's determination under the clearly erroneous standard, it is not sufficient that other jurists might reach a different conclusion.

Movant points to no specific factual errors in the trial court's findings on which it based its determination that there was no interrogation. At most, Movant argues that the court should have evaluated the facts differently, to reach a different conclusion. And indeed, the undersigned might have reached a different conclusion.[10] But the

[10] To the extent a finding of interrogation would be based on the undersigned's interpretation of poor recordings of the defendants' often cryptic manner of communicating in the van video, any error in the trial court's alternative determination would be even less clear. The Supreme Court has observed that *Miranda* analyses can only be conducted "[o]nce the scene is set and the players' lines and actions are reconstructed." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (reviewing whether

undersigned cannot say that the trial court's determination was not plausible.

With nothing more, appellate counsel would have been reasonable to conclude that the Ninth Circuit was likely to decide that the trial court's findings were not clearly erroneous, and thus the claim was not likely to succeed.

d. Conclusion re Ground 2A

Based on the foregoing, the undersigned must conclude that appellate counsel was not ineffective in filing to challenge the admission of the van video, because of the limited likelihood of success of establishing clear error by the trial on the factual finding that the evidence did not result from interrogation.

Therefore, this ground for relief must be denied.

E. GROUND 2B – IAAC RE *BRUTON* MOTION IN LIMINE

1. Parties Arguments

Motion – In Ground 2B, Movant argues that appellate counsel was ineffective when he "failed to appeal…the district court's denial of Mahon's *Bruton* motion to preclude introduction of non-testimonial statements of a co-conspirator in a joint trial." (Amended Motion, Doc. 31 at 6-7.)

Response – Respondent argues appellate counsel was not ineffective because the motion had no merit because the trial court properly concluded that the statements were non-testimonial and thus not subject to a Confrontation Clause based exclusion, and that any error was harmless because of the failure to identify improperly admitted statements and other evidence of guilt. (*Id.* at 23-24.)

Reply – Movant replies that the *Bruton* claim has merit because the trial court improperly rejected Ninth Circuit law extending *Bruton* to non-testimonial statements, and the non-testimonial statements were prejudicial, citing *United States v. Larson*, 460

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defendant was in "custody"). Here, reconstructing the lines is no mean task, leaving more than enough room for an appellate judge to conclude that any error is not clear.

F.3d 1200, 1212, n. 10 (9th Cir. 2006), *modified in other regards on rehearing en banc*, 495 F.3d 1094 (2007). (Reply, Doc. 48 at 9.) Movant clarifies that this claim is reference to co-defendant's "statements obtained surreptitiously in the van." (*Id.*)

2. Factual Background

In the van video, co-defendant's discernible comments were limited to what items listed on the search warrant would be found on the farm, confirmation that Scottsdale was the subject of the search, the "little girlfriend" was related to Scottsdale, that he knew it ("she's the one"), that they were going to get Steve and Joos, confirming that he had disposed of the powder, that there were some items like matches and candles, a fuse laying around, asking if Movant checked in a blue ammo can, (DVD, Trial Exhibit 221, Clip 1), affirming they hadn't searched his car, expecting to not see the farm and to be placed in maximum lockdown, who had put powder "back there," that there might be some powder, that it might be transportation, that there were bicycles, that agents were searching a heater and taking pictures of an ammo can, the agents were taking stuff out and going through it (DVD, Trial Exhibit 221, Clip 2), that Moreland had the names of Joos, Kountze, Steve Waddell, Steve Sawyer, that Joos was being raided, (DVD, Trial Exhibit 221, Clip 3), agreeing it would take 1,000 men to raid Joos' place, that they would do his house, agreeing Joos didn't have a peer, that "this guy" "gambled he'd find something here," (DVD, Trial Exhibit 221, Clip 4), that he "knew this day would come," he didn't know where the Scottsdale library is and he had never been there, the victim was at City Hall, (DVD, Trial Exhibit 221, Clip 4a), whose papers were being searched, that agents wouldn't find anything there, that Steve Waddell wasn't "there right now," they had Steve Waddell's name and Steve Sawyer's, he had called Steve that morning and told him to be careful because they are coming down, agents were taking pictures of everything in the house, neighbors had come up, there were cars parked "up this way," they can't find anything, the whole thing is Scottsdale, something Phoenix, Arizona, that Moreland had said __ had made it and ___ delivered it, they had cameras on libraries, he

said the library, "you're being stupid here." (DVD, Trial Exhibit 221, Clip 5.)

Movant raised a Confrontation Clause claim under *Bruton* in his Motion in Limine, seeking to suppress statements by co-defendant. The trial court denied that motion.

The court reasoned that *Bruton* did not bar statements by a co-conspirator during and in furtherance of the conspiracy. As to other statements by co-conspirators not made during and in furtherance of the conspiracy, "such as statements surreptitiously recorded after Defendants were arrested," the court concluded that such statements are not barred by *Bruton*, and because they are not testimonial under the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the were not prohibited under the Confrontation Clause. The court observed that the Ninth Circuit had suggested "in dictum" that *Bruton* may bar the admission of non-testimonial statements of a co-defendant not made in furtherance of a conspiracy. (Attach. GG, Order 12/1/11 (CRDoc. 1300) at 3 (citing *Larson*, 460 F.3d at 1212, n.10).) However, the court opined that "the dictum in *Larson* is incorrect," and that the Confrontation Clause has been repeatedly recognized since *Crawford* as applying only to testimonial statements. (*Id.* at 3-4.)

Appellate counsel did not challenge that ruling on appeal. (*See generally* Attach. T, Opening Brief.)

3. Applicable Law

***Bruton* Only Applies to Testimonial Statements** - In *Bruton v. United States*, 391 U.S. 123, 126 (1968), the Supreme Court held that admission of a co-defendant's *confession* that implicated the defendant at a joint trial violated the defendant's Sixth Amendment Confrontation Clause rights when the co-defendant refused to testify based on his right to remain silent. There is a well recognized exception that *Bruton* does not apply to the introduction of statements by a co-conspirator made during and in furtherance of the conspiracy. *See United States v. McCown*, 711 F.2d 1441, 1448 (9th Cir. 1983); and *United States v. Clark*, 717 F.3d 790, 815 (10th Cir. 2013) (analyzing

post-*Crawford*).

Movant argues that appellate counsel should have argued that the co-conspirator exception does not extend to statements not made in furtherance of the conspiracy, and therefore any such statements must be excluded under *Bruton*.

Bruton is a Confrontation Clause case. Its narrow holding was that a post-arrest confession of a co-defendant accomplice could not be admitted in a joint trial, even though the jury was instructed that the confession could not be considered in convicting the non-confessing defendant.

In adopting the co-conspirator exception, the courts refused to extend *Bruton* beyond its facts to include situations where the disputed statements "were not statements made in a confession, but were statements made…in furtherance of a conspiracy," and did so based upon application of the then controlling standard for application of the Confrontation Clause, *i.e.* whether the "statements substantially met the indicia of reliability." *United States v. McCown*, 711 F.2d 1441, 1449 (9th Cir. 1983). That standard has, however, been substantially altered by *Crawford*, where the Court concluded that the Confrontation Clause applies only if a statement is "testimonial" in nature, for "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006).

While *Crawford* did not explicitly deal with statements by a co-conspirator, it did define the scope of all Confrontation Clause claims. "*Crawford* indicates that the class of testimonial statements that fall within the protective ambit of the Confrontation Clause *includes,* but is not limited to, statements covered also by *Bruton.*" *United States v. Clark*, 717 F.3d 790, 815 (10th Cir. 2013).

Thus, the co-conspirator exception was correctly recognized not because the statements were made in furtherance of the conspiracy, but because that context indicated they were not testimonial. *See Crawford*, 541 U.S. at 51–52 (listing as examples of testimonial statements "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions").

Statements in furtherance of a conspiracy fall within the ambit of non-testimonial statements, but so do other statements by a co-conspirator. So long as those other statements are non-testimonial their admission does not contravene the Confrontation Clause, even if they are not in furtherance of the conspiracy.

Movant's attempts to the limited co-conspirator exception into a general rule, precluding any co-conspirator statement not in furtherance of the conspiracy. Movant reasons: (1) *Bruton* precludes statements by non-testifying co-defendants; (2) the co-conspirator exception applies only to statements in furtherance of the conspiracy; (3) statements by co-defendants not in furtherance of the conspiracy must be barred under *Bruton*. Movant's basis for this expansion is footnote 10 in *United States v. Larson*, 460 F.3d 1200 (9th Cir. 2006), *modified in other regards on rehearing en banc*, 495 F.3d 1094 (2007).

In *Larson*, a panel of the Ninth Circuit was faced with a case charging Larson, Laverdure, Lamere, and Poitra with conspiracy to purchase and distribute methamphetamine. The investigation involved an informant's purchase of drugs from Larson, another informant's purchase of drugs from Laverdure, and a third informant's purchase of drugs from Poitra and Lamere, with Lamere acknowledging obtaining some of his drugs from Laverdure. Poitra and Lamere pled guilty, agreeing to testify against Larson and Laverdure in exchange for reduced charges. Larson and Laverdure proceeded to trial, and on cue Poitra and Lamere testified to obtaining their drugs from Larson through Laverdure. The confrontation issue arose when Lamere testified (over the defense's hearsay objections) that Laverdure had told him that the drugs came from Larson, and that a third supplier ("Fatso") had told him Larson was the source of the drugs.

On appeal, Larson and Laverdure argued, *inter alia*, that permitting Lamere to testify about the out of court statements by Laverdure and Fatso (inculpating Larson) was a violation of the hearsay rules, and a Sixth Amendment violation under *Crawford*. When addressing the latter, the panel introduced the argument, and appended the

following footnote before concluding that *Crawford* did not apply to statements made in furtherance of the conspiracy:

> The government argues that the court could affirm the admission of Laverdure's out-of-court statement against Laverdure as an admission by a party opponent. But if the statement were not the statement by a coconspirator, most likely *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and its progeny bar its use in the joint-trial setting.

460 F.3d at 1212, n.10. This footnote makes three non-controversial observations. The first is that a portion of the disputed evidence was theoretically admissible against Laverdure, because it was Laverdure's own statement that was being admitted. Second, the court observed that even so, ordinarily because this was a joint trial, it could not be admitted because of Larson's Confrontation Clause rights as recognized by *Bruton*. In so doing, the court also recognized, however, that *Bruton* would not apply in this instance because "the statement [was] the statement by a co-conspirator."

In other words, the *Larson* panel simply observed that while Laverdure's statement could ordinarily be admitted against Laverdure as an admission against interest, it could only admitted in this joint trial with Larson on the basis that it was permissible under the co-conspirator exception to *Bruton*.

Of importance to the instant case is that the statements of Laverdure were not only those of a co-conspirator, but were plainly made during and in the furtherance of the conspiracy. Thus, the *Larson* panel had no reason to consider the applicability of *Bruton* to co-conspirator statements not in furtherance of the conspiracy, and did not address such a situation in their footnote on *Bruton*.

Moreover, the *Larson* panel went on to discuss whether, because the statements were non-testimonial and thus not within the Confrontation Clause, they still were subject to the "adequate indicia of reliability" standard for hearsay established in pre-*Crawford* cases such as *Ohio v. Roberts*, 448 U.S. 56 (1980), but ultimately concluded that the co-conspirator exception to the hearsay rule sufficed to permit admission. Upon rehearing *en banc*, the Ninth Circuit observed that the Supreme Court had since clarified

that *Crawford* eliminated the *Roberts* test, citing *Whorton v. Bockting*, 549 U.S. 406 (2007). The *en banc* court then adopted the balance of the panel's analysis, including that the statements "were made in furtherance of the conspiracy and were nontestimonial" and thus "under *Crawford*, Defendants' Confrontation Clause rights were not violated." *United States v. Larson*, 495 F.3d 1094, 1099, n. 4 (9th Cir. 2007) (*en banc*).

Thus, *Larson* left undisturbed that *Bruton* only applied when out-of-court *testimonial* statements of a co-defendant were being admitted.

In sum, *Larson* would have provided no basis for appellate counsel to argue, contrary to the established law, that the co-conspirator exception to *Bruton* made inadmissible any statements by co-conspirators not made during and in furtherance of the conspiracy, regardless whether they were non-testimonial.

When are Statements Testimonial – The application of *Bruton* depends upon a determination that the out-of-court statements were testimonial, within the meaning of *Crawford*. *Larson,* 495 F.3d at 1099, n. 4.

In deciding under *Miranda* whether the police have engaged in interrogation, the focus is on the police officer's thought processes (whether he should have reasonably anticipated an incriminating response). In *Crawford*, however, the focus is on the declarant's state of mind. The Ninth Circuit has summarized *Crawford's* instruction on what qualifies as "testimonial"

> While the Court in Crawford "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial,' " the Court provided some guidance for ascertaining whether evidence is testimonial. First, the Court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." The Court next offered three "formulations of [the] core class of 'testimonial' statements":
>
> > [(1)] "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," [(2)] "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits,

> depositions, prior testimony, or confessions," [(3)] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]"
>
> The Court also gave examples of clearly testimonial statements- "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... police interrogations."

Jensen v. Pliler, 439 F.3d 1086, 1089 (9th Cir. 2006).

The three formulations identified by the *Crawford* Court all indicated the mindset of the declarant (as opposed to the police) was key: "statements that declarants would reasonably expect to be used prosecutorially"; "formalized testimonial materials"; and "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." In contrast, the court observed that "[a]n off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted." 541 U.S. at 51.

Indeed, it is not necessary that statements be provided in response to any interrogation at all. "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Davis*, *supra*, at 822–823, n. 1. "Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a witness against the defendant, than one who is responding to interrogation." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 316 (2009).

It is true that the *Crawford* Court appeared to reference the "functional equivalent" standard for interrogation from *Innis*.

> We use the term "interrogation" in its colloquial, rather than any technical legal, sense. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 300–301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

Crawford, 541 U.S. at 53, n. 4. But that appears to have been direction that substance should control over form in deciding whether the declarant believed their responses were intended to be used at trial.

The focus on the expectations of the declarant has borne out in case law applying *Crawford*. For example, in *Davis v. Washington*, 547 U.S. 813 (2006), the Court concluded that statements made in response to interrogation by a 911 operator were not testimonial because "its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying." *Id.* at 828. In *Michigan v. Bryant*, 562 U.S. 344 (2011) the Court again addressed statements made in an emergency situation, where "the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a gas station parking lot." *Id.* at 348. The Court focused not on the purpose of the police, but on that of the victim, including the effect of the his medical condition on "the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.* at 364–65. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held a police lab technician's report was "testimonial" because the technician's intent was "the production of evidence for use at trial." *Id.* at 321.

It is true that in *Bryant*, the Court opined: "In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." 562 U.S. at 367. But nonetheless, the underlying question remained what the declarant "necessarily has…in mind when she answers," *i.e.* to testify, *e.g.* for "prosecution." *Id.* at 368. "The inquiry…focuses on the understanding and purpose of …[the] victim." *Id.* at 369. "The language in [*Davis* that the focus is on the declarant] was not meant to [preclude consideration of the interrogator's purpose] to assess the nature of the declarant's purpose, but merely to remind readers that it is the statements, and not the questions, that must be evaluated under the Sixth Amendment." *Id.* at 368, n. 11

(addressing "confusion about whether the inquiry prescribes examination of one participant to the exclusion of the other").

The Supreme Court has made clear that the determination of the purpose of the declarant is an objective one. "That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 562 U.S. at 360.

The witness need not be "accusatory" (e.g. directly accusing the defendant of wrongdoing) for their statements to be considered testimonial, it is enough that statement is offered against the defendant and "is inculpatory [ ] when taken together with other evidence." *Melendez-Diaz*, 557 U.S. at 313.

Finally, a statement may be partially testimonial and partially not. "Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs, and exclude 'the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.'" *Bryant*, 562 U.S. at 365–66 (addressing statements partly directed to an emergency, and partly to provide information for prosecution).

Standard of Review on Appeal – Because Movant raises this claim as one of ineffective assistance of appellate counsel, the standard of review on appeal is relevant.

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017). And, Confrontation Clause violations are subject to harmless error analysis. *Larson*, 495 F.3d at 1107.

4. Application of Law to Facts

a. Testimonial Nature

Even without Movant's misreading of *Larson*, the admission of co-defendant's

statements would have been improper, if they were in fact testimonial.

If the court were convinced that the statements of co-defendant being introduced were testimonial, *e.g.* because made in response to interrogation (including conduct that was the functional equivalent of interrogation), then *Bruton* would apply, making the admission a violation of the Confrontation Clause (even if the statements were not in furtherance of the conspiracy).

Ground 2A depends upon a determination whether Moreland subjected Movant to interrogation. Ground 2B, in contrast, depends upon a determination whether co-defendant's purpose for speaking in the van was "the production of evidence for use at trial." *Melendez-Diaz*, 557 U.S. at 321. Movant proffers no basis for reaching that conclusion.

Indeed, the only circumstance which might remotely suggest that purpose was the suspicion (enunciated by Movant) that they were being recorded. This pronouuncement came at the very beginning of the van videos. (DVD, Trial Exhibit 221, Clip 1 at 7:11:12.) (Because interrogation is not necessary for a statement to be testimonial, ." *Melendez-Diaz*, 557 U.S. at 316, the undersigned considers co-defendants statements from any time after the recognition of the potential for being recorded, even though the conversation with Agent Moreland did not come until much later).

The ensuing conversation in the van suggests that Movant was at times intending to produce evidence for trial (e.g. as suggested by statements of innocence, assertions of the involvement of Scottsdale police, etc.). Indeed, that was in keeping with Movant's general character of regularly trying to make a record of plausible deniability, even in presumably private conversations, as demonstrated by the videos from Catoosa where Movant made obvious efforts to whitewash his instructions to the informant on violent acts as "informational."

Co-defendant, however, did not engage in such obvious efforts. To the contrary, co-defendant was (in comparison to Movant) almost silent, limiting his discussions mostly to the events of the day, including the search and conversation with Moreland.

Indeed, as Movant began to get excited about discrepancies in the story told by Moreland (library vs. City Hall), co-defendant cut him off saying "you're being stupid."

A reasonable person in co-defendant's position, "as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred," *Bryant*, 562 U.S. at 360, would not have been attempting to produce testimony for use at trial. Unlike Movant, co-defendant offered only very limited self-serving assertions of or purported evidence of his innocence, *i.e.* his assertions that he didn't know where the Scottsdale library was and had never been there. Moreover, he appeared to be trying to silence Movant by telling him he was being stupid. Under those circumstances, an objective view of co-defendant's statements were that he was trying to avoid producing evidence for use at trial, while at the same time process together with Movant the events transpiring around them.

With particular regard to co-defendant's comment that Movant was being stupid, while potentially inculpatory, would have not been testimonial. Objectively viewed, that statement would have been intended to avoid evidence for trial, rather than to produce it.

b. Harmless Error

Even if co-defendant's statements could be deemed testimonial, Movant fails to show how they were anything but harmless.

First, in identifying the harm from any error, the statements of Movant in the van video would not be relevant, except insofar as they provide the context for understanding co-defendant's statements. The Confrontation Clause does not protect a defendant from introduction of his own out-of-court testimony. *United States v. Morales*, 477 F.2d 1309, 1316 (5th Cir. 1973).

The content of co-Defendant's statements were innocuous to Movant. Most related only to narrating the ongoing search, and addressing the information provided by

Agent Moreland (i.e. the searches of their associates).[11] There was no admission of contraband to be found in the search, with the exception of a fuse and potentially some black powder. But evidence that Movant was generally engaged with bombs was overwhelming. If co-defendant had proffered some statement tying Movant to the Scottsdale bomb, that would quite different. But such was not the case.

Co-Defendant's assertions that he knew the day would come was potentially inculpatory, but could easily be seen by a jury as referring to the expected results of many years of publicly espousing a racist, anti-government set of views, rather than any particular offense for which Movant was convicted.

c. Deficient Performance by Appellate Counsel

Based on the foregoing, appellate counsel could have reasonably concluded that a *Bruton* claim was unlikely to succeed because of the likelihood that the appellate court would conclude co-defendant's statements were not testimonial, and/or that any error was harmless.

Accordingly, Ground 2B is without merit and should be denied.

F. GROUND 3 – IAAC RE POLYGRAPH

1. Parties Arguments

Motion – In Ground Three, Movant argues that appellate counsel was ineffective when he failed to appeal the grant of the prosecution's motions in limine precluding use of polygraph evidence or refusal to take a polygraph. (Amended Motion, Doc. 31 at 8.)

Response – Respondent argues that in light of the applicable appellate standard of review on decisions excluding polygraph evidence (beyond the pale of reasonable justification), and the harmlessness of any error because of the questionable value of the

[11] Arguably, such reactions would not even be considered testimonial because they would be "speaking about events as they were actually happening, rather than 'describ [ing] past events,'" Davis, 547 U.S. at 827, and thus not trying to "establish or prove past events potentially relevant to later criminal prosecution," *id.* at 822.

evidence, the risks of confusion and delay, and the ultimate admission of some polygraph evidence, appellate counsel was not ineffective in failing to raise this claim. (Response, Doc. 44 at 25-26.)

Reply – Petitioner replies that an exception to the normal inhospitable view towards polygraph evidence applied because the fact of the testing (apart from any reliability of the results) was an "operative fact," and the purpose of the polygraphs were not the results (which were either non-existent or invalidated) but the fact that no follow-up investigation was pursued. Petitioner further argues that the traditional opposition to polygraph evidence has been eroded by advances in reliability. (Reply, Doc. 48 at 15.)

2. Factual Background

Motion in Limine - Before trial, the prosecution filed a Motion in Limine (Attach. HH, CR Doc. 961) seeking to exclude evidence of any polygraph testing. The prosecution argued that the only polygraph evidence related to testing of City of Scottsdale employees (not defendants), and all were exculpating or deemed invalid. The trial court granted the motion, relying on Federal Rule of Evidence 403, based on a finding "that the dangers of unfair prejudice, misleading the jury, and waste of time substantially outweigh the minimal probative value of the polygraph evidence in this case." (Attach. JJ, CR Doc. 1129 at 2.)

In opposing the motion, the defense focused on two sets of polygraph evidence: the false negative test of Steve Anderson, and the refusal to test by Greg Olsen.

Steve Anderson was a City of Scottsdale employee who at the time of the bombing was engaged in a lawsuit against City employees, including the victim, Don Logan, arising out of an employment dispute. As noted by Respondent, despite the original order precluding polygraph evidence, evidence of this testing was ultimately introduced at trial through questioning by the prosecution of ATF Agent Curran.[12]

[12] The questioning was conducted by the prosecution because, during the defense's case, on cross-examination of Agent Curran by the prosecution, the defense argued that

BY MR. BOYLE:

* * *

Q. Now, when we talked about Mr. Anderson, you discussed that on, was it July 14th of 2004, he agreed to interview with you?
A. Yes.
Q. And it was after that that you then immediately went to his house and did a search?
A. Yes.
Q. On that day as well, did you ask him if he would submit to a polygraph examination?
A. Yes.
Q. Did he have the option to decline?
A. Yes.
Q. What did he say?
A. He said he would -- he would agree to be polygraphed.
Q. And, in fact was a polygraph set up for him?
A. Yes.
Q. On August 18th of 2004, did he show up to do a polygraph?
A. Yes.
Q. If I could refer you without actually -- to the – pardon me one second.

You agree he took the polygraph?

A. Yes.
Q. Do you agree that according to the polygraph examiner, he was asked questions about whether he was involved in the Logan bombing?
A. Yes.
Q. And according to the polygraph examiner, he was determined to be not deceptive with regard to the design, construction, or mailing of an explosive device sent to Logan on February 26th, 2004?
A. Yes.
Q. Now, later, over a year later, on September 9 of 2005, a subsequent review of that polygraph was conducted. Do you agree with that?
A. Yes.

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introduction of the polygraph evidence on Anderson was necessary to address Curran's purported basis for terminating the investigation of Anderson. The trial court summarized its thinking on this evidence as follows:

> THE COURT: Well, I think -- I think the concern Ms. Hull has expressed, if I understand it, is that the point at which Inspector Curran decided to move on to people other than Anderson it was not because of the pole camera or the house search or the DNA. It was because he had passed a polygraph. And that polygraph was later found to be invalid. I think her point is that if she were able to question Inspector Curran, he would say when I moved on, it was after he passed the polygraph, and, therefore, what the jury doesn't understand is that his decision to move on was based on a factor they haven't heard and one that was later called into question by the subsequent review of the polygraph.

(R.T. 2/8/12, CR Doc. 1826 at 3465-3466.)

> Q. And in September of 2005, you -- there is an entry that indicates that the postal service reviewed the first polygraph examination of Steve Anderson, right?
> A. Yes.
> Q. And they reviewed the examination results from that prior examination in August that showed that Anderson had passed the polygraph. But they issued a new report, correct?
> A. Yes.
> Q. And the new report says, quote: No opinion can be rendered with regard to this polygraph examination due to incorrect question formulation. An additional testing of subject Steven S. Anderson is suggested by the national polygraph manager technical services division, agreed?
> A. Agreed.
> Q. And no follow-up examination was done of Mr. Anderson?
> A. Not that I know of.

(R.T. 2/8/12, CR Doc. 1826 at 3493-3495.)

The prosecution again brought in evidence of the polygraph testing during the rebuttal case, on examination of Anderson.

> BY MR. BOYLE:
> Q. Finally, as part of your cooperation in the case, did the inspectors ask you whether or not you would be subjected to a polygraph?
> A. [By Steve Anderson] Yes.
> Q. Did you decline or agree?
> A. I accepted. Is that microphone working?
> * * *
> BY MR. BOYLE: Q. Did you decline or agree?
> A. My apologies. I agreed.
> Q. Was that immediate or did that happen later when you had to show up?
> A. The initial request was during the interview where they collected ammunition. They indicated they may want to request a polygraph from me. I agreed that I would take one if they did so. A few months later, they requested I take a polygraph and I agreed and I took a polygraph.

(R.T. 2/15/12, CR Doc. 1829 at 4089.)[13]

Greg Olsen - The second set of polygraph evidence referenced by the defense involved another City of Scottsdale employee, and law enforcement officer, Glen Olsen, a supervisor and friend of Anderson, who had been disciplined as a result of an investigation into the release of confidential information about a supervisor's

[13] In an ironic (if not intentional) twist, the prosecution's opposition to the polygraph evidence ultimately resulted in the prosecution securing admission of the favorable (if seen as reliable, despite the structural issues) polygraph result on Anderson, without the defense having the ability to challenge the reliability of the polygraphs or introduce evidence of Olsen's refusal to submit to a polygraph.

background information, who refused to submit to a polygraph. (R.T. 2/7/12, CR Doc. 1825 at 3138-3139, 3164-3165.)

In excluding this evidence on the basis of the motion in limine, the trial court reasoned:

> Jurors unfamiliar with polygraph reliability may assume that a person's refusal to take a polygraph must be based on that person's guilty knowledge, rather than other legitimate reasons for refusing. Jurors might unfairly conclude that Olson's refusal was a much more significant event in the investigation than in fact is the case when one appreciates the limited value of polygraphs. What is more, the government likely would be required to present evidence concerning the limited value of polygraph testing, evidence that would unduly delay the completion of this trial. Given the diversity and complexity of issues in this case) the Court cannot conclude that side litigation about the reliability of polygraph testing and the significance of a refusal to take such a test would be a productive use of time for the parties, the jury, or the Court.

(Attach. JJ, Order 8/11/11, CR Doc. 1129 at 4.)

Despite having made an exception for evidence related to the polygraph of Anderson, the trial court refused to permit evidence on this issue. (*See* R.T. 2/10/12, CR Doc. 1827 at 4037-4038.) The court explained:

> THE COURT: Nothing asked Inspector Curran touched on Glenn Olsen. So nothing in the rebuttal case up to this point has opened that door. I continue to be of the view that I expressed in writing and when we addressed the Anderson issue that polygraphs should not be mentioned in the case under Rule 403 for the reasons that I put in my order.
>
> We made an exception to that because of the unique circumstances of the Anderson investigation and the specific question the Government asked. And we were careful about how we let that in. But that was not intended to be a general opening of the door to polygraph information. I still think we need to stay away from that.

(*Id*)

Appellate counsel did not challenge that ruling on appeal. (*See generally* Attach. T, Opening Brief.)

3. Applicable Law

In *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), the D.C. Court of

Appeals held that a "systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

Relying on *Frye,* the Ninth Circuit once maintained a *per se* prohibition on polygraph evidence, holding that "polygraph evidence may not be admitted to establish the truth of statements made during the polygraph examination unless the parties have stipulated to the admissibility of the polygraph results before the examination is administered, and the court is satisfied that the examination has been administered in a manner which supports the reliability of the polygraph results." *Brown v. Darcy*, 783 F.2d 1389, 1391 (9th Cir. 1986). The rule has been based on "significant questions regarding the reliability of polygraph examinations…[and] because it has an overwhelmingly prejudicial effect when it is inaccurate, interferes with the jury's authority to determine credibility, and imposes a burden on district courts to review the reliability of polygraph evidence in each case." *Id.* Even then, however, the Circuit held: "If the polygraph evidence is being introduced because it is relevant that a polygraph was administered regardless of the results, or because the polygraph examination is the basis of the cause of action [e.g. in a sexual discrimination suit against the polygraph examiner, or a professional liability suit against a polygraph examiner] then the polygraph evidence may be admissible as an operative fact." *Id.* at 1397.

In 1993, the Supreme Court issued its decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), holding "that Federal Rule of Evidence 702, governing the admission of scientific expert testimony, superseded *Fry* [ ], which had required scientific testimony to be generally accepted in the relevant scientific community to be admissible." *United States v. Cordoba*, 104 F.3d 225, 227 (9th Cir. 1997), *as amended* (Feb. 11, 1997). Rule 702 required a judge faced with a proffer of expert scientific testimony to "determine at the outset, pursuant to Rule 104(a), whether

the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. Thus, in 1997 the Ninth Circuit concluded "that *Daubert* effectively overruled *Brown*'s *per se* rule under Rule 702 against admission of unstipulated polygraph evidence… [and] any *per se* rule created by *Brown* that unstipulated polygraph evidence is always inadmissible under Rule 403." *Cordoba*, 104 F.3d at 228 (9th Cir. 1997), *as amended* (Feb. 11, 1997). Thus, the Ninth Circuit directed that the trial judge "must not only evaluate the evidence under Rule 702, but consider admission under Rule 403."[14]

Here, the trial court relied on Federal Rule of Evidence 403 in excluding the polygraph evidence. Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." "Evidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." *United States v. Yazzie*, 59 F.3d 807, 811 (9th Cir.1995) (emphasis in original) (internal quotation mark omitted).

"[T]he exclusion of evidence offered by the defendant in a criminal prosecution under Rule 403 is an extraordinary remedy to be used sparingly. The danger of unfair prejudice must not merely outweigh the probative value of the evidence, but *substantially* outweigh it." *United States v. Haischer*, 780 F.3d 1277, 1281-82 (9th

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[14] The holding in *Cordoba* apparently did not effectively kill *Brown's per se* rule. *See United States v. Alvirez*, 831 F.3d 1115, 1125 (9th Cir. 2016) ("In this circuit, it is well-established that a polygraph examination may not be admitted to prove the veracity of statements made during the examination.") (citing *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988), a pre-*Daubert* decision based on *Brown*). *See also Hasan v. Ishee,* 2018 WL 898970, at *25 (S.D. Ohio Feb. 15, 2018) (citing *Alvriez* and detailing recent decisions from other circuits on the admissibility of polygraphs); and *United States v. Christensen*, CR-14-08164-PCT-DGC, 2016 WL 4138278, at *1 (D. Ariz. Aug. 4, 2016), *aff'd* on other grounds, 705 Fed. Appx. 599 (9th Cir. 2017) (citing *Alvirez* for the proposition that "polygraph results are clearly inadmissible in a criminal case").

Cir. 2015) (quotations, alterations, and citations omitted).

Nonetheless, because this claim arises in the context of ineffective assistance of appellate counsel, the appropriate standard for evaluating the potential success of the argument is that applicable on appeal. That standard is highly deferential to the trial court.

> In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings…This is particularly true with respect to Rule 403 since it requires an 'on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant.'" Under this deferential standard, courts of appeals uphold Rule 403 rulings unless the district court has abused its discretion.

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384, 128 S. Ct. 1140, 1144–45, 170 L. Ed. 2d 1 (2008) (quoting 1 S. Childress & M. Davis, Federal Standards of Review § 4.02, p. 4–16 (3d ed.1999)).[15]

"Where an evidentiary error has occurred in a criminal prosecution, we then review de novo whether the error rises to the level of a constitutional violation. If it does, we must reverse the conviction unless we conclude that the error was harmless beyond a reasonable doubt." *Haischer*, 780 F.3d at 1281 (quotations and citations omitted). "[T]he rule requiring a new trial when a district court erroneously admits prejudicial expert testimony in a civil trial, *see Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457 (9th Cir.2014) (en banc), also applies to the erroneous exclusion of expert testimony from a criminal trial." *United States v. Christian*, 749 F.3d 806, 808 (9th Cir. 2014).[16]

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/ /

[15] However, if the appellate court "decides the record is sufficient to determine whether expert testimony is relevant and reliable, it may make such findings." *Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457, 467 (9th Cir.2014) (en banc).

[16] Although issued after Movant's trial, these decisions on the appellate standard were adopted prior the October 20, 2015 conclusion of Movant's direct appeal. (*See* Amended Opinion and Memorandum Decision, CR Doc. 1864.)

4. Application of Law to Facts

At the outset, Movant fails to reply to the Respondent's contention that the evidence regarding the Anderson polygraph was admitted. Movant offers nothing to show that there was more evidence that could or should have been admitted regarding Anderson. Accordingly, the undersigned concludes that any challenge based on exclusion of evidence of Anderson's polygraph would have been futile.

With regard to the *Olsen* polygraph, Movant fails to show a basis for concluding that the appellate court would have found an abuse of discretion by the trial court.

Movant's argument is that the refusal of the polygraph was an "operative fact," the relevance of which did not depend upon the reliability of any testing, and thus governed under the exception to the *Brown* per se rule of exclusion. (Reply, Doc. 48 at 14, *et seq.*)

Indeed, if the trial court had excluded the evidence under the *per se* rule in *Brown*, then that decision would have been plainly erroneous, both because *Brown* did not extend to polygraphs as operative facts, and because *Brown* had long been overruled.

But the trial court expressly, and appropriately, eschewed the rule of *Brown*.

> In *United States v. Cordoba*, the Ninth Circuit eliminated the *per se* rule excluding the admission of polygraph evidence, but expressed no "new enthusiasm for admission of unstipulated polygraph evidence" and noted that "polygraph evidence has grave potential for interfering with the deliberative process." 104 F.3d 225, 228 (9th Cir. 1997). After *Cordoba*, "district courts are free to reject the admission of polygraph evidence on the basis of any applicable rule of evidence without analyzing all other potential bases for exclusion." *United States v. Benavidez-Benavidez*, 217 F.3d 720, 724 (9th Cir. 2000).

(Attach. JJ, Order 8/11/11, CR Doc. 1129 at 2.)

Therefore, the status of the Olsen's refusal as an "operative fact" was not controlling, although perhaps not irrelevant.

Movant also apparently argues that because "[t]he truth or falsity of any test result was not at issue or being presented as evidence," there was no "danger of unfair prejudice to the government." (Reply, Doc. 48 at 16-17.) But that ignores that the basis

for a finding of unfair prejudice was not the unreliability of an actual test, but the risk that a juror might assume that the refusal of the "polygraph must be based on that person's guilty knowledge, rather than other legitimate reasons for refusing." (Attach. JJ, Order 8/11/11, CR Doc. 1129 at 4.) This was particularly true for a law enforcement official like Olsen, who may have been likely to be familiar with the reliability issues with polygraphs. Moreover, it ignores that avoiding that erroneous assumption would likely require "evidence concerning the limited value of polygraph testing, evidence that would unduly delay the completion of this trial." *Id.*

In sum, Movant fails to establish a viable basis on which appellate counsel could have mounted a challenge to the exclusion of the polygraph evidence. Consequently, Ground 3 must be denied.

G. GROUND 4 – IAAC RE CO-CONSPIRATORS

1. Parties Arguments

Motion – In Ground Four, Movant argues that appellate counsel was ineffective when he failed to appeal the trial court's denial of the defense's request to present evidence of the absence of indictments against co-conspirators Metzger and Joos. (Amended Motion, Doc. 31 at 9.)

Response – Respondent argues that the trial court's decision was appropriate under Federal Rules of Evidence 402 and 403. (Response, Doc. 44 at 27-28.) Respondent also argues any error was harmless. (*Id.* at 28.)

Reply – Movant does not reply on this ground. (*See generally* Reply, Doc. 48.)

2. Factual Background

During trial, the government filed a motion in limine to preclude the defense from asking witnesses whether co-conspirators other than Defendants had been charged. (Attach. MM, CR Doc. 1459.)

Over defendants' objections, the trial court granted the motion based on confusion

to the jury resulting from the "incongruity of [the defense] taking a position that the indictment is not evidence and cannot be considered by the jury, and yet at the same time taking the position of the absence of an indictment is evidence that can be considered by the jury." (Attach. L, R.T. 1/20/18, CR Doc. 1817 at 1410.) The prosecution then made an offer of proof that "Robert Joos was convicted and sentenced to prison for possession of explosives," (*id.* at 1416), or more precisely for being a "felon in possession of firearms and explosives," (*id.* at 1417).

The court noted that if it allowed the defense argument, it would have to permit the government "to put in front of the jury the fact that Mr. Joos was indicted, tried, and convicted of possessing explosives, and is in prison" – "prejudicial" evidence that would lead to "something of a mini trial [about] the Joos case." (*Id.* at 1417-1420.) The defense responded that it would likely object to such evidence, or at a minimum insist on "more explanation of exactly what the charge was." (*Id.* at 1417.)

Appellate counsel did not challenge that ruling on appeal. (*See generally* Attach. T, Opening Brief.)

3. Application of Law to Facts

Rule 403 permits the court to exclude otherwise relevant information if its probative value is substantially outweighed by the risk of "confusing the issues." Movant proffers nothing to counter Respondent's argument that the trial court's decision was appropriate under Rule 403.

Indeed, this Court has nothing on which to basis a contrary decision, other than Movant's conclusory assertions in his Motion that the "district court's ruling was appropriate for appeal." "It is well-established that mere conclusory allegations are not sufficient to warrant relief under a 2255 motion." *Stein v. U.S.*, 390 F.2d 625, 627 (9th Cir. 1968). "Mere conclusory allegations do not warrant an evidentiary hearing." Shah v. U.S., 878 F.2d 1156, 1161 (9th Cir. 1989).

This ground for relief should be denied.

H. GROUND 5 – IAAC RE MOTION FOR SANCTIONS

1. Parties Arguments

Motion – In Ground Five, Movant argues that appellate counsel was ineffective when he failed to appeal the trial court's denial of Mahon's request for sanctions against the government for notifying confidential informant Rebecca Williams that the $100,000 reward was not contingent upon getting guilty verdicts in the case. (Amended Motion, Doc. 31 at 15.)

Response – Respondent argues that the trial court properly found no violation of Rule 615, any violation was cured by permitting cross examination of the CI on the issue of the reward, and any error was harmless given that the prosecution's notification did not alter the CI's testimony. (Response, Doc. 44 at 28-30.)

Reply – Movant does not reply on this ground. (*See generally* Reply, Doc. 48.)

2. Factual Background

At the final pretrial conference, the court effectively issued an exclusionary rule order under Federal Rule of Evidence 615 (excluding witnesses from remainder of trial).

> THE COURT:
> * * *
> Couple of other minor housekeeping matters. I assume the rule is going to be invoked.
> MS. WILLIAMS: Yes, Your Honor.
> THE COURT: I'm going to leave it to both sides to advise your own witnesses of the rule being invoked and what it means.

(R.T. 12/23/11, CR Doc. 1363 at 82.) (*See also* R.T. 1/12/12, CR. Doc. 1806 at 305 (counsel referring to the "rule of exclusion"); R.T. 1/26/12, CR Doc. 1820 at 2194 ("THE COURT: Well, yeah, the rule is invoked. I think counsel is all aware of it."); and R.T. 2/15/12, CR Doc. 1829 at 4076 ("THE COURT: The rule has been invoked.").)

At a pretrial hearing, the government's paid, confidential informant had testified she had been promised a $100,000 reward from the U.S. Postal Service if the trial resulted in convictions. (Attach. NN, R.T. 9/22/10, CR Doc. 1803 at 82.) During trial, after the CI's first day of testimony, the prosecution advised the CI, in the presence of

the case agents, that any reward was not contingent on the verdict. (R.T. 1/25/12, CR Doc. 1819 at 1902-1903.) The defense objected on the basis that it appeared to be interfering with the witness, and had been conducted in the presence of the other witnesses, in violation of Federal Rule of Evidence 615 (exclusion of witnesses), and as an attempt to take the sting out of anticipated the impeachment based on a contingent reward. (*Id.* at 1905-1907; 1913-1914.) The defense asked for a finding of contempt and that the CI's testimony be stricken and she be precluded from testifying. (*Id.* at 1919.)

In responding to the objection, the prosecution represented: "We did not tell her the substance of any testimony by Agent Moreland. She was never told any substance of what happened here in the courtroom during trial." (R.T. 1/24/12, CR Doc. 1819 at 1915.)

The trial court rejected the argument that correcting what was perceived to be a witness's incorrect testimony was somehow interfering with the witness. "I think a lawyer, not only can do that but has an obligation to do that if a witness is testifying incorrectly." (*Id.* at 1922.) The court rejected the argument under Rule 615, concluding:

> It seems to me that clearly under Rule 615(3), case agents and investigators can be present in the courtroom. I don't see anything inappropriate with those individuals meeting with fact witnesses or other witnesses before they testify with counsel, provided counsel and the investigator or case agent don't recount what has been said in the trial. And the Government has avowed that they didn't do that.

(*Id.* at 1923.) The court also declined to permit the defense to voir dire the witness on the issue in front of the jury, leaving the defense to address it on cross-examination. (*Id.* at 1925-1926.)

In the meantime, the defense produced a press release on the reward, representing that it promised the reward "upon arrest and conviction." (*Id.* at 1931.) The prosecution responded that despite the news release, agents are uniformly aware that rewards are never contingent upon a conviction. (*Id.* at 1992-1993.) The Court concluded that the press release did not change his conclusion on excluding the CI's testimony or a finding

of a Rule 615 violation. (*Id.* at 1999-2000.)

The Court issued the following text order:

> ORDER as to Dennis Mahon, Daniel Mahon. At the close of trial today, defense counsel asked the Court to order that prosecution attorneys not talk with Inspector Sartuche over the weekend, or other witnesses during the remainder of the trial. Defense counsel based this request on Rule 615 and their contention that they have not been able to meet with many law enforcement witnesses, while government lawyers have had years to meet with them. The prosecutors responded that no rule prohibits them from meeting with witnesses and that defense counsel have also had years to seek interviews of law enforcement witnesses. The Court took the matter under advisement. The Court concludes that Rule 615 does not prohibit counsel for either party from meeting with witnesses during the course of trial. As a leading treatise explains, courts invoking Rule 615 "usually permit the witnesses to discuss their own or other witnesses' testimony with counsel for either side." Vol 4 Weinstein's Federal Evidence § 615.06 at 615-28 (2d ed. 2011); see also United States v. Rhynes, 218 F.3d 310, 317 (4th Cir. 2000) ("the relevant authorities interpreting Rule 615, including court decisions and the leading commentators, agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party"). The Court accordingly will not direct counsel from either side to refrain from meeting with witnesses during trial.

(M.E. 2/3/12, CR Doc. 1564.)

On cross-examination, the defense questioned the CI on the reward, who repeated the assertion that the reward was contingent upon a conviction. (*Id.* at 2013-2015, 2032; R.T. 1/31/12, CR Doc. 1821 at 2394.) On redirect, after further objections by the defense, the prosecution addressed the issue with the CI.

> BY MR. BOYLE:
> Q. Ms. Williams, I was asking you questions about your understanding regarding the reward. I think you just told us that initially you believed that the reward was connected to a conviction. Do you remember saying that?
> A. Yes.
> Q. All right. Prior to testifying, did you meet with me and Agent Moreland at the U.S. Attorney's office?
> A. Yes.
> Q. And at that time, were you instructed that there was no connection between the reward and the conviction?
> A. Yes.
> Q. Is that your understanding now?
> A. Yes.
> * * *
> Q. This meeting regarding the reward prior to trial, was that a day or two before you testified?

A. Yes.

(*Id.* at 2411-2412.) The witness confirmed that the confidential informant agreement (Exhibit 642-A) included the sentence: "I understand that any monetary or other type of reward given to me by ATF will not be contingent upon the prosecution, conviction or punishment of individuals." (*Id.* at 2412.)

Appellate counsel did not raise this issue on appeal. (*See generally* Attach. T, Opening Brief.)

3. Application of Law to Facts

Movant appears to have abandoned this claim, leaving this court with nothing on which to basis a grant of relief decision, other than Movant's conclusory assertions in his Motion that the "district court's ruling was appropriate for appeal." On that basis alone, the claim should be denied as conclusory. *Stein*, 390 F.2d at 627; *Shah*, 878 F.2d at 1161.

Even assuming that Movant's intent is to simply repeat trial counsel's arguments, Movant points to no authority for the proposition that an attorney cannot meet with a witness during trial to attempt to correct erroneous testimony. To the contrary, at least a prosecutor has a constitutional duty to do so. In *Napue v. People of State of Ill.*, 360 U.S. 264, 265 (1959), "the principal state witness, then serving a 199-year sentence for the same murder, testified in response to a question by the Assistant State's Attorney that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had in fact promised him consideration, but did nothing to correct the witness' false testimony." The Court reversed, concluding that "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment." *Id.*

Moreover, there appears no basis to conclude that the inclusion of the case agents in the discussion with the CI was a violation of Rule 615. That Rule provides: "At a party's request, the court must order witnesses excluded so that they cannot hear other

witnesses' testimony." "The purpose of this rule is to prevent witnesses from 'tailoring' their testimony to that of earlier witnesses." *United States v. Ell*, 718 F.2d 291, 293 (9th Cir.1983).

In furtherance of that purpose, some Circuits have held that the invocation of the exclusion of Rule 615 extends to separating witnesses from conversing outside the courtroom about their testimony. But there is a division among the circuits, and the Ninth Circuit does not appear to have taken a side. *See* Kurtis A. Kemper, *Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence*, 181 A.L.R. Fed. 549 (Originally published in 2002) at §§ 13-14. Indeed, it was just a few months ago that the Ninth Circuit addressed the "open question in our circuit…whether Rule 615 prohibits a sequestered witness from not only attending a hearing or trial, but reading transcripts from it." *United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018).

Thus, it is not all clear that, absent a specific order, the imposition of exclusion under Rule 615 prohibits witnesses from discussing during trial their anticipated testimony (as opposed to actual testimony). Movant points to no such order in this case, and the undersigned has found none.

Moreover, Rule 615 does not encompass all witnesses. Of relevance to this case, it "does not authorize excluding…an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney," Fed. R. Evid. 615, and the Advisory Committee Notes to the 1974 Enactment conclude that "that investigative agents are within the group specified" under that exception.

Finally, where Rule 615 has been invoked, and violated, the Ninth Circuit has held that permitting cross-examination can be an appropriate remedy. "We have long recognized cross-examination as a suitable remedy for a Rule 615 violation, at least where, as here, the violation of the rule was not deliberate." *Robertson*, 895 F.3d at 1216. It is true that *Robertson* appeared to impose a condition that the violation not be deliberate. But this does not require that the offending conduct be unintended, just the violation. In *Robertson*, "the government violated Rule 615 by allowing two agent

witnesses to review transcripts of a pretrial evidentiary hearing (at which [another agent] testified) before the two agents testified at trial." *Id.* at 1215.

Here, not only was the defense was permitted to cross-examine the witness on the issue, as in *Robertson*, but the prosecution led the CI to volunteer information about the correction of her testimony. And, as in *Robertson*, Movant "makes no argument for why this common remedy was insufficient under the circumstances presented here." *Id.* at 1216.

This ground for relief must be denied.

I. GROUNDS 6, 7 AND 8 - COUNT 3

1. Parties Arguments

Motion – In Ground Six, Movant argues trial counsel was ineffective in presenting his entrapment defense concerning Count 3 (based on Movant teaching the information how to build a bomb to send to the fictitious molester). (Amend. Motion, Doc. 31 at 15.) In Ground Seven, Movant argues that defense counsel was ineffective when she withdrew the request for a jury instruction on the defense of entrapment, and for failing to preserve the issue by seeking a Rule 29 judgment of acquittal based on entrapment or insufficient evidence. (Amend. Motion, Doc. 31 at 16.) In Ground Eight, Movant argues that appellate counsel was ineffective when he "failed to appeal the district court's denials of motions to dismiss Count Three based upon insufficient of evidence or the government's entrapment." (Amended Motion, Doc. 31 at 16.)

Response – In response to Ground Six, Respondent argues that trial counsel presented the relevant evidence on entrapment (Response, Doc. 44 at 31-32). In response to Ground Seven, Respondent argues that trial counsel could have made a reasonable tactical decision to forego the entrapment defense (and jury instruction) to avoid having to admit the related criminal conduct, and a Rule 29 motion would have been unsuccessful given the evidence of predisposition. (*Id.* at 34-35.) Finally, Respondent argues that the trial court's ruling was correct, both as to the sufficiency of

the evidence, and the entrapment defense, and any argument to the contrary could have been properly rejected as a weaker issue for appeal (*Id.* at 35-37.)

Reply – Petitioner does not reply with regard to the insufficient evidence claim, but does argue that there was a reasonable probability the entrapment argument would have prevailed, because of the lack of predisposition. (Reply, Doc. 48 at 17.)

2. Factual Background

Count 3 of the Superseding Indictment described Count 3 as:

> From on or about January 29, 2005 up to and including on or about May 15, 2005, in the District of Arizona and elsewhere, defendant DENNIS MAHON taught and demonstrated the making and use of an explosive and destructive device, and distributed information pertaining to in whole and in part the manufacture and use of an explosive and destructive device, in that DENNIS MAHON taught an individual how to blow-up a house using simple tools and a propane tank, taught that individual how to construct a package pipe-bomb, mailed to that individual in Wickenburg, Arizona, a book titled Forgive? Forget it! Creative Revenge at its Best, and a book titled Poor Man James Bond 2, with the intent that the teaching, demonstration, and information be used for and in furtherance of an activity that constitutes a Federal crime of violence, that is, a violation of Title 18, United States Code, Section 844(d), transportation and attempted transportation in interstate commerce of an explosive for the purpose of killing, injuring, or intimidating an individual or unlawfully damaging and destroying any building, vehicle, or real and personal property.
>
> All in violation of Title 18, United States Code. Sections 842(p)(2)(A).

(Attach. R, Superseding Indictment at 5-6.)

At the beginning of trial, the prosecution identified the factual basis of Count 3:

> THE COURT: To stay on that for a minute, then, it sounds as though you would not disagree with the idea that I need to tell the jury that Count 3 is based only on the teaching in Catoosa, the mailing of the two books in Count 3, and nothing else.
>
> MR. MORRISSEY: That's right.

(R.T. 1/10/12, CR Doc. 1804 at 209.) The trial court's closing instruction on Count 3 identified the charged conduct as:

> THE COURT:
> * * *
> First, beginning on or about January 29th, 2005, and ending on or about May 15th, 2005, in the District of Arizona and

> elsewhere, the defendant taught or demonstrated the making or use of an explosive or destructive device or distributed information pertaining to, in whole or in part, the manufacture or use of an explosive or destructive device.
>
> * * *
>
> The teaching or demonstrating charged in this count consists of the in-person communications between Dennis Mahon and Rebecca Williams in Catoosa, Oklahoma, telephone calls between Dennis Mahon and Rebecca Williams after Catoosa and up to May 15th, 2005, and the mailing by Dennis Mahon to Rebecca Williams of the books entitled "Forgive? Forget it! Creative Revenge at its Best," and "Poor Man's James Bond 2."

(R.T. 2/21/12, CR Doc.1811 at 4423-4424.) In closing argument, the prosecution summarized the evidence on Count 3 as related to the instructions to the informant on building a bomb at Catoosa, Oklahoma, as depicted in the videos in Exhibits 191 and 193. (R.T. 2/21/12, CR Doc. 1811 at 4287-4289.) Those events occurred on February 1, 2005 and February 2, 2005, respectively. (R.T. 1/12/12, CR Doc. 1806 at 498-499.)

Movant's first encounter with the informant was in on January 25th or 26th, 2005, at a trailer park in Catoosa, Oklahoma. (R.T. 1/12/12, CR Doc. 1806 at 490.)

Trial Exhibit 191**,** the surveillance videotape of the informant's trailer, from Catoosa on February 1, 2005, was published. (Attach. O, R.T. 1/13/12 at 632.) In it, Movant and the informant sit in a travel trailer, and talk (after the informant had told Movant about the informant's cousin whose children were being abused by the cousin's husband. Movant stated: "I get involved in the racial causes, not personal problems like yours. But nothing bothers me more than a ____ child abuser. I hate him. I just wanna just kill him. They need to be killed. The Bible says to kill them. The Koran, the Koran says to kill them." Movant then encouraged her to have the mother go to the authorities, but the informant said the police would not listen to her. Movant agreed to call the abuser to get him to stop abusing, and if he didn't he'd burn him with gas, but he would survive. Movant discussed how to shoot someone with it being only assault with a deadly weapon, rather than attempted murder. Movant expressed concern about the emotional impact on the informant from the abuse, and argued that a threat of prosecution would work because of the fear of a child abuser being killed in prison. That conversation lasted a little over two and one half minutes, from 17:13:36 to 17:16:05

After an eight minute gap in the video, Movant then discussed setting a propane gas bomb while the abuser was gone to work, using a propane tank, either in the basement or fed through a small hole, to be ignited by a light switch or a water heater or furnace lighter.

Throughout the admitted portions of the recording, the informant said very little.

Trial Exhibit 193, the videotape from Catoosa from February 2, 2005, was published. (Attach. O, R.T. 1/13/12 at 632, 648.) In it, Movant and the informant sit in the trailer, and talk about "the asshole" with the two girls, and his upcoming birthday. Movant offered to call him, but the informant expressed concern about Movant being recorded. Movant asserted he would never be caught. The informant thought a phone call wouldn't be effective. They discussed books, including "Getting Even," a series written by an ex-CIA agent, and an upcoming retreat and gun show. The informant wanted gather up stuff to send the guy a "present for his birthday." Movant said they could go to Joos and then the gun show and get the Getting Even books. The informant expressed a plan to get even with the molester, and that she wasn't going to get caught. Movant said he wanted to go to the retreat and would vouch for her. Movant told the informant that she was a wonderful, beautiful woman he would like to have kids by. He said he drank when he was burned. He talked about losing money trying to save the white race, and was angry at them. He expressed admiration for Asians and their commitment to children. He talked about going to Robert [Joos's] place, with hunting, etc. and she could live there cheaply and he had pot growing. The informant expressed impatience with not acting to protect the children, and fear that they would be killed. They discussed whether the molester's children would eventually talk. Movant said the molester would not kill the kids. They discussed the risk of getting caught. Movant expressed concern that the informant would be in jail beyond her child bearing years. Informant said she was going to put a package together and send it to the guy. Movant asked to take her to Joos' property. The informant thanked him for his expert advice, reminded Movant he had done stuff and not gotten caught. Movant suggested burning

up his car. Informant said that was going to be enough.

Movant then instructed the informant to buy parts from several different towns, using cash, and altering her appearance. He instructed her to wipe the parts down for fingerprints and DNA, and using gloves when making a bomb. Movant asserted that knowledge was against the law, and confirmed that the informant had no intention of using the knowledge, and that it was all hypothetical. Movant then continued gesturing and whispering, referencing a book on the table. The informant then talked about sending the guy a birthday present in the mail, like a case of wine. Movant continued gesturing and whispering. Movant talked about injecting antifreeze into a wine bottle with a syringe so the seal would be intact, and it would result in kidney failure. He explained the return address would need to be someone he knew, an acquaintance or neighbor or old friend. He suggested using a typewriter. The informant said she wanted something a little more dramatic. She said she liked what he had told her the day before, except for the fuse thing, she wanted him to open it and read a letter. He warned her that you had to be careful with the contacts so you didn't blow yourself up, so he opens the package up, there would be a nine volt battery, black powder or C4 or symtex, a string attached so when he opens the box top it pulls the insulator from the contacts and boom. He talked about in needing to be under a pound. They discussed the construction of the contacts, the string and the box. Movant recommended a one inch pipe bomb, which would "kill him," rather than a bag of black powder. The informant said she didn't want to kill him, just send him a message. He again discussed needing to limit the weight, putting on enough stick on postage stamps, without licking it, and protecting against fingerprints, and talked about how cops could put together little pieces. He said he would help her with something. Movant expressed a belief that molester's should be punished and made an example of. He said he would get her some stuff, and there would be no finger prints. She talked about going to Kingman, which Movant approved of. The informant talked about the post office having dogs, etc. but Movant said as long as it was under a pound, and putting a small amount of garlic on it because the dogs hate it.

Movant said that one by five inches will blow a man's face off and take some fingers off, but it won't kill him. Movant again said he wanted to take her to the property, and how private it was, how people disappeared there. Movant talked about making his own furniture. He talked about being in a Tempe RV park with Dan, but hated the dust, and that it was controlled by ex-Californians. He talked about getting her the Silencer Cookbook and Getting Even books. He said he was going to go to the property on Saturday and shoot his AK-47, and on Sunday he would go to the gun show and pick up some black powder and an electric match. She said he didn't need to do that. He said it was still legal. He suggested by reading Getting Even she would find a better way to "f___ with" him than a bomb. They discussed eating venison at the property, and the effects of hormones in food on the maturation of young girls. Movant talked about lying down with her, holding her close, cuddling. She said the day may come, and patted Movant on the arm. He said he hoped she wasn't a cop. She said he didn't want to get him in trouble. He talked about wearing a hat, etc. to disguise their appearance. They talked about going to the gun show. She asked about using stick on letters to make the letter, putting it into a padded envelope, with the bomb sandwiched in cardboard, attaching it to the fuse, and using a multimeter to check it, and taping it shut. Movant talked about serious but non-fatal injuries. He talked about using clear tape but making sure there were no fingerprints. He talked about preparing the address, and using a return address like a book company, and mailing it somewhere away from there. He talked about the weight limit and disguises. He talked about it being complicated and she asked if he had ever been "hypothetically successful." He said yes. She asked if it had come back on him. He said no, and said it took a lot of time and being very careful. He again talked about getting her the books and finding ways to harass him rather than a letter bomb, like having a construction company deliver gravel on his yard. They talked about getting caught, and how good it was to hide out on the property. Movant talked about agents looking for someone and being afraid of rattlesnakes. He talked about taking skinheads to the property, and them being afraid of a rattlesnake, and Robert

skinning it and cooking it. They talked about the risk of getting bit by snakes while hiking. He again referenced the books and alternatives to a bomb. Movant talked about black powder and an electric match, and the risk of getting caught from a small mistake. They talked about hiding out in the Ozarks. They talked about calling him. They again talked about the bomb, hoping he opened it in his lap, and the expected injuries to his face and hands. They talked about the potential it would hurt him enough he would commit suicide. Movant again talked about wanting to hold the informant, and that she looked German. They talked about the Scottsdale diversity office and how the older white cops were getting fed up.

a. Motion re Entrapment

Prior to trial, Movant filed a motion to dismiss (CR Doc. 479) Count 3 of the Indictment ("intent that the teaching, demonstration, and information be used for and in furtherance of an activity that constitutes a Federal crime of violence, that is, a violation of Title 18, United States Code, Section 844(d)" (interstate transportation of explosive)). (Attach. R, Sup. Indict., CR Doc. 476 at 5.) Movant argued that the government induced him through the use of the confidential informant, and that his lack of predisposition was shown by his history of "exaggeration and drunken rambling" and because the CI "created the offense and then manipulated his emotions until he capitulated." (CR Doc. 479 at 6.) The government responded (CR Doc. 576), and Movant replied (CR Doc. 579).

The court heard evidence and arguments on September 22 and 23, 2010 (Attach. NN, R.T. 9/22/10, CR Doc. 1803), and issued its ruling on October 14, 2010 (Attach. OO, Order 10/14/10, CR Doc. 664). (That ruling also addressed a motion (CR Doc. 467) based on outrageous conduct by the government.) The trial court reasoned that entrapment defenses are generally for the jury to decide, and a motion based on the defense "'must point to 'undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act' by government agents.' *United*

States v. Skurie, 971 F .2d 317, 320 (9th Cir. 1992)." (Attach. OO, Order 10/14/10, CR Doc. 664 at 16.) The court concluded Movant had not met that burden because (assuming inducement) the predisposition of Movant was subject to factual dispute. (*Id.*)

Appellate counsel did not challenge the ruling on the motion to dismiss. (*See generally* Attach. T, Opening Brief.)

b. Insufficient Evidence of Intent

On February 2, 2012, prior to the close of the prosecutions' case, Defendants filed a Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29(a), arguing that the government had failed to prove the offense in Counts 1 and 2 of the indictment on various grounds (Attach. SS, Motion for Aquittal, CR Doc. 1547 at 1-7), and had failed to prove the offense in Count 3 because the evidence did not show Movant actually intended for the CI to commit an imminent lawless act, only constitutionally protected speech (*id.* at 7-8).

The motion was argued on February 2, 2012, and was taken under advisement, with the Court expressing concern about whether, if certain overt acts were not proven, the count failed in its entirety or only as to unproven acts. (M.E. 2/2/12, CR Doc. 1556; R.T. 2/2/12, CR Doc. 1823 at 2814-2827.) On February 10, 2012, the Court issued the following minute order:

> ORDER as to Dennis Mahon, Daniel Mahon. Defendants filed a Rule 29 motion for judgment of acquittal. Doc. 1547. In arguing the motion, Defendants have asserted that the Court can enter partial judgments of acquittal that eliminate some overt acts from Count 1 and some factual allegations from the Superseding Indictment. This issue is still being briefed. In the meantime, however, that Court has concluded that it should not grant Defendants' motion with respect to the charges as a whole. Viewing the evidence in the light most favorable to the prosecution, the Court concludes that a rational trier of fact could find that the essential elements of the crimes charged in each count have been proved beyond a reasonable doubt. United States v. Milwitt, 475 F.3d 1150, 1154 (9th Cir. 2007). The Court bases this decision on the evidence as it existed at the close of the government's case. The Court will await completion of briefing before determining whether a portion of a particular count can be removed through a Rule 29 motion.

(M.E. 2/10/12, CR Doc. 1615.)

The motion was renewed after trial:

> THE COURT: Please be seated.
> All right, Ms. Hull, you said there were a couple of motions you want to make?
> MS. HULL: Oh, Judge, I - - I may have exaggerated. I do have a Rule 29 motion to make. I made it previously. I renew that.

(R.T. 2/15/12, CR Doc. 1829 at 4143.) The motion was ultimately denied. (Attach. UU, R.T. 2/15/12, CR Doc. 1829 at 4148; M.E. 2/15/12, CR Doc. 1657.)

> THE COURT: If there's a case, bring a case, I'll be happy to look at it. But it seems to me that we probably don't need to brief that issue.
> But what that does mean is that we have -- we have had pending for some time the defendant Dennis Mahon's Rule 29 motion for judgment of acquittal. That's at docket 1547. And I have been holding off on a final ruling on that.
> MS. WILLIAMS: I thought you did rule.
> THE COURT: I did. I denied it, but I said I wouldn't deny it finally until we address the partial judgment of acquittal issue. I am now going to deny it completely with the understanding we will talk about what should or should not be in jury instructions and the Indictment when it goes back.
> So I'm going to finally deny 1547 and deny the renewed motion for judgment of acquittal for the same reasons I denied the original motion. I do think there is sufficient evidence that has been presented in this case that when viewed in the light most favorable to the prosecution, could permit a rational trier of fact to find the essential elements of the offenses beyond a reasonable doubt.
> So I'm denying that motion for judgment of acquittal.

(R.T. 2/15/12, CR Doc. 1829 at 4148-4149.)

Appellate counsel did not challenge that ruling on appeal. (*See generally* Attach. T, Opening Brief.)

c. Jury Instruction

Prior to trial, Movant submitted proposed jury instructions (CR Doc. 1342) which included three instructions relating to an entrapment defense. (CR Doc. 1342 at 3 (referencing DF Model Instruction 6.2 and 6.3) and at Defendant's Proposed Jury Instruction 19.) The prosecution voiced no objection to the entrapment instructions. (*See* Response to Proposed Instructions, CR Doc. 1384.)

At the beginning of trial, the prosecution expressed concern that the defense seemed to be pursuing an entrapment defense, but had not given notice of such a defense. Defense counsel responded:

> MS. WILLIAMS: Well, number one, Judge, as before, last time I looked, we don't have to notice entrapment. I don't necessarily have a problem -- I will probably be ready to tell the Court by the end of the defense case, which we will be putting on, whether I'm going to ask for an entrapment instruction.
>
> I say "probably" because I don't know for sure. But I probably will.
>
> THE COURT: But let me stop you there for a minute, Ms. Williams, and ask this question. Let's assume the confidential informant is on the stand during the government's case.
>
> MS. WILLIAMS: Yes.
>
> THE COURT: You stand up and start asking questions about entrapment. The government stands up and says "Objection. Relevancy." What is your response?
>
> MS. WILLIAMS: My response is -- and I was having the same concern when I was listening to Mr. Boyle -- what does that mean, objection, it's about entrapment. What does that mean? Because entrapment means that if, on behalf of Dennis, I put on an entrapment case, it means Dennis is conceding guilt on a point. That is a far cry from presenting evidence about what went on, for example, between Dennis and the confidential informant.

(R.T. 1/11/12, CR Doc. 1805 at 275-276.) The trial court concluded:

> THE COURT: Well, it seems to me that bridge will have to be crossed at the close of the defense case. When you say, "I need to know if they're going to request an entrapment instruction, because if so, I've got some evidence I want to put on."
>
> MR. BOYLE: Agreed.
>
> THE COURT: What is it that this argument calls for me to do today?
>
> MR. BOYLE: Number one, it gives the defense notice and the Court notice that that is when we believe they will need to make their call on the entrapment instruction. And I believe it's an important point, because if they use that instruction, we will have a rebuttal case on it.
>
> And the second one is just also to let you know if there are straight entrapment questions, and I think it really would be for the agent, and they can only be entrapment, we've now at least identified that issue for you.
>
> We're not asking you to rule on anything right now because I don't know that -- unless you're prepared to rule that the defense has to give us notice of entrapment by the close of their case.
>
> THE COURT: I think that decision needs to be made in the context of what's happened during the case.
>
> MR. BOYLE: Fair enough. Thank you.

(*Id.* at 278-279.)

Ultimately, there was also an agreement that before cross-examining witnesses on ATF policies for informants on avoiding entrapment, a sidebar would be requested. (R.T. 1/19/12, CR Doc. 1816 at 1403.) When the admission of the informant's agreement with ATF (Trial Exhibit 642) was sought during cross-examination of the informant, the prosecution raised the question whether the reference in the agreement to entrapment sufficiently raised the entrapment decision to allow the prosecution to address the defense on rebuttal.[17] (R.T. 1/24/12, CR Doc. 1818 at 2023-2025.) The court concluded it did not:

> THE COURT: Well, it seems to me that the thing you're raising is not an objection to its admission. What you're suggesting is if it comes in with that word in it, then it opens the issue of entrapment in this case. And I'm not sure that it does, just because it's in her agreement, assuming the defense doesn't start questioning about it. If the defense starts questioning about it, then I think it clearly does open the entrapment door.
> MR. BOYLE: Okay.
> THE COURT: But its presence in the agreement doesn't make the agreement inadmissible.
> MR. BOYLE: All right, then the second point I have is does this open the door in closing argument to talk about entrapment? If we are not --
> THE COURT: No, I think we need to clearly cross – we are not crossing the entrapment bridge. So I am not going to deem this document as having crossed that bridge.
> MR. BOYLE: Thank you.
> THE COURT: I think it needs to be a clearer crossing before we go there.

(*Id.* at 2024-2025.)

On January 25, 2012, the court issued its proposed final jury instructions, which included entrapment instructions. (Order 1/25/12, CR Doc. 1507 at 31-32.)

On February 13, 2012, in the middle of the defense case, trial counsel filed a "Notice re Withdrawal of Request for Entrapment Instruction" (Attach. PP, CR Doc. 1630). The Notice did not include any explanation or argument.

After the close of evidence, the entrapment defense again arose:

> MR. BOYLE: Your Honor, on behalf of Dennis Mahon, the

[17] The defense indicated in response to a motion in limine on the agreements that they would be relevant to an entrapment defense. (Response, CR Doc. 1275 at 4.)

> defense withdrew the potential defense of entrapment. And I may have missed it, but I think it's an appropriate time as we craft jury instructions to determine that as to Daniel Mahon.
> THE COURT: Yeah, I was going to ask that question.
> Ms. Hull?
> MS. HULL: I never alleged it, Judge.
> THE COURT: Okay, so you're not asserting entrapment?
> MS. HULL: Never did.
> THE COURT: So there is no entrapment.

(R.T. 2/15/12, CR Doc. 2/15/12 at 4149.)

No instructions on entrapment were given.

d. Appeal

On direct appeal, counsel asserted a related claim challenging the denial of Movant's attack on Ground 3 based on outrageous conduct of the government, *e.g.* by creating the crime and forcefully and persistently entreating Movant to commit it. (Attach. T, Opening Brief at 58-61.) The Ninth Circuit found no outrageous conduct. (Mem. Dec. 7/20/15, CR Doc. 1864 at 4-5.)

3. Applicable Law

a. Entrapment

The entrapment defense has two elements: "(1) the defendant was induced to commit the crime by a government agent, and (2) he was not otherwise predisposed to commit the crime." *United States v. Barry*, 814 F.2d 1400, 1401 (9th Cir.1987). "The entrapment defense is meant to prevent the government from convincing someone who will not be persuaded by criminal motivations to commit a crime." *United States v. Spentz*, 653 F.3d 815, 819 (9th Cir. 2011).

(1). No Admission of Guilt Necessary

In order to be granted a jury instruction on entrapment, a defendant need not formally admit the commission of the underlying offense. "We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment

instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews v. United States*, 485 U.S. 58, 62 (1988). *But see* George L.Blum, J.D., *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Entrapment Defense—Federal Cases*, 42 A.L.R. Fed. 2d 145 (Originally published in 2009) (characterizing the entrapment defense as "a judicially created 20th Century American doctrine" which generally requires the defendant to "first admit that he or she has committed the crime and then show that he or she has done so because of unlawful inducement by a law enforcement office," but the latter requirement no longer applies in federal prosecutions after *Mathews*). "We take this opportunity to make clear that under federal law, in contrast to the law of certain states, a defendant is not obligated to admit her guilt to a crime as a precondition for raising an affirmative defense such as duress." *United States v. Haischer*, 780 F.3d 1277, 1283 (9th Cir. 2015) (citing *Mathews*).

(2). Inducement

"An improper 'inducement' ... goes beyond providing an ordinary 'opportunity to commit a crime.' An 'inducement' consists of an 'opportunity' plus something else—typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive." *United States v. Poehlman*, 217 F.3d 692, 701 (9th Cir. 2000). "Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir.1994). "*Poehlman* demonstrates the types of promises that constitute inducement. There, the undercover government agent 'played on Poehlman's obvious need for an adult relationship, for acceptance of his sexual proclivities and for a family' to induce him to commit a crime." *Spentz*, 653 F.3d at 820 (quoting *Poehlman*, 217 F.3d at 702). On the other hand, "[w]hen the motivation

presented by the government is the typical benefit from engaging in the proposed criminal act, there is no reason to be concerned that an innocent person is being entrapped." *Id.* at 819.

(3). Predisposition

There are "five factors to consider when determining predisposition: (1) the character or reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement." *United States v. So*, 755 F.2d 1350, 1354 (9th Cir. 1985).[18] "Although none of these factors is controlling, the defendant's reluctance to engage in the criminal activity is the most important." *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995).

Predisposition is determined as of the time the government's agent first engages the defendant. "Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992). *See United States v. Williams*, 547 F.3d 1187, 1198 (9th Cir. 2008) ("the question of predisposition is to be determined prior to the time the government agent suggested the criminal activity").

With regard to reluctance, in *So*, the court found a lack of reluctance to participate in a money laundering scheme (and ultimately no entrapment) where the

[18] The trial court and the parties reference these factors as the "*Bonanno*" factors, citing to the recitation of them in *United States v. Bonanno*, 852 F.2d 434, 438 (9th Cir. 1988), cert. denied, 488 U.S. 1016, 109 S. Ct. 812 (1989). The Ninth Circuit's adoption of this list of factors dates back to at least the 1977 decision in *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977), which cited only the much older decisions in *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1958).

defendant "appears to have entered the transactions with relish and expertise, providing technical advice and documentation, while boasting of his ability to launder money for smugglers in various parts of the world." *So*, 755 F.2d at 1354.

Predisposition is not limited to the specific crime charged, but extends to the "type of criminal activity." *United States v. Williams*, 547 F.3d 1187, 1198 (9th Cir. 2008). In *Williams*, the court found relevant (to an entrapment defense to a drug conspiracy charge) the defendant's status as a fugitive from justice for a bank robbery, previous criminal gun sales, and criminal record. But, the court also noted the defendant's prior drug dealing.

At trial, "it is the government's burden to prove predisposition beyond a reasonable doubt." *United States v. Gurolla*, 333 F.3d 944, 956 (9th Cir. 2003). *See also Jacobson*, 503 U.S. at 548–49.

(4). Jury Instruction on Entrapment

"A defendant is entitled to an entrapment instruction whenever there is sufficient evidence in the record from which a reasonable jury could find entrapment." *United States v. Gurolla*, 333 F.3d 944, 957 (9th Cir. 2003). The degree of evidence required at this stage is not high. "A defendant need only present 'slight' evidence of two elements in order to receive an entrapment instruction: (1) inducement by a government agent to commit an illegal act that (2) the defendant was not predisposed to commit." *United States v. Burt*, 143 F.3d 1215, 1218 (9th Cir. 1998). "The legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense." *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir.2007) (internal citation and quotations omitted).

(5). Standard on Motion to Dismiss re Entrapment

Although Movant's motion to dismiss (CR Doc. 479) did not clarify the rule on which it was founded, a pretrial motion to dismiss is ordinarily brought pursuant to Federal Rule of Criminal Procedure 12(b), which encompasses "any defense, objection, or request that the court can determine without a trial on the merits." However, because entrapment defenses usually involve intent and credibility determinations that must be decided at trial, pretrial motions based on entrapment are generally disfavored. *See United States v. Fadel,* 844 F.2d 1425, 1430 (10th Cir. 1988) ("The vast majority of courts which have considered the issue have not favored the pretrial resolution of entrapment defense motions."). *See United States v. Knox*, 396 U.S. 77, 84 n. 7 (1969) (addressing defense of duress) ("Rule 12(b)(1) of the Federal Rules of Criminal Procedure, which cautions the trial judge that he may consider on a motion to dismiss the indictment only those objections that are 'capable of determination without the trial of the general issue,' indicates that evidentiary questions of this type should not be determined on such a motion.").

That is not to say that a pre-trial motion to dismiss on entrapment is prohibited, just hard to support.

"Entrapment is generally a jury question. To establish entrapment as a matter of law, the defendant must point to undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act by trickery, persuasion, or fraud of a government agent." *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986). To grant a motion to dismiss based on entrapment, the court must not be "choosing between conflicting witnesses, nor judging credibility." *Sherman v. United States*, 356 U.S. 369, 373 (1958).

The court of appeals will "review de novo whether a defendant was entrapped as a matter of law." *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997). *See also United States v. Schafer*, 625 F.3d 629, 636 (9th Cir. 2010) (addressing motion to dismiss based on entrapment by estoppel defense). Moreover, the court of appeals views

the evidence on entrapment "in the light most favorable to the government." *United States v. Citro*, 842 F.2d 1149, 1152 (9th Cir. 1988). "In reviewing the denial of a motion for acquittal based on entrapment as a matter of law, the court must view the evidence in the light most favorable to the government, and decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Citro*, 842 F.2d 1149, 1151 (9th Cir. 1988).

b. Insufficient Evidence

A mid-trial motion to acquit is brought pursuant to Federal Rule of Criminal Procedure 29(a), and is based on a showing that "the evidence is insufficient to sustain a conviction." In evaluating an insufficient evidence claim, the court must "assume that the evidence at trial was properly admitted, must "review[ ] the evidence in the light most favorable to the prosecution," and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1009–10 (9th Cir. 1995).

A trial court's ruling on a motion for acquittal is ordinarily reviewed *de novo*. *See United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016); and *United States v. Sanchez*, 639 F.3d 1201, 1203 (9th Cir. 2011). In doing so, the appellate court also reviews evidence presented against the defendant in a light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Mincoff*, 574 F.3d 1186, 1191-92 (9th Cir. 2009).[19]

Where a defendant makes a motion for judgment of acquittal at the end of the government's case, but fails to renew the motion at the close of all the evidence, the

[19] The defense did not clarify the basis for the renewed motion, and the discussion at the time was limited to overt acts. Thus, the undersigned presumes for purposes of this R&R that the renewed motion was on all the same grounds as the original motion, and applies the abuse of discretion standard rather than plain error. It does not affect the outcome.

failure operates as a waiver of the motion, and the court of appeals will review "sufficiency of the evidence arguments only for plain error to prevent a miscarriage of justice." *United States v. Winslow*, 962 F.2d 845, 850 (9th Cir. 1992), as amended (May 14, 1992). In substance, however, the courts have struggled to define a practical effect to the higher "plain error" standard, in light of the already exacting standard for claims of insufficient evidence. *See Vizcarra-Martinez*, 66 F.3d at 1010 ("it is difficult to imagine just what consequences flow from our application of the two different standards or to envision a case in which the result would be different because of the application of one rather than the other of the standards"); *Cruz*, 554 F.3d at 844 ("while plain-error review appears more stringent in theory, it is hard to comprehend how a standard can be any more stringent in actuality than that ordinarily applied to sufficiency-of-the-evidence challenges").

4. Application of Law to Facts

a. Ground 8A - Entrapment

Respondent argues that an appellate claim based on denial of the pretrial motion to dismiss Count 3 based on entrapment would have been futile because the "court correctly found Movant had failed to make the required showing for a dismissal because his 'predisposition to commit violent crimes' was subject to factual disputes concerning 'his alleged involvement in the bombing of the Scottsdale office, his allegiance to groups that advocated violence, and his efforts to recruit Ms. Williams into white supremacist violent activities." (Response, Doc. 55 at 36.)

Movant replies that he "had a very strong case for entrapment," and asserts that he meets all of the Ninth Circuit's factors for showing a lack of predisposition, citing his lack of a prior criminal record, that the confidential informant made the initial suggestion of making a bomb, he had not engaged in criminal activity for profit, he expressed reluctance to commit the offense and only succumbed after repeated inducement by the confidential informant, and he was induced by appeals to his sexual and emotional

attraction to the informant. (Reply, Doc. 48 at 18-19.)

Movant's "very strong case" is not sufficient to meet the standard of "undisputed evidence" to be entitled to an entrapment defense based on a pretrial motion. Movant points to a number of factors in his favor. But no factor is controlling, and they must all be considered together, although reluctance is the most important. *McClelland*, *supra* 72 F.3d at 722.

Movant's **lack of a criminal record** is not strong evidence of a lack of predisposition. While a criminal record may show a predisposition, the lack of one does not preclude it. Indeed, the lack of a criminal record may show nothing more than success at evading prosecution. Moreover, it is not necessary that the government show that the defendant "had previously been convicted of, or had previously committed, acts similar to those for which he was being tried. This argument is specious, inasmuch as one may be predisposed to commit his first crime as much as, if not more than, a chronic offender who, theoretically, should be more fearful of the consequences." *United States v. Martinez*, 488 F.2d 1088, 1089 (9th Cir. 1973). Indeed, the relevant factor is not even prior criminal conduct, but "the character or reputation of the defendant." *So*, 755 F.2d at 1354. Here, Movant's character and reputation was one of a self-avowed bomber, who regularly encouraged others to employ violent means against their opponents.

Movant argues the informant **first suggested** a bomb. But Movant fails to point to such suggestion. The undersigned's review of the evidence before the jury showed that the confidential informant clearly was the one to initiate the discussions about taking physical action against the molester. But Movant suggested using a gas tank to blow up the molester, and even though the informant continued to press for physical action against him, it was Movant who first brought up building a bomb.

Movant points to the fact that he had not engaged in the criminal activity for **profit**. Indeed, the evidence suggested that his motivations for engaging in instructing the confidential informant were directed towards his romantic aspirations and/or pursuing his racist views. And, this factor does not appear to lend itself to a broad

reading of advantages other than monetary profit. *See e.g. United States v. Poehlman,* 217 F.3d 692, 706 (9th Cir. 2000) (Thompson, J., dissenting) (finding an absence of "profit motive" where motivation was sexual activity).

Movant also argues his **reluctance** to instruct the informant on bombs, and that he instead encouraged her to deal with the child molester with a range of other means, including legal and police action, threats, etc.

But, Movant showed little reluctance. His only expressed reluctance in using violent means was to move from racial causes to personal problems.

Further the evidence also tended to show that Movant was cunning and careful about avoiding incriminating himself, and distrusting others. Indeed, his instructions about the bomb were carefully cast as dealing with a "hypothetical" and only being for "information." A juror could reasonably conclude, in light of evidence of Movant's history with encouraging and instructing on bombs, that Movant's purported reluctance demonstrated a fear of being prosecuted, rather than a reluctance to engage in the crime. "[F]ear of apprehension by undercover agents using electronic surveillance does not constitute lack of predisposition to become involved in criminal activity." *United States v. Brandon*, 633 F.2d 773, 778 (9th Cir. 1980).

Such fear is different than the "generalized respect for legality or the fear of prosecution," that leads many to "obey the law even when they disapprove of it." *Jacobson v. United States*, 503 U.S. 540, 551 (1992). That kind of reluctance is that of the "[ ]wary innocent," while the kind of fear shown by Movant was more that of the "[ ]wary criminal." *Sherman v. United States*, 356 U.S. 369, 372 (1958).

Moreover, such reluctance from fear of prosecution is far different from the reluctant sympathy of a recovering addict for a fellow addict making repeated pleas for drugs, as in *Sherman.*

Further, Movant was not subjected to the kind of long term inducement involved in *Jacobson*, 503 U.S. 540 (1992) before he finally relented. In *Jacobson*, "[t]he evidence that petitioner was ready and willing to commit the offense came only after the

Government had devoted 2 ½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." *Id.* at 553. Instead, here, Movant rapidly relented over the course of about one minute, moving with very little response or comment by the informant from relying on law enforcement to shooting the molester, as recorded in Exhibit 191, Clip1. Some eight and a half minutes later, Movant was explain how to blowing up the molester's house with a gas tank, as recorded in Exhibit 191, Clip 2. It is true that Movant did not proceed directly to the type of bomb utilized in the Scottsdale bombing, but only reached those discussions the following day, as recorded in Exhibit 193. But the jury could have reasonably concluded that this was not born of a lack of predisposition to use explosive measures (which his proposal for using a propane tank had revealed the day before), but a wariness about exposing his participation in the Scottsdale bombing, and (as Movant expressed) his concern about harm to the informant from such a bomb accidentally exploding during construction.

To be sure, the government did not conclude its inducement of Movant in Catoosa, Oklahoma, but persisted over the next four years in its attempts to garner evidence to tie Movant to the Scottsdale bombing. But that long term inducement was not the impetus for Movant's willingness to instruct the informant on bombing. At best, it was simply the culmination of what Movant had demonstrated an eagerness to do when they were still in Catoosa.

Moreover, Movant's conduct related to the package bomb, once he began, reflected the kind of "relish and expertise, providing technical advice and documentation, while boasting of his ability," *So*, 755 F.2d at 1354, that would permit a reasonable juror to conclude that Movant's only reluctance was a fear of prosecution, not an aversion to committing the act.

Finally, Movant argues that the **nature of the inducement** suggests no predisposition. This factor weighs in Movant's favor. The government's agents purposefully, thoughtfully, and resourcefully plied Movant with an attractive, sympathetic, and flirtatious younger woman with similar life views, and a sad story

designed to appeal to Movant's heroic self image. But, to be sure, the inducement was not extreme. The informant did not engage in or make specific promises of sexual or romantic conduct with Movant. At best, she invited his interest through her actions and dress, and did not discourage his interest, but joked about it, while at the same time not obliging him. Accordingly, the weight of this factor is limited.

Thus, in **weighing the factors**, the appellate court would have had two factors suggesting no predisposition (no profit motive, and to a lesser degree the nature of the inducement), and three (first suggestion, character and reputation, and reluctance) which suggested a predisposition, including the "most important" factor, reluctance. Viewing the evidence in the light most favorable to the prosecution, the appellate court would have had no basis for finding that "undisputed evidence [made] it patently clear that an otherwise innocent person was induced to commit the illegal act by trickery, persuasion, or fraud of a government agent." *Smith*, 802 F.2d at 1124.

Under these circumstances, raising the entrapment claim would have been futile. Accordingly, this portion of Ground 8 is without merit and must be denied.

b. Ground 8B - Insufficient Evidence

Movant appears to have abandoned the portion Ground 8 related to insufficient evidence, leaving this Court with nothing on which to basis a grant of relief decision, other than Movant's conclusory assertions in his Motion that the "issues were ripe for appeal." On that basis alone, the claim should be denied as conclusory. *Stein*, 390 F.2d at 627; *Shah*, 878 F.2d at 1161.

Even assuming that Movant's intent is to simply repeat trial counsel's arguments on the motion for acquittal, the argument is without merit.

In considering this claim, the undersigned observes that the defense did not clarify the basis for its renewed motion to acquit, and the discussion at the time was limited to overt acts. There is a limited distinction between the normal test of insufficient evidence and the plaint error test applied in the absence of a renewed motion at trial. *See*

Vizcarra-Martinez, 66 F.3d at 1010; and *Cruz*, 554 F.3d at 844. Accordingly, the undersigned presumes (in Movant's favor) for purposes of this Report and Recommendation that the renewed motion was on all the same grounds as the original motion, and applies the theoretically less onerous *de novo* standard rather than plain error. It does not affect the outcome.

Movant contended there was a lack of evidence of an intent of an immediate criminal act, and that Movant was simply teaching or advocating violence as a means of accomplishing political reform. (Attach. SS, Motion to Acquit, CR Doc. 1547 at 7-8.)

Respondent argues that the "evidence included facts showing that on the day Williams introduced the subject, Mahon instructed her on how to use a hose connected to a propane tank to cause an explosion that would blow the fictitious molester's house "to kingdom come" (Ex. 191); gave her detailed instructions the next day on how to make an explosive similar to the pipe bomb used in the Diversity Office bombing (Ex. 193); reviewed bomb construction with her (Ex. 198); and engaged in a series of other actions calculated to recruit Williams, educate her on explosives, and direct her to engage in violent action." (Response, Doc. 44 at 37.) Movant proffers nothing to counter those contentions.

Moreover, the evidence showed that Movant was convinced enough about the informant's intention to act on his instructions that he expressed fear about her ending up in prison, or being harmed from an accidental explosion.

Further, a significant portion of the charged conduct in Count 3 had nothing to do with political reform, but was instruction on exacting vigilante justice on the informant's cousin's husband.

Movant argued that his lack of intent of action was shown by his "repeated admonitions that she call his lawyer to discuss her legal options, call the 'D.A.,' and call the police." (Attach. SS, Motion to Acquit, CR Doc. 1547 at 8.) But such evidence showed at best Movant's preference for such means, not a lack of intent that informant act on his more violent proposals if she chose to do so instead.

Finally, Movant argued that the attack on the molester "was essentially dropped after the initial meeting in Catoosa." (Attach. SS, Motion to Acquit, CR Doc. 1547 at 8.) But that does little to show that the intent for imminent action did not exist at the time of Movant's instructions in Catoosa, or thereafter.

In sum, viewing the evidence in the light most favorable to the prosecution, the undersigned cannot determine no rational trier of fact could have found that Movant intended the informant take imminent action on his instructions. *Vizcarra-Martinez*, 66 F.3d at 1009–10. Consequently, raising this claim would have been futile, and appellate counsel would not have been ineffective for failing to do so.

Accordingly, this portion of Ground 8 is without merit and must be denied.

c. Ground 6 - Presentation of Entrapment Defense

In Ground Six, Movant argues trial counsel was ineffective when presenting his entrapment defense concerning Count 3. Movant references evidence of: (1) his efforts to divert the informant and giving her alternatives to building a bomb; (2) the persistent inquiry and sexually-charged comments and actions by the informant; and (3) that it was only afterwards that Movant provided the informant instruction on bombs. (Amend. Mot. Doc. 31 at 15.)

Respondent argues that trial counsel presented the relevant evidence on entrapment (Response, Doc. 44 at 31-32). Movant does not counter that contention. (*See generally*, Reply, Doc. 48.) Indeed, the interactions between Movant and the informant were well placed before the jury, perhaps most significantly by the admission of the surveillance videos from the trailer in Catoosa, Oklahoma.

Movant fails to suggest what additional evidence could have been admitted. "[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *U.S. v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991).

Counsel cannot be faulted for failure to call a witness of whom he has no knowledge, unless he has failed to adequately investigate the case. *See Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995).).

Without some indication that what additional evidence was available for presentation to the jury to establish entrapment, and an indication that the evidence was available to trial counsel, this claim must be denied as conclusory. *Stein*, 390 F.2d at 627.

d. Ground 7A –Trial Counsel on Entrapment

Movant argues in Ground Seven that trial counsel should not have withdrawn the request for a jury instruction on entrapment. Respondent argues that this was a reasonable tactical alternative to admitting the commission of the offense, and must be presumed reasonable conduct, particularly in this long, complex trial, and any deficiency was not prejudicial because of the evidence of predisposition.

Deficient Performance - Respondent's primary argument is unavailing, because a formal admission of the offense is not a prerequisite to an entrapment defense in a federal prosecution. *Mathews*, 485 U.S. at 62.

If this court were convinced that the requirement for such an admission was the actual basis for trial counsel, then a finding of deficient performance would likely be required.

The court need not determine the actual reason for an attorney's actions, as long as the act falls within the range of reasonable representation. *Morris v. California*, 966 F.2d 448, 456-457 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 96 (1992). On the other hand, while they need not discern the actual reason for counsel's conduct to deem it reasonable, "courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526–527 (2003)). *See Postconviction Remedies § 35:4 (*citing *Kimmelman v. Morris* and *Wiggins*

v. Smith).

But here, the undersigned does not find that trial counsel's reason for foregoing an entrapment instruction was based on a belief that an admission of the offense was a prerequisite. The only basis for such a finding would be trial counsel's argument on whether notice of an entrapment defense was required:

> MS. WILLIAMS: My response is -- and I was having the same concern when I was listening to Mr. Boyle -- what does that mean, objection, it's about entrapment. What does that mean? Because entrapment means that if, on behalf of Dennis, I put on an entrapment case, it means Dennis is conceding guilt on a point. That is a far cry from presenting evidence about what went on, for example, between Dennis and the confidential informant.

(R.T. 1/11/12, CR Doc. 1805 at 275-276.) While this comment could be construed as evidencing a belief that admission of commission was a prerequisite, it could equally be seen (in light of the prefatory question about the prosecution's meaning) as an assertion that the prosecution was attempting to make such an argument.

Nowhere in the balance of the litigation over entrapment did either the defense or prosecution evidence a belief that an admission of commission was a prerequisite. Movant's Motion to Dismiss regarding entrapment (CR Doc. 479) did not suggest such a requirement. Nor did the prosecution's response (CR Doc. 576) or Movant reply (CR Doc. 579). The trial court's proposed instruction did not include such a requirement. (Order 1/25/12, CR Doc. 1507 at 31-32.)

Moreover, the key issue raised at trial regarding the entrapment defense was not whether such an admission was made or required, but the rebuttal evidence that the prosecution would seek to introduce if entrapment was raised. (*See* R.T. 1/11/12, CR Doc. 1805 at 278-279 ("if they use that instruction, we will have a rebuttal case on it"); R.T. 1/24/12, CR Doc. 1818 at 2024 ("open the entrapment door").

Indeed, in responding to an entrapment defense, a variety of evidence not otherwise admissible could have become relevant to establishing Movant's predisposition. "Where a jurisdiction adopts a subjective entrapment defense that is limited to those who are not predisposed to commit the offense, evidence of the

defendant's prior and subsequent involvement in similar criminal activity is relevant to his predisposition and therefore admissible." Robinson, Palo, *et al.*, *Entrapment*, 2 Crim. L. Def. § 209.

This could have included additional materials recovered in the post-arrest search of Movant's farm (*see* Defendants' Motion in Limine, CR Doc. 654), evidence of Movant's connections with other bombings, etc. (*see* Motion in Limine re 404(b), CR Doc. 1047, and Response, CR Doc. 1085 (arguing such evidence might be admissible on rebuttal, dependent upon the defenses raised at trial)), evidence of Defendant's military service (*see* Order 12/1/11, CR Doc. 1300 at 6 ("[b]oth sides should be prepared to address the relevance of such evidence to an entrapment defense").

In light of this factor, trial counsel could have reasonably made a tactical decision to rely on the defense to Count 3 as being bluster with no intent of action, rather than pursuing an entrapment defense and risking the introduction of evidence which could have adversely impacted Movant on the other, more significant, counts. *See e.g. Brooks v. Kelly,* 2007 WL 5023665, at *11 (S.D. Miss. Dec. 17, 2007), *report and recommendation adopted in part, rejected on other grounds*, 2008 WL 783736 (S.D. Miss. Mar. 20, 2008), *rev'd on other grounds*, 579 F.3d 521 (5th Cir. 2009) ("not unreasonable for petitioner's attorney not to raise an entrapment defense, particularly where doing so would have allowed the state to introduce evidence that petitioner had engaged in additional drug sales since her arrest on the charges in question, as well as other evidence relating to her predisposition to commit the crime"); *Mayes v. United States*, 93 F. Supp. 2d 882, 891 (E.D. Tenn. 2000) ("Defense counsel's decision not to pursue an entrapment defense was sound strategy since such a defense was unlikely to succeed. Had such a defense been raised, the government in proving predisposition would have been permitted to introduce Mayes' prior criminal record before the jury."); and *United States v. Jones*, 785 F. Supp. 1181, 1185 (E.D. Pa.) ("Because an entrapment claim would have been weak (if not completely untenable) and would have opened the door to extremely prejudicial evidence about the defendant's prior drug dealing, the

decision not to claim entrapment cannot be characterized as unreasonable.").

The reasonableness of such a decision is enhanced by the likelihood of a conviction on Count 3 (where evidence consisted mostly of exhibits, e.g. the videos, mailings, etc., rather than discreditable testimony) and the potential for an acquittal on the other, more serious (40 years vs. 33 months), counts on which the evidence was less strong, and on which the potential evidence related to predisposition could be particularly damning.

Under these circumstances, the undersigned concludes that Movant has failed to show that counsel's decision to forego the entrapment defense could not have been a reasonable tactical choice.

Prejudice – Even if the undersigned could conclude that trial counsel's performance was deficient, the undersigned cannot find a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88. As discussed herein above in connection with Ground 8A regarding the motion to dismiss on entrapment, the evidence showed that even assuming Movant was induced, he was amply predisposed to commit the offense in Count 3, and indeed began instructing the informant on bombs in less than a minute of being provided the context to do so, evidencing almost no reluctance other than fear of discovery and prosecution.

e. Ground 7B - Motion for Acquittal

Movant argues trial counsel should have preserved the issue by renewing the motion for acquittal based on entrapment or lack of sufficient evidence.

For the reasons discussed hereinabove in connection with Ground 8A, a claim of entrapment was not supported by the weight of the evidence. Given the standard for a Rule 29 motion to acquit (light favorable to prosecution, no rational juror could have found the elements, *Vizcarra-Martinez*, 66 F.3d at 1009–10), such a motion would have been futile. Counsel was not ineffective for failing to pursue a futile motion.

To the extent that Movant's reference to a motion on insufficient evidence relates to the lack of intent raised in Ground 8B, that motion was renewed at the close of evidence. (R.T. 2/15/12, CR Doc. 1829 at 4143.)

5. Summary

Movant has failed to show that appellate counsel was ineffective as to the motion to dismiss on entrapment (Ground 8A), or the motion to acquit on intent (Ground 8B), and has failed to show that trial counsel was ineffective as to evidence on entrapment (Ground 6), the jury instruction on entrapment (Ground 7A), or a motion to acquit based on entrapment (Ground 7B).

Accordingly, Grounds 6, 7 and 8 must be denied.

J. GROUND 9 – IAAC RE SENTENCING ON VICTIMS

1. Parties Arguments

Motion – In Ground 9, Movant argues that appellate counsel was ineffective when he failed to appeal the application of a six-level enhancement based on a finding that the victims were "officials" with the government. (Amended Motion, Doc. 31 at 17.)

Response – Respondent counters that any claim on this point would have been foreclosed by the doctrine of invited error because trial counsel had not opposed a finding of "officials" as victims, but had instead argued that the trial court should have applied the lesser three-level enhancement permitted under the Guidelines. Respondent further argues that the argument was futile because the assertion that the Guideline only applies to federal officials has been rejected by the Ninth Circuit and other circuits. Therefore, appellate counsel was not ineffective in failing to raise this claim. (Response, Doc. 44 at 37-38.)

Reply – Movant does not reply on this ground. (*See generally* Reply, Doc. 48.)

2. Factual Background

At sentencing, the trial court summarized the presentence report:

THE COURT: Okay. Thank you.

> In the guideline calculation in the presentence report, there are four factors that result in significant increases: the fact that the defendant conspired with others, that he actually attempted to murder Don Logan, that Mr. Logan suffered permanent bodily injury and Ms. Linyard suffered serious bodily injury, and that the victims were government employees targeted because they were government employees.

(R.T. 5/22/12, CR Doc. 1847 at 8-17.)

In response to the Presentence Report, Movant had challenged the increases based on the attempted murder and the government victims. Movant noted that Movant's sentence under U.S.S.G. § 2K1.4(a)(1) (property damage by use of explosives with knowing risk of death or serious bodily injury), had a base offense level of 24, but had been increased by 3 levels based on a cross-reference to § 2A2.1(b)(1)(A) (attempted murder with permanent or life-threating bodily injury)[20] and 6 levels based on § 3A1.2(b) (government officer as victim), resulting in an offense level of 33 and a recommended sentence of 100 years. Movant argued: (1) that the cross-reference should not apply because the disproportionate impact should be permitted only when the facts supporting the cross-reference were found by clear and convincing evidence, citing *United States v. Pineda-Doval*, 614 F.3d 1019, 1041 (9th Cir. 2010); (2) even if the clear and convincing standard did not apply (but the cross reference did), the "evidence does not establish that the bombing was done with the intent to cause death or serious bodily injury," but was done with an intent "to send a political message"; (3) that § 2A2.1(attempted murder) did not apply because there was no evidence of intent to kill, but at worst to create serious bodily injury, and therefore the applicable provision was § 2A2.2 (aggravated assault). (Objection, CR Doc. 1737 at 3-5.)

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[20] U.S.S.G. § 2A2.1(b)(1)(A) (2007) specified a 4 level increase, not a 3 level increase.

Sentencing Guideline § 3A1.2 provides, in pertinent part:

> (a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3 levels.
>
> (b) If subsection (a)(1) and (2) apply, **and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person)**, increase by 6 levels.

U.S.S.G. § 3A1.2 (2010) (emphasis added).[21]

Relying on the highlighted portion, and based on the foregoing arguments that the cross-reference to § 2A2.1 (attempted murder) could not apply, Movant argued with regard to the government victim adjustment that only the three level enhancement under § 3A1.2(a) could apply, not the six level enhancement under §3A1.2(b). (Objection, CR Doc. 1737 at 5.)

Movant did not raise any argument that the victim did not qualify as a government officer.

At sentencing, the Court rejected the argument that § 2A2.1 did not apply. (R.T. 5/22/12, CR Doc. 1847 at 8-11.) Counsel made no further argument, other than to disagree with the application of the cross-reference to § 2A2.1. (*Id.*at 11-12.) The Court denied the objection and found the six-level increase applied. (*Id.* at 12.)

Eventually, the trial court addressed the government's complaint that the presentence report had not included an upward adjustment based on terrorism under U.S.S.G. § 3A1.4. (*Id.* at 18, *et seq*.) Defense counsel then argued that the enhancement should not apply because § 3A1.4 related only to crimes under 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries) which did not apply because the victims were state employees.[22] (*Id.* at 18-20.)

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[21] U.S.S.G. § 1B1.11 provides for use of "the Guidelines Manual in effect on the date that the defendant is sentenced." Movant was sentenced on May 22, 2012. (Attach S, Judgment, CR Doc. 1753 at 4.) The 2010 version of U.S.S.G. § 3A1.2 was the then applicable version.

[22] Indeed, the upward adjustment in U.S.S.G. § 3A1.4 pertains only to "a federal crime of terrorism," U.S.S.G. § 3A1.4(a), which the Application Notes clarify "has the meaning given that term in 18 U.S.C. § 2332b(g)(5)."

The trial court ruled in the prosecution's favor:

> THE COURT: All right. Thank you.
> Section 3A1.4 applies and calls for a 12-level increase if the crime is a felony that involved or was intended to promote a federal crime of terrorism. Application Note 1 to that section says that a federal crime of terrorism has the meaning given that term in 18 United States Code Section 2332b(g)(5). That section, in turn, states that the term "federal crime of terrorism" means an offense that is calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct, and as a violation of a number of enumerated statutes, one of which is 844(i), the statute that has been violated in this case.
> The question that has been raised by the defense is whether this definition of a federal crime of terrorism applies to an attack on a municipal building or a state building.
> I conclude that it applies to attacks on state and local government offices.

(*Id.* at 23-24.) The trial court continued to outline its reasoning, including analogizing to § 3A1.2:

> The guideline section at issue today, Section 3A1.4, applies when a federal crime of terrorism has been committed and it looks to that specific statutory definition I mentioned earlier. Like Section 3A1.2 that has been addressed by the Ninth Circuit, nothing in Section 2332b(g)(5), which provides the definition, limits the word "government" to the federal government. Under the plain meaning of the statute and Section 3A1.4, therefore, the enhancement applies to offenses against any government unit, including the City of Scottsdale Office of Diversity & Dialogue.

(*Id.* at 25.)

Appellate counsel did not challenge that ruling on appeal. (*See generally* Attach. T, Opening Brief.)

3. Application of Law to Facts

Movant complains about a six-level enhancement based on the finding that the victims were "officials" with the government. Movant fails to explain, in his Motion or Reply, what was erroneous about that determination. As such, this Ground 9 should be denied as conclusory. *Stein*, 390 F.2d at 627.

Assuming that Respondents have posited the correct assumption, that the complaint is not that the victims were not state officials, but that they were not federal

officials, then the claim is without merit.

Invited Error - Respondents contend that the error was invited. In *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997), the Ninth Circuit discussed, in light of the landmark decision on plain error review in *United States v. Olano*, 507 U.S. 725, 733 (1993) the distinction between rights which are forfeited by failing to timely raise them, and rights which are waived by the "intentional relinquishment or abandonment of a known right." *Id.* at 845 (quoting *Olano*, 507 U.S. at 733). "Forfeited rights are reviewable for plain error, while waived rights are not." *Id.* "If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable." *Id.*

Thus, under *Perez*, to avoid review, the error had to be both invited and waived. *Perez* contrasted a situation where the prosecution raised an issue about an omitted jury instruction, and the defense argued to the court that the instruction was not required. The court concluded this was "an example of waiver because the record reflects that the defendant was aware of the omitted element and yet relinquished his right to have it submitted to the jury." *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997). On the other hand, *Perez* dealt with a situation where "neither defendants, the government, nor the court was aware of" the potential issue with instructions subsequently determined erroneous, and thus had submitted instructions which included the error. The court found the defendants had not affirmatively acted to waive a known right for some tactical or other reason. Accordingly, the right was forfeited (and thus subject to plain error review) and not waived and barred from review.

Thus, the teaching of *Perez* is that an invited error may be evidence of either a waiver or a forfeiture, depending on whether the error was known. "Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right." 116 F.3d at 845.

Here, Movant "invited" the error to the extent that he proposed an application of a

less onerous provision of the government official enhancement under § 3A1.2. But there is no indication that Movant, or the government, or the trial court considered whether the victims in this case qualified as government officials under that section because they were employed by a state subdivision, rather than the federal government. It is true that the defense did draw a distinction between the victims as employees of a state subdivision and national or federal employees, but that was in reference to the terrorism enhancement U.S.S.G. § 3A1.4. Indeed, the conclusion was that § 3A1.4, like everyone agreed as to § 3A1.2, extended to state employees.

Therefore, any error on the basis of § 3A1.2, although invited, was not a known right waived by the acquiescence in the milder enhancement. At most, it was forfeited and thus subject to plain error review on appeal.

Merits of Claim – In any event, the claim is without merit. In *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002), the Ninth Circuit determined to adhere to the Sixth Circuit's decision in *United States v. Hudspeth*, 208 F.3d 537 (6th Cir.2000), which held as follows:

> We believe both that the meaning of § 3A1.2(a) is clear and that the history of the provision affirms our conclusion that conduct motivated by the work of state and local employees, or by their status as employees, is covered by this guideline.

Alexander, 287 F.3d at 820 (quoting *Hudspeth*, 208 F.3d at 539).

Consequently, raising this claim would have been futile, and appellate counsel would not have been ineffective for failing to do so.

Even if appellate counsel could have mounted an argument for reversal of *Alexander*, he would not have been deficient for failing to do so in the face of clear circuit authority, and strong persuasive authority to the contrary.

Accordingly, Ground 9 is without merit and must be denied.

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K. GROUND 10 – IAAC RE SENTENCING ON TERRORISM

1. Parties Arguments

Motion – In Ground 10 , Movant argues that appellate counsel was ineffective when he failed to appeal the trial court's application of the 12-level enhancement for terrorism, after "[t]rial counsel objected… that the conduct was not an act of terrorism and did not meet the requirements for the enhancement." (Amended Motion, Doc. 31 at 17.) Movant does not further identify the basis for the objection which he contends should have been pursued.

Response – Respondent argues that the trial court properly concluded that the terrorism enhancement applied to the attack on the city officials, based on *United States v. Harris*, 535 F.3d 767 (5th Cir. 2005) and *Alexander*, 285 F.3d at 820, and that failing to pursue it was sound appellate strategy. (Response, Doc. 44 at 38-39.)

Reply – In his Reply, Movant notes that trial counsel had reported that the Sentencing Commission had opined that the enhancement did not apply, and because the Ninth Circuit had no precedent, the issue was ripe for appeal. (Reply, Doc. 48 at 21-22.)

2. Factual Background

As discussed above with regard to Ground 9, the trial court addressed the government's complaint that the presentence report had not included an upward adjustment based on terrorism under U.S.S.G. § 3A1.4. Defense counsel had argued in part that the enhancement should not apply because § 3A1.4 did not relate to crimes against state or local employees based on the language of the referenced statute 18 U.S.C. § 2332b(g)(5) as compared to language in the related statute 18 U.S.C. § 2332f, which related to attacks on state and local governments. (R.T. 5/22/12, CR Doc. 1847 at 18-20.) In addition, trial counsel had argued:

> MS. WILLIAMS: Yes, Your Honor.
> I think that in the probation officer's final report, there's a section listing her responses to the objections on both sides. I think it -- what's a very interesting piece of information that she added, that when she called the Sentencing Guidelines Commission to

> provide input on how this enhancement should and should not be applied, that they agreed, the Commission itself agreed, that it should not apply in a case like this.

(*Id.* at 18.)

As discussed in connection with Ground 9, the trial court concluded that the enhancement applied.

Appellate counsel did not challenge that ruling on appeal. (*See generally* Attach. T, Opening Brief.)

3. Application of Law to Facts

Movant asserts two bases for appeal: (1) the advice by Sentencing Commission personnel; and (2) the federal versus state employee dichotomy.

Sentencing Commission Advice - Movant makes no argument that the Sentencing Commission personnel referenced in the presentence report addressed any issue other than the federal versus state distinction raised by trial counsel. Accordingly, the undersigned presumes that it was the basis for the advice.[23]

Accordingly, the only question is what, if any, weight should have been afforded by appellate counsel to the Commission personnel's advice. That, in turn, depends upon the weight that the appellate court would have afforded.

Movant points to nothing giving any authoritative weight to such advice. The Commission's Rules of Practice and Procedure do not authorize such advice, nor give it any authoritative weight. *See* U.S.S.C. Rules of Practice and Procedure, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf (last accessed 10/17/18). Nor do the governing statutes. *See* 28 U.S.C. §§ 991-998. At most, the Commission is given authority to "issue instructions to probation officers concerning the application of Commission guidelines and policy statements." 28

[23] To the extent any other basis was referenced, Movant's failure to reveal it makes this portion of the claim conclusory, and subject to denial on that basis. *Stein*, 390 F.2d at 627; *Shah*, 878 F.2d at 1161.

U.S.C. § 995(a)(10). But such instructions are not authorized to be issued by staff, but "by vote of a majority of the members" of the Commission. 28 U.S.C. § 995(a). Movant points to no such formal action.

As a matter of general law, the opinions of individual government employees have no authoritative or even persuasive weight. *Compare Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("rulings, interpretations and opinions of the *Administrator* under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (emphasis added), *with Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (agency not bound by erroneous advice from employee).[24]

Thus, the appellate court would have been free to reject the Commission employee's opinion, and substitute its own opinion on the application of § 3A1.4. In light of the unanimous authorities extending § 3A1.4 to state and local governments (as discussed hereinafter), reliance on the employee's opinion would have been futile.

Extension to State Employees - Movant points to no authority refusing to extend § 3A1.4 to state and local governments. (Amended Motion, Doc. 31 at 17; Reply, Doc. 48 at 21-22.) All of the cases found to address this issue conclude that it applies. *See United States v. Harris,* 434 F.3d 767, 774 (5th Cir. 2005) ("maliciously damaging and destroying a municipal building by means of fire and explosive materials"); *United States v. Dye,* 538 Fed. Appx. 654, 657 (6th Cir. 2013) ("courthouse in the Mansfield City Hall building was firebombed"); *United States v. Thurston*, 2007 WL 1500176, at *17 (D. Or. May 21, 2007), *aff'd sub nom. United States v. Tubbs*, 290 Fed. Appx. 66 (9th Cir. 2008) (rejecting argument that "§ 3A1.4 applies to offenses that target the conduct of the federal government rather than state or local government entities").

[24] It is true that representations by government employees may, in some limited instances, give rise to an estoppel argument. *See e.g. Portmann v. United States,* 674 F.2d 1155 (7th Cir. 1982) (reliance on advice by postal employee that shipment was covered by insurance). But here, there is no suggestion that Movant detrimentally relied on any such advice.

Apart from the references to the Sentencing Commission employee's opinion, Movant proffers no basis to reject the reasoning of these cases, which include: (1) the absence of references to international conduct in subsection (g)(5) as required for the offenses created in the balance of § 2332b; (2) the direct reference in § 3A1.4 to the limited definition in subsection (g)(5); (3) the inclusion in the definition in subsection (g)(5) of crimes which are not limited to international crimes; (4) § 3A1.4 is not limited to offenses of § 2332b, but extends to any felony that "involved, or was intended to promote, a federal crime of terrorism. *See Harris*, 434 F.3d at 773. The Ninth Circuit has long held that "absent a strong reason to do so, we will not create a direct conflict with other circuits." *United States v. Chavez–Vernaza*, 844 F.2d 1368, 1374 (9th Cir.1987).

Moreover, the reasoning in *U.S. v. Alexander*, 287 F.3d 811 (9th Cir. 2002) would call for the same result. In *Alexander*, the court analyzed whether the reference to "government officer or employee" in U.S.S.G. § 3A1.2 (which is the subject of Ground 9), was limited to federal employees. The court found the term "government" was unambiguous, and thus the plain meaning (which is not limited to a specific political unit) applied. 287 F.3d at 820. Movant posits no basis on which the reference in 18 U.S.C. § 2332b(g)(5) to "government" should be different.

Accordingly, appellate counsel would not have been deficient in concluding that the Ninth Circuit would agree with the Fifth Circuit that "[a]ll that section 3A1.4 requires for an upward adjustment to apply is that one of the enumerated offenses was 'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct'," *Harris*, 434 F.3d at 773, and that an intent to influence state government was sufficient to meet that requirement, *id.* at 774, and thus an intent to influence municipal government was sufficient as well.

Accordingly, Ground 10 is without merit, and should be denied.

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L. CLAIMS SELECTION BY APPELLATE COUNSEL

Movant argues that appellate counsel was ineffective when he omitted the claims laid out in Grounds 1, 2, 3, 4, 5, 8, 9, and 10, because they were more likely to be successful than those actually raised.

But, the undersigned has concluded that bringing the claims underlying Grounds 1 (lost evidence), 3 (polygraph), 4 (co-conspirators), 5 (sanctions re reward), 8B (teaching bombs) and 9 (government victim enhancement) would have been futile.

Only the claims underlying Grounds 2 (*Miranda*/*Bruton*) and 10 (terrorism enhancement) have been shown to be of some merit. The undersigned has ultimately concluded that, viewed alone, these claims were not sufficiently likely to succeed such that appellate counsel would not have been objectively unreasonable in failing to raise them. Moreover, Ground 2A (*Miranda*) was at its heart a factual dispute over whether Movant was interrogated, and whether his statements resulted from that interrogation. And, Ground 2B (*Bruton*) was at its heart a factual dispute over whether co-defendant's statements were testimonial and/or harmless. And, succeeding on Ground 10 would have required asking the Ninth Circuit to reject all the authorities addressing the issue.

Movant fails to explain how the claims actually pursued by appellate counsel were so less likely to succeed that appellate counsel was objectively unreasonable in selecting them. To be sure, the claims selected were ultimately unsuccessful, but that does not make their selection unreasonable.

Accordingly, Movant fails to show that appellate counsel performed deficiently, even when reviewing the other possible claims collectively and in comparison to the claims actually raised.

M. SUMMARY

Ground 1 did not relate back to the original Motion, and must be dismissed as untimely. All of Movant's grounds for relief, including Ground 1, are without merit.

Accordingly, the Amended Motion to Vacate, Set Aside or Correct Sentence

(Doc. 31) should be denied, and this case dismissed with prejudice.

IV. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2255 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Motion to Vacate is brought pursuant to 28 U.S.C. § 2255, and challenges Movant's federal criminal judgment or sentence. The recommendations if accepted will result in Movant's Motion being resolved adversely to Movant. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Standard Not Met - Assuming the recommendations herein are followed in the district court's judgment, that decision will be in part on procedural grounds, and in part on the merits. Under the reasoning set forth herein, jurists of reason would not find it

debatable whether the district court was correct in its procedural ruling, and jurists of reason would not find the district court's assessment of the constitutional claims debatable or wrong.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Motion to Vacate, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Ground One of Movant's Amended Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, filed March 21, 2018 (Doc. 31) be **DISMISSED WITH PREJUDICE** or, alternatively, **DENIED**.

IT IS FURTHER RECOMMENDED that remainder of Movant's Amended Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, filed March 21, 2018 (Doc. 31) be **DENIED**.

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 10, Rules Governing Section 2255 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a

party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: November 5, 2018

James F. Metcalf
United States Magistrate Judge

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