No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON A. TOBEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

HEATHER E. WILLIAMS
Federal Defender
Eastern District of California
CAROLYN M. WIGGIN
Assistant Federal Defender
Counsel of Record
801 I Street, 3rd Floor
Sacramento, California 95814
e-mail address: carolyn_wiggin@fd.org
Telephone: (916) 498-5700

Attorneys for Petitioner
JASON A. TOBEY

TABLE OF CONTENTS

Appendix A

FILED

JUN 3 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON A. TOBEY, Defendant-Appellant.	No. 20-10127 D.C. Nos. 2:19-cr-00150-JAM-1 2:19-cr-00150-JAM Eastern District of California, Sacramento ORDER

Before: W. FLETCHER, RAWLINSON, and BADE, Circuit Judges.

The panel has voted to deny the petition for rehearing and for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED.**

Appendix B

NOT FOR PUBLICATION

FILED

APR 27 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON A. TOBEY, Defendant-Appellant.	No. 20-10127 D.C. Nos. 2:19-cr-00150-JAM-1 2:19-cr-00150-JAM MEMORANDUM*

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

Argued and Submitted April 15, 2021
San Francisco, California

Before: W. FLETCHER, RAWLINSON, and BADE, Circuit Judges.

Jason Tobey appeals his conviction for threatening or intimidating a forest officer engaged in performance of official duties in violation of 36 C.F.R. § 261.3, a class B misdemeanor. He challenges the magistrate judge's denial of his request to discharge retained counsel and for the appointment of counsel.[1] We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] Tobey appealed to the district court under 18 U.S.C. § 3402 and Federal Rule of Criminal Procedure 58(g). The district court affirmed and determined that review of Tobey's challenges to the magistrate judge's rulings regarding counsel

jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. The magistrate judge did not abuse his direction in denying Tobey's request to discharge counsel. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010). When a defendant seeks to discharge retained counsel, the defendant may generally do so "for any reason or no reason" as long as doing so is not outweighed by "purposes inherent in the fair, efficient and orderly administration of justice." *Id.* at 979-80 (citations omitted).

Tobey waited until the eve of trial to request a change of counsel. The magistrate judge found that granting the motion would have substantially burdened the court and the government as at least one witness was already *en route* to California from Georgia, while others were preparing to travel for trial. The magistrate judge thus did not abuse his discretion by denying Tobey's request to discharge counsel. *See Rivera-Corona*, 618 F.3d at 979-80."

2. Because the magistrate judge denied Tobey's request to discharge counsel, he did not abuse his discretion by not considering whether to appoint counsel under 18 U.S.C. § 3006A. *See United States v. Brown*, 785 F.3d 1337, 1345 (9th Cir.

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were unripe. The parties dispute the district court's resolution of the ripeness issue and at oral argument broadened the ripeness arguments beyond those set forth in the briefs. We review the magistrate judge's denial of the request for substitution of counsel for an abuse of discretion, and, under the circumstances of the case, reject the parties' broader arguments. *See United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010) (reviewing for abuse of discretion when district court denied motion to substitute retained counsel with appointed counsel).

2015).

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON A. TOBEY, Defendant-Appellant.	No. 2:19-cr-00150-JAM **ORDER AFFIRMING JASON A. TOBEY'S CONVICTION AND SENTENCING**

In October 2018, the United States charged Jason Tobey with a Class B misdemeanor: threatening or intimidating a forest officer engaged in the performance of his official duties. Compl. ¶ 9 (citing 36 CFR 261.3(c)), ECF No. 2. Tobey retained counsel and entered a plea of not guilty. Sept. 25, 2018 Min. Order, ECF No. 1; March 6, 2019 Min. Order, ECF No. 6. The magistrate judge held a one-day bench trial, then allowed parties to file closing briefs. May 13, 2019 Min. Order., ECF No. 13; May 24, 2019 Order; see also Brief by Jason A. Tobey, ECF No. 21;

Brief by USA, ECF No. 22. After considering the parties' briefs and the evidence presented at trial, the Court found Tobey guilty of violating 36 CFR 261.3(c). Decision and Judgment at 7, ECF No. 27. It sentenced him to a 24-month term of unsupervised probation and ordered him to pay a $500 fine. Id.

Tobey appealed his conviction to the district court.[1] ECF No. 25. Upon Tobey's appeal, the Court appointed appellate counsel from the Federal Defender's Office. Sept. 9, 2019 Order, ECF No. 28. Tobey argues the district court should vacate his conviction for four reasons: (1) the magistrate judge abused its discretion when it denied Tobey's pretrial motion to substitute counsel; (2) the magistrate judge violated the Criminal Justice Act when he declined to determine whether Tobey was eligible for appointed counsel; (3) Tobey's trial counsel was constitutionally ineffective; and (4) Tobey's waiver of his right to testify was not knowing, intelligent, and voluntary.

As discussed below, neither of Tobey's right-to-counsel claims are ripe for review because Tobey is not facing a term of "actual imprisonment." See Scott v. Illinois, 440 U.S. 367, 373-74 (1979); U.S. v. Moran, 403 Fed. Appx. 222, 223-24 (9th Cir. 2010). Moreover, Tobey's right-to-testify claim fails because Tobey "remain[ed] silent in the face of his attorney's decision not to call him as a witness." U.S. v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir. 1999). Under the Ninth Circuit's caselaw, this amounts to a knowing, intelligent, and voluntary waiver.

[1] This appeal was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for March 13, 2020.

I. JURISDICTION

A district court may "specially designate" magistrate judges within its district to exercise jurisdiction over the trial and sentencing of people charged with misdemeanor offenses. 18 U.S.C. § 3401(a). Because the Eastern District of California has designated its magistrate judges to exercise jurisdiction in these instances, it was proper for the magistrate judge to preside over "all pretrial, trial, and post-trial matters" in Tobey's case. E.D. Cal. L.R. 302(b)(3).

It is likewise proper for the district court to exercise jurisdiction over this appeal, as "an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed." 18 U.S.C. § 3402.

II. BACKGROUND

In September 2018, members of the United States Forest Service were stationed at Mott Airport in Northern California to help fight the Delta fire. May 7, 2019 Tr. at 26:2-20. As part of this effort, the Forest Service flew helicopters in and out of Mott Airport. Id. at 26:17-24.

Jason Tobey lived near Mott Airport at the time. Id. at 261:7-9. On September 23, 2018, the helicopters flying nearby startled Tobey, his wife, and their service dog. Id. at 257:1-20, 260:4-5. At trial, Tobey's wife testified that the helicopters flew so close to their home that day that their dishes began to shake—one even fell off the shelf. Id. at 257:5-9. The helicopters also knocked a limb out of the Tobey's plum

tree. Ex. E to Decision and Judgment.

Frustrated, Tobey drove to Mott Airport. Id. at 186:3-21, 189:6-17. Jeffrey Schifflett, a Forest Service employee, stopped Tobey at the gate. Id. at 186:3-21. Owen Solomon, a contract worker who was managing operations at Mott airport that day, joined Schifflett. Id. at 78:6-12, 186:24-187:2. At trial, Schifflett and Solomon both testified that Tobey was angry when he arrived and throughout the interaction. Id. at 77:13-24, 189:3-21. Ultimately, Tobey threatened to "shoot [the helicopters] out of the sky" if he had to. Id. Solomon promised to tell the pilots not to fly over Tobey's house. Id. at 190:13-16. Satisfied, Tobey left. Id. at 190:3-9.

But the next day, another helicopter flew over Tobey's house. Tobey drove back to Mott Airport. See id. at 87:1-6. Schifflett, again manning the gate, saw Tobey driving up and called Solomon. Id. at 87:7-13, 204:1-2. Someone else at the airport called law enforcement. Id. at 204:1-9. After another heated dispute, Tobey returned home where he, too, called law enforcement. Id. at 87:18-88:1. A Forest Service law enforcement officer arrested Tobey later that day. Id. at 247:9-16. The officer charged him with violating 36 C.F.R. § 261.3(c) the next day.

Tobey retained counsel: Travis Stroud. ECF No. 3. Stroud's associate filed a motion to dismiss and appeared at the motion to dismiss hearing on Stroud's behalf. Mot. to Dismiss, ECF No. 8. The motion essentially asked the Court to resolve all factual disputes in Tobey's favor and dismiss the charges. See generally Mot. to Dismiss at 2-8. The magistrate judge properly denied the

motion. May 9, 2019 Mins., ECF No. 13.

At the hearing, the magistrate judge also addressed Tobey's motion to substitute counsel. Tobey explained that Stroud had not been working with him to prepare for trial. May 7, 2019 Tr. at 2:7-22. He pointed out that Stroud was not at the hearing and had not appeared for two previous hearings. Id. Stroud's associate confirmed that Stroud had not been preparing for Tobey's case and would not be prepared for trial. Id. at 11:11-18. Having established Stroud's inattention and lack of preparation, Tobey requested that the Court appoint John Kucera—an attorney from the CJA list—because Stroud had "exhausted" Tobey's "funds, time[,] and energy." Id. at 3:6-13, 19-22. The government opposed Tobey's motion, arguing that trial was in two days, its witnesses were already flying out to Sacramento from out of state, and that allowing a last-minute substitution of counsel would be unfairly prejudicial. Id. at 4:6-16, 8:8-25.

The magistrate judge believed Tobey was bringing his motion in good faith and acknowledged that defense counsel was "unavailable [and] unprepared." Id. at 11:7-10, 19-22. Even so, he found that—absent a stipulation from the government—that continuing trial so Tobey could bring a new attorney up to speed would be too prejudicial. Id. at 10:2-13. The Court denied Tobey's motion to substitute counsel. Id. at 13:8-13.

The parties proceeded to trial two days later. May 9, 2019 Mins. After a one-day bench trial, the Court convicted Tobey, sentenced him to two years' probation, and ordered him to pay a $500 fine. Decision and Judgment at 7.

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III. OPINION

A. Standard of Review

When a criminal defendant appeals his conviction to a district judge, the appeal is the same in scope as it would be if a defendant appealed a district court judgment to the court of appeals. Fed. R. Civ. Proc. 58(g)(2)(D). Likewise, a district judge reviewing a magistrate judge decision must use the same standard of review that the court of appeals would use if a district judge imposed the judgment. U.S. v. Mancia, 720 F. Supp. 2d 1173, 1178 (E.D. Cal. 2010).

Accordingly, this Court reviews the magistrate judge's denial of Tobey's motion for substitution of counsel for abuse of discretion. U.S. v. Rivera-Corona, 618 F.3d 976, 978 (9th Cir. 2010). The Court reviews the remainder of Tobey's challenges de novo. U.S. v. Gillenwater, 717 F.3d 1070, 1076 (9th Cir. 2013) (reviewing right-to-testify claim de novo); U.S. v. Rodrigues, 347 F.3d 818, 823 (9th Cir. 2003) (reviewing right-to-counsel claim de novo).

B. Right to Counsel

1. Sixth Amendment

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." The right to counsel under the Sixth Amendment "encompasses two distinct rights: a right to adequate representation and a right to choose one's own counsel"—the two rights Tobey now claims. U.S. v. Brown, 785 F.3d 1337, 1343 (9th Cir. 2015) (quoting Rivera-Corona, 618 F.3d 976, 979 (9th Cir. 2010)). The logical

corollary: if a defendant does not have a Sixth Amendment right to counsel, nor does he have either of these two derivative rights.

Notwithstanding the Sixth Amendment's sweeping language, its right to counsel does not extend to "all criminal prosecutions." Rather, it extends to all felony prosecutions, Johnson v. Zerbst, 304 U.S. 458, 466-68 (1938); Gideon v. Wainwright, 372 U.S. 335, 339-43 (1963), and some misdemeanor prosecutions, Scott, 440 U.S. at 373-74; Alabama v. Shelton, 535 U.S. 654, 667 (2002). Specifically, the Sixth Amendment prohibits courts from either (1) sentencing an uncounseled defendant to a term of imprisonment, or (2) activating an uncounseled defendant's previously-suspended prison sentence. Scott, 440 U.S. at 373-74; Shelton, 535 U.S. at 667.

A misdemeanor prosecution does not trigger the Sixth Amendment's right to counsel simply because the crime charged carries with it the possibility of imprisonment. Scott, 440 U.S. 373-74. Scott disavowed this proposition, finding the right merely prohibited courts from sentencing uncounseled defendants to a term of imprisonment. Id. It reasoned, "actual imprisonment is a penalty [so] different in kind from fines or the mere threat of imprisonment" that it warrants the extension of different protections. Id. At 373.

Even so, Shelton counsels against reading Scott too broadly. 535 U.S. at 667. There, an Alabama court convicted an uncounseled defendant of third-degree assault. Id. At 658. Although the court sentenced Shelton to a thirty-day term of imprisonment, it immediately suspended that sentence and placed

him on two years' unsupervised probation, conditioned on payment of court costs. Id. Shelton appealed, arguing that, absent counsel, the Sixth Amendment barred the court from imposing a term of imprisonment, suspended or otherwise. Id. At 658-59. The Supreme Court agreed:

> A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point result[s] in imprisonment; it end[s] up in the actual deprivation of a person's liberty.

Id. at 662 (internal citations and quotations omitted) (modifications in original). With this in mind, Shelton found that incarceration for an uncounseled conviction—be it delayed or immediate—is "precisely what the Sixth Amendment . . . does not allow." Id.; contra Nichols v. United States, 511 U.S. 738, 746-47 (1994) (holding a court may use an uncounseled misdemeanor conviction to enhance the sentence for a subsequent conviction).

Shelton, however, left open the question of whether a term of probation, untethered to a suspended prison sentence, implicates a defendant's Sixth Amendment right to counsel. 535 U.S. at 672-73. This is the question Tobey's appeal raises.

Citing U.S. v. Ramirez, 555 F. Supp. 736, 741 (E.D. Cal. 1983), Tobey tries to shield his appeal from Scott altogether. Appellant's Supplemental Brief at 2-3. In Ramirez, this Court limited Scott's "actual imprisonment" rule to state criminal proceedings. 55 F. Supp. at 739. At the time, the court faced questions about whether the Fourteenth Amendment incorporated the full scope of the Sixth Amendment's right to counsel against the states. Id. at 739-40. Ramirez determined that federally-

charged defendants enjoyed a more expansive right to counsel than state defendants did. Id. Specifically, the Court found that the Sixth Amendment guaranteed federal defendants a right to counsel "unless the magistrate [judge] commits on the record prior to trial that any sentence will not include imprisonment." Id. at 740. Tobey argues the same rule applies here. Appellant's Supplemental Brief at 2-3.

But, as the United States argues, Ninth Circuit cases since Ramirez have applied Scott's rule to federal defendants. Appellee's Response to Appellant's Supplemental Brief ("Appellee's Response") at 3 (quoting United States v. First, 731 F.3d 998, 1002-03 (9th Cir. 2013)), ECF No. 42; see also United States v. Gordon, 187 F.3d 649 (9th Cir. 1999). While Ramirez's rationale is legally defensible, the theory has not gained traction over the past thirty-seven years. Indeed, adopting Ramirez would require the Court to depart from the weight of authority within and without this circuit. See, e.g., Gordon, 187 F.3d at 649; U.S. v. Acuna-Reyna, 677 F.3d 1282, 1285 (11th Cir. 2012); U.S. v. Pollard, 389 F.3d 101, 103-104 (4th Cir. 2004); U.S. v. Perez-Macias, 335 F.3d 421, 425-26 (5th Cir. 2003). Ramirez, therefore, is not controlling or persuasive authority.

United States v. Moran, 403 Fed. Appx. 222, 223-24 (9th Cir. 2010), although unpublished, provides a more compelling—and recent—analysis of the question Shelton left unanswered. In Moran, a magistrate judge convicted an uncounseled defendant of three misdemeanor offenses and sentenced him to a five-year term of probation. Id. at 223. Moran appealed his sentence to the

district judge, arguing the sentence was "illegal" because a probation violation would result in incarceration—a result the Sixth Amendment proscribed. Id. The district judge affirmed Moran's sentence. Id. Moran then appealed the decision to the Ninth Circuit, raising the same argument. Id. The Ninth Circuit likewise affirmed, upholding Moran's probationary sentence even though it rested on an uncounseled conviction. Id. at 223-24.

Moran is too similar to this case for the Court to ignore its guidance: a probationary sentence only implicates the Sixth Amendment right to counsel when the government seeks to impose a term of imprisonment for a probation violation. Id.; cf. U.S. v. Foster, 904 F.2d 20, 21 (9th Cir. 199) (stating in dicta, "[W]e cannot agree . . . that imprisonment may be imposed for violations of probation when the defendant was denied assistance of counsel at the initial trial").

To date, Tobey has not violated the terms of his probation and the government has not sought to incarcerate him. If these two events occur, they would trigger the Sixth Amendment's protections and require this Court to determine whether the pretrial and trial proceedings effectively deprived Tobey of his constitutional right to counsel. But, as is, Tobey's right-to-counsel challenges are not ripe for review. See U.S. v. Infante-Caballero, 789 Fed.Appx 614, 615 (9th Cir. 2020); U.S. v. Linares, 921 F.3d 841, 843-44 (9th Cir. 1990). The Court therefore denies this portion of the appeal as unripe.

2. Criminal Justice Act

The CJA authorizes magistrate judges to provide representation "for any financially eligible person who is

charged with a Class B or C misdemeanor" when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(A). Tobey contends the magistrate judge erred when he declined to inquire into Tobey's financial eligibility. Appellant's Brief at 29. But as the United States argues, the magistrate judge had no reason to assess Tobey's eligibility because the Court did not allow Tobey to discharge his retained counsel. Appellee's Brief at 22. As this argument demonstrates, the question of whether the magistrate judge violated the CJA is necessarily intertwined with the question of whether the magistrate judge erred in denying Tobey's motion to substitute counsel. Consequently, the ripeness issues that preclude the Court from adjudicating Tobey's Sixth Amendment claims likewise require the Court to deny this portion of Tobey's appeal as unripe.

C. Right to Testify

"The right of an accused to testify in his own defense is well established, and is a 'constitutional right of fundamental dimension.'" U.S. v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir. 1999) (quoting U.S. v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993)). This right flows from the Fifth Amendment's due process guarantee, the Fifth Amendment's right to be free from compelled testimony, and the Sixth Amendment's right to call favorable defense witnesses. See Rock v. Arkansas, 483 U.S. 44, 51-53. The right to testify belongs to the accused, not his attorney. Pino-Noriega, 189 F.3d at 1094. Accordingly, only the accused, not counsel, can waive the right to testify. Id. This waiver "must be knowing and intentional." Id.

Notwithstanding how deeply the right to testify lies within

the Constitution's fundamental protections, the Ninth Circuit has narrowly circumscribed this right as a basis for appeal. As the United States argues, Pino-Noriega is particularly emblematic of this winnowing:

> [W]hile the waiver of the right to testify must be knowing and voluntary, it need not be explicit. A defendant is presumed to assent to his attorney's tactical decision not to have him testify. The district court has no duty to affirmatively inform defendants of their right to testify, or to inquire whether they wish to exercise that right. . . . When a defendant remains silent in the face of his attorney's decision not to call him as a witness, he waives the right to testify.

Pino-Noriega, 189 F.3d at 1094 (internal citations and quotations omitted); see also Appellee's Response at 23-24.

The doctrine surrounding a defendant's right to testify insists defense counsel cannot waive a defendant's right to counsel, but then presumes an attorney's decision on this matter is coextensive with their client's. Id. It requires a "knowing and intentional waiver" of the right to testify. Id. And yet, it upholds waivers when a defendant is silent, id.; when he doesn't know he has the right to testify, U.S. v. Edwards, 897 F.2d 445, 446-47 (9th Cir. 1990); and when he produces evidence that he wanted to testify but was denied the opportunity, Karkehabadi v. Tampkins, No. 8:16-cv-01854-JLS-MAA, 2019 WL 3849175, at *10 (collecting cases). Under this circuit's precedent, neither defense counsel nor courts must inform a defendant about this right. Edwards, 897 F.2d at 446-47; Pino-Noriega, 189 F.3d at 1094. In short, the Ninth Circuit all but forecloses relief for the defendant who silently objects to his attorney's waiver of a right he never knew existed.

Bearing this in mind, Tobey urges the Court to adopt out-of-circuit caselaw to conduct this analysis. See Appellant's Brief at 31-33 (citing Ledezma v. State, 626 N.W.2d 134, 146 (Iowa 2001); Blackburn v. Foltz, 828 F.2d 1177, 1181-82 (6th Cir. 1987); Horton v. State, 306 S.C. 252, 255 (1991)). This Court is nonetheless bound by the Ninth Circuit's rulings.

Here, the magistrate judge allowed Tobey an opportunity to speak with his attorney before deciding whether to testify. May 9, 2019 Tr. at 263:3-4. Before they went off the record, the government attorney clarified, "I just want to make sure it's clear on the record that Mr. Tobey knows that it's his decision whether or not to testify, not counsel's decision." Id. at 263:5-8. The Court agreed, told Tobey to take his time in making the decision, and even allowed him to consult with his wife. Id. at 263:14-16, 264: 1-9. Tobey decided to testify. Id. at 264:14-15.

Once Tobey took the stand, his counsel revealed a minimal understanding of both hearsay and the Fifth Amendment privilege against self-incrimination. Id. at 265:3-6, 266:15-267:7. Upon realizing that his intended line of questioning would "open the door" for certain cross-examination, defense counsel requested to speak to Tobey again. Id. at 267:7-8. The Court obliged. Id. at 267:9. Afterward, Tobey's counsel said, "[M]y client would decline to testify and we will submit on the matter." Id. at 267:14-15. Crucially, Tobey did not object to this change of course.

As the United States argues, the proceedings below went far beyond what the Ninth Circuit requires to ensure Tobey knew the

right to testify was his to waive. Appellee's Brief at 22-30. Tobey nonetheless assented to his attorney's decision to end his direct examination. The Court therefore finds Tobey knowingly, intelligently, and voluntarily waived his right to testify.

IV. ORDER

For the reasons set forth above, the Court AFFIRMS Tobey's conviction and sentencing.

IT IS SO ORDERED.

Dated: March 24, 2020

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JASON A. TOBEY, Defendant.	No. 3:18-MJ-0024-DMC DECISION AND JUDGMENT

This matter came on regularly for bench trial on May 9, 2019, at the United States District Court in Redding, California, before the Honorable Dennis M. Cota, United States Magistrate Judge presiding. The government appeared by and through Christopher S. Hales, Assistant United States Attorney. Defendant appeared by and through Travis E. Stroud, Attorney at Law.

The matter was before the Court by way of Complaint filed on October 31, 2018. In the sole count of the Complaint Jason A. Tobey was charged with violating 36 C.F.R. § 261.3(c). Pursuant to 36 C.F.R. § 261.3(c), the following is prohibited:

> Threatening, intimidating, or intentionally interfering with any Forest officer, volunteer, or human resource program enrollee, while engaged in, or on account of, the performance of duties for the protection, improvement, or administration of the National Forest System or other duties assigned by the Forest Service.

/ / /

At trial, the government adduced the following evidence:

Exhibit 1	Map of the Delta and Hirz Fires.
Exhibit 2	California Master Cooperative Wildland Fire Management and Stafford Act Response Agreement.
Exhibit 3	U.S. Department of Agriculture Forest Service Contract with Aspen Helicopters, Inc.
Exhibit 4	Resource Order – T3 Helicopter.
Exhibit 5	Resource Order – Owen Solomon.
Exhibit 6	Photos of Mott Airport.
Exhibit 7	Photos of Fire Crew Clothing.
Exhibit 8	Ariel Photograph of Mott Airport.
Exhibit 9	Emergency Facilities & Land Use Agreement.

The government also provided the testimony of John Casey, Forest Aviation Officer, Jeffrey Schifflett, Monongahela National Forest Firefighter, Owen Solomon, State of Alaska Division of Forestry and USFS Contractor, and John Dumont, Helicopter Pilot.

The defense adduced the following evidence:

Exhibit A	Photo of Entrance to Mott Airport (with vehicle in phono redacted).
Exhibit B	Photo of Gate into Heli Base (with tape measurer redacted).
Exhibit C	Statement taken by Lisa Wilson.
Exhibit D	Video of area on USB.
Exhibit E	Tree Limb (admitted over objections).

The defense also provided the testimony of Sam Kubowtiz, Siskiyou County Sheriff's Department, Cassandra Novak Tobey, Defendant's spouse, and Defendant Jason A. Tobey.

The testimony and evidence introduced at trial having been fully considered, this Court finds as follows: The evidence introduced at trial on behalf of the United States (hereafter "the Government") proved beyond a reasonable doubt that Defendant Tobey's statements and actions on September 23, 2018, and thereafter on September 24, 2018, in confronting US Forest

Service employee Jeff Schifflett, constituted a violation of 36 CFR 261.3(c).

1. FINDINGS OF FACT

As of the events at issue on September 23-24, 2018, the United States Forest Service was utilizing the Mott Airport near Mt. Shasta City, California as a helibase, from which the Forest Service deployed helicopters in conjunction with active firefighting efforts. Defendant Tobey's residence is at 1217 Mott Airport Road, Mt. Shasta, on property near or adjoining the Mott Airport facilities. As helicopters used by the Forest Service in fighting the Delta fire were flown in and out of the Mott Airport in September 2018, one or more of those aircraft flew over Defendant Tobey's property. In response to this helicopter traffic, and the noise and disruption allegedly caused by that air traffic, Defendant traveled to Mott Airport on both September 23 and 24th, 2018. There Defendant Tobey encountered full time US Forest Service employee Jeffrey Schiflett.

On each occasion that Defendant made contact, Forest Officer Schiflett was dressed in a US Forest Service attire consistent with his assigned tasks of performing road guard duty at an entry gate into the Mott Airport during the firefighting operations, and his role as a crew member on one of the helicopters operating from Mott Airport. The Court finds that at all times in his dealings with Defendant Tobey, Mr. Schiflett was acting in the capacity of a "Forest Officer," as defined in 36 C.F.R. § 261.2, and was performing an official duty for the "protection, improvement, or administration of the national Forest," as set forth in 36 C.F.R. § 261.3(c).

Defendant contends that on repeated occasions, including after Defendant expressed his concerns about the helicopter traffic over his house, that the pilots operating the helicopters for the US Forest Service flew low enough to rattle Defendant's dishes, scare Defendant, his wife and their dog, and allegedly break a large tree limb (Def. Exhibit E). The Court finds that based on the initial flights over Defendant's residence, Defendant Tobey was so agitated that Defendant drove to Mott Airport on September 23, 2018, with the stated objective of confronting the pilot of the helicopter and stopping the continued flights over Defendant's property.

At the instruction of Forest Officer Schiflett, Defendant Tobey stopped at an entrance to Mott Airport. There he addressed Forest Officer Schiflett and stated his anger over the pending helicopter operations. In the course of his comments to Forest Officer Schiflett, Defendant Tobey threatened to shoot the subject helicopter out of the sky if it flew over again. While Defendant attempts in his closing brief to characterize Defendant's statements as merely referencing the need to "defend his airspace," the Court finds the contrary testimony of the Government witnesses in this regard to be more credible on the issue of what was stated by Defendant Tobey. On Defendant's initial encounter with Forest Officer Schiflett on September 23, 2018, Defendant Tobey stated: "I will shoot that motherfucker out of the sky if I have to." When Defendant Tobey returned to the Mott Airport on September 24, 2018, he made the statement: "Did I not make myself clear to you yesterday, or am I just out of my fucking mind?"

The Court finds each of Defendant Tobey's statements to be threatening, intimidating, and intentionally interfering with Forest officer Schifflett while he was engaged in the performance of duties for the protection of the National Forest System at the Mott Airport and in conjunction with the firefighting efforts being undertaken from that location. The plain objective of Defendant's initial statement was to use the threat of a potential attack on the aircraft being used in the Forest Service fire operations to intimidate Forest Officer Schiflett into restricting or modifying those operations to no longer include flights over Defendant Tobey's residence. Notwithstanding Officer Schiflett's explanation of the need to navigate the helicopters in patterns dictated by wind and existing conditions and objectives, Defendant Tobey returned to Mott Airport on September 24, 2018 with a further intimidation fueled statement, referencing and renewing the threat that he previously intended to "make clear."

The Court finds that the statements made by Defendant Tobey on each of these occasions were not conditional, as subsequently maintained by Defendant. The message conveyed by the language used by Defendant on September 23, 2018 expressly stated that the threatened action would follow any continued operation of the helicopters over his property. Defendant's statement of September 24, 2018 then referred back to that statement and renewed the threat that he intended to "make clear" in his earlier comment. Defendant's threat was not

conditional on anything and would be given effect on the continuation of the status quo, specifically, the continued helicopter operations. Even assuming arguendo the statements at issue could be read as conditional threats, Defendant Tobey's liability under 36 C.F.R. § 261.3(c) remains here, where the activity of threatening and intimidating, even conditionally, constituted acts in violation of the statute.

2. CONCLUSIONS OF LAW

Defendant's statements to Forest Officer Schiflett on both September 23 and 24, 2018, resulted in both intimidation and intentional interference with a Forest Officer's duties of protecting the National Forest System, and as such, Defendant's actions were acts in violation of 36 C.F.R. § 261.3(c). Defendant Tobey's statements constituted intimidation, in that those statements sought to use Defendant's threatened acts of violence in shooting down a helicopter to compel Forest Officer Schiflett to comply with Defendant's objectives. To the extent Defendant's objectives included the goal of limiting the flight operations employed by the U.S. Forest Service, Defendant's statements also constituted interference generally with a program for the protection of the National Forest System. More specifically, Defendant's threatening statements required Forest Officer Schiflett's immediate attention and response, and so interfered with Forest Officer Schiflett's performance of his duties for protection of the National Forest System.

Defendant's argument that the statements at issue constitute speech protected under the First Amendment is unavailing as a matter of law. Statements such as those at issue here, that can reasonably be interpreted as expressing an intent to harm or assault, enjoy no constitutional protection as free speech under the First Amendment. See U.S. v. Hoff, 22 F. 3d 222 (9th Cir. 1994); U.S. v. Poocha, 259 F.3d 1077 (9th Cir. 2001). While the Supreme Court's jurisprudence protects a significant amount of verbal criticism and challenge directed at law enforcement, where, as here, words by their very utterance inflict harm in the form or intimidation or interference with the duties of an officer, such words fail to meet any "conceivable definition of protected speech." Hoff, 22 F.3d at 223. The First Amendment can not be employed to protect a statement intended to harm or intimidate a Federal employee. In making

statements in violation of 36 C.F.R. § 261.3(c), Defendant Tobey is afforded no free speech safeguards in the First Amendment.

Neither can Defendant Tobey here rationalize the actions of September 23-24, 2018, as justified or necessitated by the alleged disruptive helicopter air traffic. Even assuming arguendo that employing helicopters in firefighting efforts at issue resulted in the disruption and damage charged by Defendant (a conclusion neither adopted nor addressed by this Court), Defendant's redress for such damage does not permit the violation of 36 C.F.R. § 261.3(c). Irritation and anger can never be the catalyst for undertaking self-help outside the law.

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3. VERDICT

The Court finds Defendant Jason A. Tobey guilty of violating 36 C.F.R. § 261.3(c), a Class B Misdemeanor. While this violation is otherwise subject to a maximum possible penalty of 6 months imprisonment and up to a $5,000 fine, in consideration of the evidence received at trial and the absence of any prior record of offense by this Defendant, the Court rules as follows:

1. Defendant shall pay a fine of $500 within 15 days of the date of this Judgment; and

2. Defendant shall be placed on an unsupervised court probation for a period of twenty-four months, commencing on the date of this Judgment, during which period Defendant shall not commit another Local, State, or Federal crime.

4. APPEAL RIGHTS ADVISEMENT

Pursuant to Rule 58(g)(2)(13) and Rule 32(j) of the Federal Rules of Criminal Procedure, you have the right to appeal the judgment of conviction or sentence to the United States District Court within ten days of the entry of this Judgment. You must file your Notice of Appeal with the Clerk of the United States District Court, Eastern District of California, 501 'I' Street, Sacramento, California 95814. You are further advised that if you are unable to pay the costs of appeal, you may seek permission to appeal in forma pauperis.

Dated: August 15, 2019

DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE