APPENDIX 1

NOT FOR PUBLICATION

FILED

NOV 19 2020

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. MARLIN LEE GOUGHER, Defendant-Appellant.	No. 17-50436 18-50352 D.C. No. 3:14-cr-00635-WQH-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted May 14, 2020
Pasadena, California

Before: COLLINS and LEE, Circuit Judges, and PRESNELL,** District Judge.
Concurrence by Judge COLLINS

This case involves two consolidated appeals. The first is an appeal from Marlin Lee Gougher's ("Gougher") convictions for distribution, receipt, and possession of child pornography in violation of 18 U.S.C. § 2252. The second

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

** The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

appeals the denial of a motion to correct transcripts that were filed for the first appeal. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I. Gougher's Representation

Gougher's representation by counsel and his objections to that representation appear to be based on his "sovereign citizen" beliefs. Sovereign citizens share a common belief that the court system is "a vast governmental conspiracy" controlled by complicated and enigmatic rules. *United States v. Glover*, 715 F. App'x 253, 256 n.2 (4th Cir. 2017). They generally take the position "that they are not subject to" federal laws and proceedings. *United States v. Mesquiti*, 854 F.3d 267, 269-70 (5th Cir. 2017). This creates a difficult balancing act for trial courts when considering whether to allow criminal defendants with profoundly flawed views of the law to represent themselves.

Gougher first argues that the district court violated his Sixth Amendment rights by (1) allowing him to represent himself at the bail revocation hearing when he had not yet made an unequivocal decision to represent himself, and (2) not allowing him to represent himself at trial once he had made an unequivocal decision to represent himself. We review waivers of counsel de novo. *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004). The Ninth Circuit has "not yet clarified whether denial of a request to proceed pro se is reviewed de novo or for abuse of discretion." *United States v. Maness*, 566 F.3d 894, 896 n.2 (9th Cir. 2009).

"Whether to allow hybrid representation, where the accused assumes some of the lawyer's functions, is within the sound discretion of the judge." *United States v. Williams*, 791 F.2d 1383, 1389 (9th Cir. 1986).

The first question is whether Gougher, as he argues, engaged in "self-representation without counsel" at the revocation hearing. Gougher had the benefit of counsel both prior to and during the revocation hearing. Because Gougher would not permit his counsel to speak without interruption, the district court permitted Gougher to assume some of counsel's functions: questioning witnesses, making objections, and giving oral argument. The Court also gave Gougher's counsel the opportunity to object, to cross-examine, and to give oral argument. At most, Gougher's participation created a hybrid counsel situation. The district court did not abuse its discretion in permitting Gougher to participate.

The next question is whether Gougher made an unequivocal decision to represent himself at trial and whether the district court violated his Sixth Amendment rights by failing to honor that decision. "In order to deem a defendant's *Faretta* waiver knowing and intelligent, the district court must [e]nsure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the 'dangers and disadvantages of self-representation.'" *Erskine*, 355 F.3d at 1167 (quoting *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). The district court denied Gougher's request to represent himself at trial. Gougher had repeatedly

insisted, and continued to insist, that he did not understand the nature of the charges against him. A district judge cannot be expected to ensure that a defendant understands the nature of the charges against him when the defendant repeatedly and consistently refuses to acknowledge that he understands them.

Gougher also argues that the district court's refusal to appoint substitute counsel following Gougher's bar complaint against his attorney violated the Sixth Amendment. We review de novo claims "that trial counsel had a conflict of interest with the defendant." *United States v. Nickerson*, 556 F.3d 1014, 1018 (9th Cir. 2009). The Sixth Amendment is violated when an attorney has an actual conflict of interest that adversely impacts his or her performance in a criminal case. *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998). Where, as here, the defendant has been repeatedly uncooperative with successive counsel, we have declined to find that an eve-of-trial filing of a bar complaint against the defendant's latest counsel gives rise to an actual conflict of interest that would require a substitution of counsel. *See United States v. Plasencia-Orozco*, 852 F.3d 910, 916–18 (9th Cir. 2017). Beyond his mere filing of a bar complaint against his fourth appointed counsel, Gougher does not otherwise explain why the district court should have found an actual conflict. Accordingly, there is no basis for finding that the district court's refusal to appoint substitute counsel violated the Sixth Amendment.

II. Speaking in Court

Gougher argues that the district court abused its discretion by prohibiting Gougher from making statements during court proceedings. A represented defendant does retain authority over some aspects of the case, such as whether to plead guilty, to have a jury trial, to appeal, and to testify on his own behalf. *United States v. Read*, 918 F.3d 712, 720 (9th Cir. 2019). Beyond that, it was not an abuse of discretion for the district court to otherwise insist that Gougher speak only through his appointed counsel. *See United States v. Williams*, 791 F.2d 1383, 1389 (9th Cir. 1986) (district court has discretion to deny "hybrid" representation in which defendant supplements attorney's representation). Moreover, Gougher cites no persuasive authority to support his argument that the First Amendment somehow grants a criminal defendant the right to speak at his trial outside the strictures of the applicable rules of court.

III. Gougher's Stricken Testimony

We review de novo comments on a criminal defendant's failure to testify. *United States v. Inzunza*, 638 F.3d 1006, 1022 (9th Cir. 2011). When the defendant fails to object at trial, we review Fifth Amendment claims for plain error. *United States v. Sehnal*, 930 F.2d 1420, 1426 (9th Cir. 1991).

Gougher contends that (1) the cross-examination about child pornography on the computers and (2) the rebuttal argument that mentioned Gougher's failure to say

anything contradicting the government's evidence both violated the Fifth Amendment. But the Fifth Amendment privilege is not self-executing. A defendant who wishes to avail himself of the privilege against self-incrimination "must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943)). Gougher voluntarily took the stand, and at no point during his testimony did Gougher assert his Fifth Amendment privilege. Thus, neither the cross-examination nor the rebuttal argument violated his Fifth Amendment rights.

IV. The Motions for Discovery and Evidentiary Hearing about Current NCIS Investigative Practices

We review district court discovery rulings for abuse of discretion. *United States v. Sellers*, 906 F.3d 848, 851 (9th Cir. 2018). However, if the district court applied the wrong legal standard, it necessarily abused its discretion. *Id.* at 852. We review de novo the question of whether the district court applied the correct legal standard. *Id.* at 851. Essentially, Gougher argues he was entitled to discovery that could show that a different case, *United States v. Dreyer*, 804 F.3d 1266 (9th Cir. 2015), was wrongly decided. The district court did not abuse its discretion when it found that such information was irrelevant to this case. And Gougher fails to establish that the district court applied an incorrect legal standard. Accordingly, the

district court's denial of the motions for discovery and evidentiary hearing was not improper.

V. Motion to Correct Transcripts

We will not disturb "a trial court's factual finding that transcripts are accurate and complete" unless clearly erroneous. *United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir. 1989). Gougher argues that the district court erred in denying the Motion to Correct Transcripts without first reviewing the recordings of the proceedings. The district court stated that it reviewed Gougher's proposed changes and the response of the court reporter, and it found that the court reporter's version was accurate. We find no basis for concluding that the district court clearly erred in denying Gougher's requests for additional changes to the transcript. But, even if there were errors in the transcript, Gougher has not made a showing of specific prejudice, and thus he cannot prevail on this issue. *United States v. Horob*, 735 F.3d 866, 872 (9th Cir. 2013).[1]

AFFIRMED.

[1] We deny Gougher's motion in this court to make additional changes to the transcript (17-50436 Docket No. 18).

United States v. Gougher, Nos. 17-50436, 18-50352

COLLINS, Circuit Judge, concurring in part and in the judgment:

I concur in the last paragraph of Section I of the memorandum disposition, as well as in Sections II-V. As to the remainder of Section I, I concur only in the judgment.

1. I do not join in the majority's gratuitous observations, at the beginning of Section 1, about whether Gougher subscribes to "'sovereign citizen' beliefs" and about what such beliefs entail. *See* Mem. Dispo. at 2. Whether or not such beliefs underlay Gougher's behavior in court seems to me to be beside the point.

2. I agree that Gougher was not deprived of his Sixth Amendment right to counsel at his bond revocation hearing, where the district court allowed Gougher to question witnesses and to make objections. But I reach that conclusion for reasons that differ from the majority's rationale.

The majority contends that "Gougher's participation created a hybrid counsel situation" and that the district court "did not abuse its discretion in permitting Gougher to participate." *See* Mem. Dispo. at 3. In my view, the majority's reasoning begs the Sixth Amendment question. Assuming that the bond hearing constituted a critical stage of the case at which Gougher had a Sixth Amendment right to counsel, we made clear in *United States v. Turnbull*, 888 F.2d 636 (9th Cir. 1989), that "hybrid representation" is "acceptable *only* if the

defendant *has voluntarily waived* [his right to] counsel"—at least where, as here, "the defendant assumes any of the 'core functions' of the lawyer." *Id.* at 638 (emphasis added). Thus, there still must be a predicate waiver of the Sixth Amendment right to counsel in order to uphold a district court's authorization of a hybrid situation in which the defendant assumes the sort of central role that Gougher did at the bond hearing. The majority cites nothing to support its conclusion or to justify its disregard of the underlying Sixth Amendment issue and Ninth Circuit precedent.

Although the record does not appear to demonstrate that the district court conducted a proper *Faretta* colloquy at the bond hearing, *United States v. Hayes*, 231 F.3d 1132, 1136 (9th Cir. 2000), I nonetheless conclude that Gougher effectively waived his Sixth Amendment right to counsel by his conduct at that hearing. Gougher's counsel had not been discharged, and Gougher therefore remained represented by counsel during the hearing, but Gougher repeatedly objected to his counsel's participation. At the same time, Gougher conversely insisted that he did *not* wish to proceed pro se. The district court's handling of the difficult situation created by Gougher's conduct did not violate his Sixth Amendment right to counsel. *See United States v. Turner*, 897 F.3d 1084, 1104 (9th Cir. 2018) (district court did not err in finding waiver of right to counsel where defendant "'manipulated the proceedings' by vacillating between asserting

his right to self representation and his right to counsel"); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) ("Massey attempted to hinder his trial by declining every constitutionally recognized form of counsel while simultaneously refusing to proceed pro se. A defendant may not abuse the Sixth Amendment in this way[.]").

3. I also agree that the district court did not infringe Gougher's constitutional rights by refusing on the first day of trial to allow him to proceed pro se. Again, however, my reasoning differs from that of the majority.

The majority concludes that the denial of self-representation was proper based on the fact that Gougher refused to state that he understood the nature of the charges against him. *See* Mem. Dispo. at 3–4. But there is no indication in the record that Gougher did not understand either the elements of the crimes with which he was charged or the nature of the charged conduct that he was alleged to have committed. *See United States v. Lopez-Osuna*, 232 F.3d 657, 664–65 (9th Cir. 2000) (waiver of counsel was sufficient under *Faretta* where defendant knew the elements of the charge and the underlying violative conduct alleged). Rather, Gougher's comments made clear that he claimed not to understand why the "United States"—which he characterized as an officious "corporation"—could assert the authority to punish him at all. But that is not part of what *Faretta* requires, because "there is a difference between agreeing with the charges and

understanding them." *Id.* at 665. And if it really had been true that Gougher did not understand the charged offenses, then "the district court should have informed him of the pending charges before proceeding any further." *Id.* at 664.

I nonetheless agree that the district court properly declined to allow Gougher to proceed pro se based on the district court's conclusion that Gougher was not "able and willing to abide by the rules of procedure and courtroom protocol." Gougher concedes that this is a proper ground for denying the right to self-representation, *see Lopez-Osuna*, 232 F.3d at 664, but he asserts that it was "necessary to give self-representation a try before concluding [that] Gougher would not respect courtroom decorum." That is wrong. By the first day of trial, there was already an extensive record of Gougher's repeatedly inappropriate and disruptive behavior throughout the proceedings below, and that record provided ample grounds for the district court to deny Gougher's request to proceed pro se.

For these reasons, I respectfully concur in part and in the judgment.

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 4 2021

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARLIN LEE GOUGHER,

Defendant-Appellant.

No. 17-50436
18-50352

D.C. No. 3:14-cr-00635-WQH-1
Southern District of California,
San Diego

ORDER

Before: COLLINS and LEE, Circuit Judges, and PRESNELL,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Collins and Lee have voted to deny the petition for rehearing en banc, and Judge Presnell so recommends. 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. *See* FED. R. APP. P. 35. The petition for panel rehearing and for rehearing en banc, filed December 10, 2020, is DENIED.

* The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

APPENDIX 3

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	No. 14-CR-0635-WQH
v.	April 18, 2017
MARLIN LEE GOUGHER,	10:03 a.m.
Defendant.	San Diego, California

EXCERPTED TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: United States Attorney's Office
By: ALESSANDRA P. SERANO, ESQ.
880 Front Street, Room 6293
San Diego, California 92101

For the Defendant: Law Office of Robert Garcia
By: ROBERT A. GARCIA, ESQ.
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San Diego, California 92101

Court Reporter: Melinda S. Setterman, RPR, CRR
District Court Clerk's Office
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Reported by Stenotype, Transcribed by Computer

SAN DIEGO, CALIFORNIA, APRIL 18, 2017, 10:03 A.M.

* * * *

THE CLERK: Number one on calendar, case 14-CR-635, United States of America vs Marlin Lee Gougher, on for status hearing.

10:03

MR. GARCIA: Your Honor, Robert Garcia for Mr. Gougher, who is present in custody.

THE COURT: Good morning.

THE DEFENDANT: I object to his presence, Your Honor.

10:03

THE COURT: Mr. Gougher, you are to remain silent unless I speak to you. You don't represent yourself. This gentleman represents you.

THE DEFENDANT: No, he does not, Your Honor. I object.

10:03

THE COURT: Don't -- don't speak over me. You are to remain silent, unless I call you on, because at this point you don't represent yourself. Mr. Garcia does.

MS. SERANO: Alessandra Serano on behalf of the United States. Good morning, Your Honor.

10:03

THE COURT: Thank you. All right.

Mr. Garcia.

MR. GARCIA: Yes, Your Honor. Thank you. I wanted to bring this motion before Judge Huff on April 3rd, but she recused herself before I could make it.

10:03

My motion would be to be relieved as attorney of

record in this case due to a breakdown -- complete breakdown in communications between me and Mr. Gougher. I was appointed -- just for background, Your Honor, I was appointed on February 14th, 2017, to this case to relieve Mr. Gary Burcham.

10:04 THE COURT: Sure. And if you want to discuss it -- it might be best that we have a conversation outside the presence of the Government.

So I'll ask that Ms. Serano to please leave and everyone to leave other than court staff, so please step

10:04 outside, Ms. Serano. Thank you.

(Sealed portion of the proceedings took place.)

THE COURT: All right. Ms. Serano has returned.

Mr. Garcia has indicated a difficulty in representing the defendant and in large part because the defendant --

10:13 Mr. Garcia believes that, you know, he can't successfully or competently represent the defendant because the defendant has been unwilling to speak with him.

And I understand, Mr. Garcia, you are unease with the circumstance that you have been placed in, so what we'll do, I

10:13 am going to relieve you, appoint Kris Kraus to represent the defendant. We'll put it on for status of counsel tomorrow, April 19th, at 10:00. Mr. Kraus represents the defendant.

Ms. Serano, you should note that I made brief inquiry to the defendant about, you know, the prior requests to

10:14 represent himself, and again, he indicated that he didn't --

couldn't understand the nature of the charges.

Is that fair to say, Mr. Gougher? Did I properly characterize what you said?

THE DEFENDANT: Yes. The reason that I don't understand is because I don't understand how I am subject to the laws, Your Honor.

THE COURT: Okay. All right. That is fine.

What we'll do is Mr. Kraus has then been appointed to represent the defendant. It is on for confirmation of counsel tomorrow, April 19th, at -- did I say 10:00.

MR. GARCIA: I believe you did, Your Honor.

THE COURT: -- at 10:00 AM. Mr. Garcia, you are relieved. And tomorrow I'll set motion hearing dates, trial dates.

And then I'll advise Mr. Kraus, as I'll advise the Government now, any requests for bond are to be brought to this Court, not the magistrate. They come here.

And so with that we'll see everybody other than Mr. Garcia tomorrow at 10:00 AM.

Mr. Garcia, thank you for your --

MR. GARCIA: I am excused from tomorrow's hearing?

THE COURT: You are.

MS. SERANO: I'm sorry, before we break -- and I can bring this up tomorrow if the Court would like, just to provide the Court because I know this is the Court's first appearance

with this case -- a little bit of background on the numerous requests that the defendant has had to obtain counsel and then also the comment that he doesn't understand the laws, how they are subject to him.

10:15 He filed a motion for what he called it a Bill of Particulars, and Judge Huff ordered me to respond, which I did.

THE COURT: I've read those. I read the -- and, counsel, you should be aware, I read the transcript of Monday, March 6th, and February 15th of 2017, so I read those

10:15 transcripts. I am aware that Judge Huff has gone through the colloquy with the defendant on two prior occasions concerning his requests to represent himself.

The one time he said he was under duress. The second time he said he doesn't understand. Apparently he still

10:16 doesn't understand. And I am also aware that Federal Defenders was appointed, and then Gary Burcham was in the case for a brief period of time, and then Mr. Garcia has been in for similarly a very brief period of time, so Mr. Kraus is going to represent the defendant. I assume that he accepts the

10:16 appointment, so I am somewhat familiar with the background.

MS. SERANO: The one thing that I would just like to add is that Judge Huff did give the defendant approximately four months of time to try to interview somebody of his choice, and he was unable to find somebody during that time.

10:16 THE COURT: Right. He did -- I did have a colloquy

with him, and he did indicate that he had been trying to find somebody, and he is unable to find anybody, but he doesn't -- he doesn't have retained counsel. He doesn't represent himself, and now Mr. Kraus represents him.

10:17 And so we'll go forward tomorrow with -- I assume Mr. Kraus will accept the appointment, and we'll go through and set some dates tomorrow, and then all -- any requests for bail is to be brought to this Court and not the magistrate court.

So Mr. Garcia, you are relieved. Thank you for your

10:17 brief service, and we'll have -- I expect Mr. Kraus to be here tomorrow.

MR. GARCIA: Thank you, Your Honor.

THE COURT: Thank you. We'll be in recess until tomorrow at 10:00.

10:17 THE DEFENDANT: Your Honor, can I say something?

THE COURT: No, no, the proceeding has ended.

THE DEFENDANT: Oh, okay.

(Proceedings concluded at 10:17 a.m.)

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

DATED: April 24, 2017, at San Diego, California.

/s/ Melinda S. Setterman

Melinda S. Setterman,
Registered Professional Reporter
Certified Realtime Reporter

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	No. 14-CR-0635-WQH
v.	April 19, 2017
MARLIN LEE GOUGHER,	9:55 a.m.
Defendant.	San Diego, California

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: United States Attorney's Office
By: ALESSANDRA P. SERANO, ESQ.
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SAN DIEGO, CALIFORNIA, APRIL 19, 2017, 9:55 A.M.

* * * *

THE CLERK: Number four, case 14-CR-635, United States of America vs Marlin Lee Gougher, on for status hearing.

09:55 MR. KRAUS: Good morning, again, Your Honor. Kris J. Kraus.

THE COURT: Good morning.

MS. SERANO: Alessandra Serano on behalf of the United States.

09:55 THE COURT: Good morning.

THE COURT: He can be seated at counsel table.

All right. Mr. Kraus, your client is present. Have you had a chance to meet your client yet?

09:57 MR. KRAUS: No, Your Honor. I just found out about the case yesterday.

THE COURT: Be seated.

MR. KRAUS: I will go over next week and speak with him.

09:58 THE COURT: Let me give you some dates here. We'll set -- are you familiar with the nature of the charges?

MR. KRAUS: I spoke briefly with Ms. Serano yesterday and Mr. Garcia. I am going to pick up the file this afternoon and review the docket.

09:58 THE COURT: All right. Do you have an idea how much

time you think you want for a motion hearing date?

THE DEFENDANT: You are not speaking on my behalf, sir. I'll sue you under Title 42 of the --

THE COURT: Sir, you need to remain silent. Because at this point you don't represent yourself, Mr. Kraus does, and so don't interrupt the proceedings.

THE DEFENDANT: Pursuant to --

THE COURT: Do not interrupt the proceedings or you will be removed.

THE DEFENDANT: -- violate my constitutional rights and my right to due process, sir.

THE COURT: If you continue to interrupt the proceedings, you will be removed. You do not represent yourself. Mr. Kraus represents you.

THE DEFENDANT: No, he does not, sir.

THE COURT: So you need to remain seated.

THE DEFENDANT: I am going to sue him under 1983 -- Title 42 1983 if he speaks on my behalf.

THE COURT: If you continue, you will be removed.

THE DEFENDANT: He is not my counsel. He is not an attorney of my choice --

THE COURT: You are remain quiet.

THE DEFENDANT: -- and is violating my rights.

THE COURT: Do you not understand what I told you?

THE DEFENDANT: He is violating my rights --

THE COURT: You'll be removed if you continue.

THE DEFENDANT: -- to the constitution.

THE COURT: You are getting close. You will not be able to attend these proceedings if you continue to interrupt them.

09:59

THE DEFENDANT: He is not to speak on my behalf.

THE COURT: You are to remain quiet.

Mr. Kraus --

THE DEFENDANT: Objection, Your Honor.

09:59

THE COURT: -- how much do you need for a motion hearing?

MR. KRAUS: Your Honor, I looked at the docket yesterday. There is over 100 entries. I understand the case has been going on for, like, three years. There is motions

09:59

that were filed previously that I don't know if they were adjudicated yet or decided. I have to look at all that. I have to look at the discovery. I am not sure if Mr. Gougher will even meet with me.

THE COURT: He may not, but I can't control whether he

09:59

meets with you or not. I can control who his lawyer is. Whether he elects to meet with you or not, that is his choice, and so that may make it -- your task a bit more difficult, but it -- I simply can't control -- and this is not the first defendant who doesn't want to meet with his lawyer, so it,

10:00

candidly, it is not really that unusual, certainly, from my

perspective.

THE DEFENDANT: He is violating my constitutional rights under the constitution --

THE COURT: I told you, more than once. Now, you are going to eventually require me to remove you from the courtroom, so if you want to be present during your legal proceedings, you'll follow the directions of the Court, and so I am telling now, yet again, that you are to remain quiet while I have conversations with your lawyer.

10:00 Do you understand what I just told you?

THE DEFENDANT: Yes. He is not my lawyer, sir.

THE COURT: All right.

THE DEFENDANT: I object.

THE COURT: Now, you are to remain quiet while I continue with this proceedings. If you continue to interrupt the legal proceedings, you'll be removed, and you'll listen to the proceedings in a cell. Now, that is your choice, but I am not going to allow you to continue to interrupt the proceedings. I warned you on more than one occasion.

10:00 Now, Mr. Kraus, how much time do you think that you need for a motion hearing, and then I think it is probably appropriate to set a motion hearing and then to talk about a trial date because at some point this -- there needs to be some resolution in the case. Though, I'll give you the time that you feel is necessary.

Do you have an idea as to how much time you think you might want for a motion hearing?

MR. KRAUS: I would ask for 60 days, Your Honor.

THE COURT: All right. That's fine. And -- how about June 26th at 2:00? Does that work for you?

MS. SERANO: Your Honor --

THE DEFENDANT: I object, Your Honor.

MS. SERANO: Your Honor, I am out the week of June 26th. Could we have --

THE DEFENDANT: I will object --

THE COURT: I told you to be quiet. One, the court reporter can't pick it up, and two, I told you don't interrupt the proceedings.

THE DEFENDANT: The proceedings violates my constitutional rights, sir.

THE COURT: It is not likely that you are going to be present if you continue -- I told you countless times, and I am reluctant to remove somebody from their own legal proceedings, but I'll do it with you, and if you continue you will be listening to these court proceedings in the cell that is next door.

THE DEFENDANT: (Unintelligible).

MS. SERANO: Your Honor, I am sorry. If we can do it the week earlier, the week of June 19th, or if the Court prefers an off day, the 20th, 21st, or 22nd. I am scheduled to

be out of the district starting July 23rd through July 3rd.

THE COURT: How about the 19th at 2:00?

MS. SERANO: That is fine with me. Thank you.

THE DEFENDANT: I object to this.

10:02 THE COURT: Is that fine for you, Mr. Kraus?

MR. KRAUS: That's fine.

THE DEFENDANT: I object, Your Honor.

THE COURT: I told you remain quiet.

THE DEFENDANT: You violated my constitutional rights.

10:02 THE COURT: The record is very clear now that you've been warned countless times, and the only thing that I can conclude is that you simply don't wish to be present at your own proceedings, and that is likely what you will end up with.

THE DEFENDANT: I am appearing propria persona, Your

10:03 Honor. I need to file some papers.

THE COURT: So we will have -- you don't represent yourself. You can't file papers.

THE DEFENDANT: I want to file my papers, Your Honor.

THE COURT: You can't file -- I told you be quiet.

10:03 You don't represent yourself.

THE DEFENDANT: I need to file the papers.

THE COURT: Mr. Kraus, Mr. Kraus, come forward.

THE DEFENDANT: You got to let me do it. He is not my attorney of record, Your Honor. I object.

10:03 THE COURT: Mr. Kraus, can you file by June 5th?

THE DEFENDANT: I am going to sue you sir, under Title 42 1983.

THE COURT: Can you file by the 5th?

MR. KRAUS: That should be fine, Your Honor.

10:03 THE COURT: File by the 5th, responses by the 12th. The hearing is the 19th at 2:00.

Now, let's talk about a trial date, Mr. Kraus. Do you have -- realistically, are you in a position to discuss a trial date?

10:03 MR. KRAUS: No, Your Honor.

THE COURT: All right. Because am some point -- after we get past the motion hearing date -- I have looked at the indictment. Obviously, I don't have your view of the case, but it would seem that this case doesn't seem to be that

10:04 complicated to me, but I understand you have just came into the case, so I'll give you the opportunity that you think is appropriate.

Ms. Serano, how long is the Government's case in this case?

10:04 MS. SERANO: I imagine it would take, not including jury selection, perhaps a day and a half.

THE COURT: All right. So it is a relatively -- I understand it is easy for us to say it is straightforward. You just came into the case. I can tell you this, Mr. Kraus, and I

10:04 don't know what your schedule is like, so the reason why I am

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	No. 14-CR-0635-WQH
v.	July 25, 2017
MARLIN LEE GOUGHER,	10:30 a.m.
Defendant.	San Diego, California

* * SECOND AMENDED TRANSCRIPT * *
TRANSCRIPT OF COMPETENCY HEARING
BEFORE THE HONORABLE WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Reported by Stenotype, Transcribed by Computer

SAN DIEGO, CALIFORNIA, JULY 25, 2017, 10:30 A.M.

* * * *

THE CLERK: Number one on calendar, case 14-CR-635, United States of America vs Marlin Lee Gougher, on for competency hearing, status hearing.

10:33

MR. KRAUS: Good morning, Your Honor. Kris J. Kraus.

THE COURT: Good morning.

MS. SERANO: Alessandra Serano on behalf of the United States. Good morning.

10:33

THE COURT: Good morning.

(Defendant present.)

THE COURT: He can be seated. Thank you, sir.

All right. Mr. Kraus, your client is present; is that correct?

10:36

MR. KRAUS: Yes, Your Honor.

THE COURT: All right. We're here for a competency hearing. Is there any objection to the Court receiving the report that was authored by Dr. Gilbert?

MR. KRAUS: No, Your Honor.

10:36

MS. SERANO: No, Your Honor.

THE COURT: All right. The report is --

THE DEFENDANT: I have an objection, Your Honor.

THE COURT: You don't represent yourself, Mr. Gougher.

THE DEFENDANT: I am proceeding persona propria.

10:37

THE COURT: Don't interrupt. You don't represent

yourself. I explained have explained that to you.

THE DEFENDANT: I do, sir.

THE COURT: What did you say?

THE DEFENDANT: I do, sir. I'm sorry. I have to

10:37 invoke my rights.

THE COURT: You don't represent yourself, Mr. Gougher. This is a competency proceeding, so don't interrupt.

THE DEFENDANT: I want to be represented and --

THE COURT: First off, Mr. Gougher, you don't

10:37 represent yourself. I've told you more than once. Do not interrupt the proceedings. Mr. Kraus represents you, and so you don't have an opportunity --

THE DEFENDANT: I sent him a letter on April 19th, 2017, and it got lost in the mail, and he finally received it a

10:37 month ago, sir, and I told him not to do anything in my case. I have the right to an attorney of my choice by law, and you're violating that right, sir.

THE COURT: Don't interrupt the proceedings. If you continue to interrupt the proceedings, you'll hear the

10:37 proceedings in the cell as I've explained to you before, but you continually seek to interrupt the proceedings, and I've explained that to you on many occasions.

You do not represent yourself. Mr. Kraus represents yourself -- Mr. Kraus represents you.

10:38 THE DEFENDANT: I don't accept him as my counsel, Your

Honor.

THE COURT: Mr. Gougher, I have warned you more than once.

THE DEFENDANT: I tried to hire one.

10:38 THE COURT: Mr. Gougher, I told you more than once, don't interrupt the proceeding.

Mr. Kraus, there is no objection to receiving the report; is that correct?

MR. KRAUS: That's correct.

10:38 THE COURT: No objection receiving the report from the Government; is that correct?

MS. SERANO: Yes, sir.

THE COURT: Does the Government have any additional evidence that you wish to present with respect to the issue of

10:38 competency?

MS. SERANO: No, Your Honor.

THE COURT: Mr. Kraus, are any evidence that you wish to present on the issue of competency?

MR. KRAUS: No, sir.

10:38 THE COURT: All right. The forensic report dated July 6th, 2017, prepared by forensic Alicia Gilbert concludes that there is no objective evidence to indicate that the defendant is suffering from any mental disease or defect rendering him unable to understand the nature and consequences

10:39 of the Court proceedings against him or unable to assist in his

defense.

Mr. Kraus, as I understand it, you don't wish to present any evidence; is that right?

MR. KRAUS: No, Your Honor.

10:39 THE COURT: Have you checked with Mr. Gougher to see if he wants to testify on his own behalf?

MR. KRAUS: Your Honor, Mr. Gougher refuses to see me. He actually returns my mail. I attempted to visit him. He refuses to see me. I did put the report in the mail. He just 10:39 told me now that he did receive it.

THE COURT: All right.

MR. KRAUS: I haven't been able to discuss it with him at all.

THE COURT: All right. Mr. Gougher, do you want to 10:39 testify on your own behalf at your competency hearing?

THE DEFENDANT: No, sir.

THE COURT: All right. Pursuant to Section 4241(c), the hearing shall be conducted pursuant to the provisions of 4247(d). Section 4247(d) provides at a hearing or pursuant to 10:39 this chapter, the person whose mental condition is the subject of the hearing shall be represented by counsel, and if he financially unable to obtained adequate representation, counsel shall be appointed for him pursuant to Section 3006(a). The person shall be afforded an opportunity to testify, to present 10:40 evidence, subpoena witnesses to testify in his behalf, and to

confront and cross-examine witnesses who appear at the record -- who appear at the hearing.

The evaluation by Dr. Gilbert is ordered filed under seal in the record.

10:40 Based upon the record in this case, including the evaluation dated -- the psychiatric evaluation dated July 6th, 2017, the Court finds by a preponderance of the evidence that the defendant is presently competent to understand the nature and consequences of the proceedings pending against him in the 10:40 case and competent to assist properly in his defense.

Counsel, I did have -- the case was set for trial on August 29th. I had a couple cases set on the 29th. Then in an effort to give some certainty to the lawyers that I had more than one case, I moved the case, but I moved it to 10:41 September 11th, and as I understand it, Government counsel is unavailable that day; is that right?

MS. SERANO: That's correct, Your Honor. I was hoping if I could have it set two weeks from that date.

THE COURT: Actually, counsel, I can't do that, so 10:41 what I am going to do is I am going to reset it back to the date it was set. So it was set on August 29th, and that was the date it was set for sometime.

MR. KRAUS: Your Honor, I would appreciate more time. Like I said, Mr. Gougher hasn't met with me.

10:41 THE COURT: Mr. Kraus, with all -- he is not likely

to.

MR. KRAUS: And --

THE COURT: He doesn't have to, but I am not going to continue the case to allow him to decide if he wants to cooperate in his own defense or not. Frankly, if he elects not to, that is his right, but the case has been set -- been pending for an extended period of time. You have represented him for months. He could have met with you. He can still change his mind and meet with you, but if he elects not to, that is his choice.

10:41

MR. KRAUS: Your Honor, one other issue, I will be out of town the Thursday through Monday prior to that. I'll be returning Monday.

THE COURT: Well, I'll move it a day or so. The case was set then, and then I moved it. I understand sometimes when the Court moves it, you fill those dates in, which I understand, but just based on, you know, Government counsel's schedule, my schedule, that it is going to have to move too far out, and this is a case that needs to be -- needs to get tried.

10:42

MR. KRAUS: Can we have the 4th, Your Honor.

THE COURT: You know, I have another case set then that I really can't.

MS. SERANO: How about September 19th, Your Honor? It is one week later than the Court initially set it. I am gone from the first -- September 1st through the 15th is my concern.

10:42

THE COURT: Okay.

MS. SERANO: So I don't know if we can kick it out one week later. It will be September 19th, which is a Tuesday.

MR. KRAUS: I have a hearing before Judge Benitez, but I'll get somebody to cover it for me.

10:42

THE COURT: That is the absolute -- that is the absolute farthest this is going. It is getting tried on the 19th.

MR. KRAUS: That would be appreciated, Your Honor, considering our schedules.

10:43

THE COURT: That is it. I understand that -- I moved it from the 29th, and so I know -- you have a tendency after somebody moves it, you don't think it is going to get moved back, so you make your plans accordingly, but this trial is going on the 19th.

10:43

MS. SERANO: It might be helpful -- and I am just throwing this idea out there. I apologize for interrupting. Could we set motions in limine perhaps the end of August so we see --

10:43

THE COURT: Sure. How long is your case, Ms. Serano? How total is your case? How long is it totally?

MS. SERANO: I don't recall how long it takes for the Court to pick a jury, but I would imagine less than one day, our case in chief.

10:43

THE COURT: It doesn't take that long to get a jury.

It is a reasonable period of time. So we can do the motions in limine then -- we'll do the motions in limine on August 28th -- well, actually --

MR. KRAUS: Your Honor, I'm sorry. I am out of town the 28th as well.

THE COURT: Okay.

MR. KRAUS: Could we do the 29th, please?

MS. SERANO: That would be fine, Your Honor.

THE COURT: I have a trial that starts that day.

MR. KRAUS: I am available the 4th, if Ms. Serano is.

MS. SERANO: No.

THE COURT: What dates are you gone, Ms. Serano?

MS. SERANO: September 1st through the 15th. It is the first two weeks of September.

THE COURT: And, Mr. Kraus, you are gone from when to when?

MR. KRAUS: I am out of town on the 24th through the 28th, and the dates that you -- yes, the 24th through the 28th. Those were the dates.

MS. SERANO: Does the Court have -- I don't know how long the trial Your Honor has --

MR. KRAUS: I'm sorry, Ms. Serano. The 11th through the -- the 11th, the 24th through the 28th. Those are the dates I am unavailable.

THE COURT: Of what month?

MR. KRAUS: August.

THE COURT: So, Ms. Serano, you are out the first; is that right?

MS. SERANO: Yes, sir.

10:44 THE COURT: All right.

MS. SERANO: That was just a suggestion. If the Court wants to handle the motions in limine the day before, sometimes it is helpful --

THE COURT: I think sometimes it is helpful to have --

10:45 MR. KRAUS: Your Honor --

THE COURT: -- a better idea.

MR. KRAUS: Maybe the 31st, Your Honor. I know -- would your trial be in --

THE COURT: I don't know -- I don't know. It is not a

10:45 long case, but it might not be that short. Why don't we just move them up and do them August 15th. Let's try August 15th at 2:00.

I can have you in -- you can argue them. I don't know if I will give you a decision on that day, but we might --

10:45 actually, I might have to move that. What about August 16th at 2:00?

MS. SERANO: That's fine with the Government, Your Honor.

THE COURT: Does that work for you, Mr. Kraus?

10:46 MR. KRAUS: That does, Your Honor. And can we file

simultaneously on the 9th, or would you like us to file --

THE COURT: I rather you file -- file on the 2nd and the 9th.

MR. KRAUS: Thank you, Your Honor.

10:46 THE COURT: All right. So --

THE DEFENDANT: May I say something, Your Honor?

THE COURT: What is the request?

THE REPORTER: I can't hear you.

THE COURT: First, don't mumble.

10:46 THE DEFENDANT: Sorry, Your Honor.

The microphone was not pushed up far enough. Huff said this was a statutory court, Your Honor, and there is no such thing in the constitution.

THE COURT: No, no. I am going to --

THE DEFENDANT: All our (unintelligible)--

THE COURT: -- order you to --

THE DEFENDANT: -- grants (unintelligible) of the constitutional (unintelligible)--

THE REPORTER: I can't understand you.

10:46 THE COURT: Stop, stop, Mr. Gougher.

THE DEFENDANT: -- are null and void --

THE COURT: No, Mr. Gougher.

THE DEFENDANT: You are operating outside the law under color of law.

10:46 THE COURT: Mr. Gougher --

THE DEFENDANT: I move this Court to dismiss all charges right now, Your Honor.

THE COURT: I am ordering you to stop speaking at this point, Mr. Gougher.

10:46 THE DEFENDANT: I am going to sue you, the DEA, the United States incorporated, and all the United States Attorneys under Section 1983.

THE COURT: The marshals are ordered to take Mr. Gougher out.

10:47 THE DEFENDANT: You don't have judicial immunity under Stump vs Sparkman, 435 US 349 --

THE COURT: Mr. Gougher, you've interrupted the proceedings. You'll be removed. You'll be removed.

THE DEFENDANT: Okay.

10:47 (Defendant absent.)

THE COURT: The record should note that Mr. Gougher has been removed from the courtroom.

All right. Mr. Kraus, you may come back.

So, Mr. Kraus, I removed your client because he was

10:47 disruptive and he refused to comply with the instructions of the Court.

So you have your -- you've got the trial date. You got the motion in limine date, and all I can tell you is continue to prepare for the case, because the case is going to

10:47 trial on the date that it is set, and we'll have the motion in

limine date on the date set.

Thank you, counsel.

MR. KRAUS: Your Honor, as I stated before, Mr. Gougher has refused to visit with me. He has actually sent back my mail. He sent me a number of letters asking me to recuse myself saying he is going to hire another attorney, things of that nature.

I am not asking to be relieved. I think today me made a motion to have me relieved, in some sort of way. Does Your Honor want to rule on that or --

THE COURT: I didn't interpret it as a motion to relieve you. I don't remember those words being said. He's never accepted you as his lawyer. Apparently he has refused to meet with you, and that is his choice. He doesn't have to cooperate with you, but you are the lawyer assigned to him.

And if he wishes to make it difficult for you, which apparently he is, to represent him, and to make it difficult for you to do your job, I mean, he can do that, but, you know, the answers to those questions as to why he does that might be in the report, if you review -- I understand that you have.

MR. KRAUS: I have. I have. Like I said, I sought to discuss this with Mr. Gougher, and he refuses to meet with me.

THE COURT: I think it is likely that he will continue to do that, and he can. If somebody doesn't want to cooperate with their lawyer, they can do that. He certainly is not the

first person whose refused to cooperate with his lawyer or the first defendant whose has made decisions that may not be in his, you know, case's best interest, but, you know, he has the right to make the decisions that he thinks are appropriate, and he has elected to do that.

I understand that preparing the case is, you know, maybe a bit more difficult than some other cases, but I have every confidence that you will give him outstanding representation, and the case is going to go forward on the date set, so, you know, prepare. And, you know, despite the difficulties that he may be causing with you --

MR. KRAUS: That's fine, Your Honor. I just wanted to put it on the record.

THE COURT: I understand that. I appreciate that.

MR. KRAUS: At this point I am not asking to be relieved.

THE COURT: I appreciate that. As I indicated, I have every expectation that this case is going to trial on the date that is set.

MR. KRAUS: Your Honor, as with the last case that we tried before you, I will be assisted by Mr. Kington from my office. He is volunteering his time.

THE COURT: All right. Thank you. Thank you, counsel.

MR. KRAUS: Have a good day, Your Honor.

THE COURT: You as well.

(Proceedings concluded at 10:50 a.m.)

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

DATED: March 25, 2017, at San Diego, California.

/s/ Melinda S. Setterman

Melinda S. Setterman,
Registered Professional Reporter
Certified Realtime Reporter

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 14-CR-0635-WQH
	)	
v.	)	August 31, 2017
	)	
MARLIN LEE GOUGHER,	)	2:02 p.m.
	)	
Defendant.	)	San Diego, California
	)	

* * AMENDED * *
TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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SAN DIEGO, CALIFORNIA, AUGUST 31, 2017, 2:02 P.M.

* * * *

THE CLERK: Number three on calendar, case 14-CR-635, United States of America vs Marlin Lee Gougher, on for status hearing.

02:02

MR. KRAUS: Good afternoon, Your Honor. Kris J. Kraus for Mr. Gougher.

THE COURT: Good afternoon.

MS. SERANO: Alessandra Serano and Connie Wu on behalf of the United States.

02:03

MR. KRAUS: Your Honor, I many not sure that Mr. Gougher is making a motion to represent himself, but I gave the Court a letter that was sent to me via his wife that appears to be the case.

02:03

THE COURT: All right. I'll inquire.

(Defendant present.)

THE COURT: All right. Mr. Kraus, you indicated that you had some communication from the defendant's wife; is that right? You don't know who it is from. You got an e-mail.

02:03

MR. KRAUS: Your Honor, I a got an e-mail. I gave it to Your Honor. I got an e-mail from his wife.

THE COURT: It should be marked then.

MR. KRAUS: It appears as if she is speaking for him, but I don't think that it is confidential because it came through the wife. If you look at it, it says that it appears

02:03

that Mr. Gougher is requesting to represent himself.

THE COURT: He hasn't done that here.

Mr. Gougher, are you making a request to represent yourself?

02:04 THE DEFENDANT: Yes, sir. I think I will request to represent myself, sir.

THE COURT: Well, we've gone through this before. You were never able to understand the charges.

THE DEFENDANT: The reason is, sir, is because -- hang 02:04 on one second -- because -- thank you. Give me a second. I wasn't expecting this right off the bat.

The reason is because I submitted a Bill of Particulars which was answered, but the -- by the prosecution, and unfortunately the prosecution didn't answer correctly, 02:04 completely, and with a step-by-step facts of how they got there. I am challenging personal choice --

THE COURT: First off, Mr. Gougher --

THE DEFENDANT: I have venue questions.

THE COURT: Mr. Gougher, before you get removed, don't 02:05 talk over me.

THE DEFENDANT: I'm sorry.

THE COURT: You have to answer the questions that I ask you. Do you understand what that means?

THE DEFENDANT: Yes, sir. I am trying to.

02:05 THE COURT: Well, don't -- don't read off your paper.

THE DEFENDANT: All right.

THE COURT: Answer the questions that I ask. Do you understand?

THE DEFENDANT: Uh-huh.

02:05 THE COURT: All right. Question number one, are you requesting to represent yourself, yes or no?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Well, this is -- Judge Huff went through the Faretta warnings with you a few times, and you 02:05 were unable to understand what the nature of the charges were. Do you understand that?

THE DEFENDANT: I do.

THE COURT: Do you recall that?

THE DEFENDANT: I do because the prosecution didn't 02:05 answer my Bill of Particulars correctly.

THE COURT: All right. You can stop speaking.

What we'll do is go over some questions for you, and we'll see whether you are able to represent yourself. But either way, Mr. Kraus will remain in the case, and Mr. Kraus 02:05 will remain even if I permit you to represent yourself, and I haven't made that decision yet. Mr. Kraus is going to remain in the case as advisory counsel, so either way, Mr. Kraus remains in the case.

THE DEFENDANT: I object to that, sir.

02:06 THE COURT: You can object all you want.

First off, how old are you?

THE DEFENDANT: I am 59, sir.

THE COURT: How far did you go in school?

THE DEFENDANT: College.

02:06 THE COURT: What college did you graduate?

THE DEFENDANT: Yes, sir, economics of management.

THE COURT: Where?

THE DEFENDANT: I kind of find that irrelevant.

THE COURT: Answer the questions. So you graduated

02:06 with a degree in economics; is that right?

THE DEFENDANT: That's correct.

THE COURT: And have you ever studied law?

THE DEFENDANT: No.

THE COURT: How would you describe your health?

02:06 THE DEFENDANT: Good.

THE COURT: Have you taken any medication or drugs or consumed any other substance in the past 72 hours?

THE DEFENDANT: Just for sleeping.

THE COURT: What?

02:06 THE DEFENDANT: I don't know, trazodone.

THE COURT: Is it prescription?

THE DEFENDANT: Yes.

THE COURT: And you are getting it from the MCC?

THE DEFENDANT: Yes.

02:06 THE COURT: Is there anything effecting your ability

to understand what is happening here today?

THE DEFENDANT: No.

THE COURT: Do you understand that you have a right under the Sixth Amendment to the United States Constitution to effective assistance of counsel throughout all proceedings including at trial? If you cannot afford to pay an attorney, appointed counsel will represent you through the conclusion of this case at no cost to you. Do you understand that?

THE DEFENDANT: I'm sorry. Say that again, sir.

02:07 THE COURT: Let me break it up. Do you understand that you have the right under the Sixth Amendment to the United States Constitution to effective assistance of counsel throughout all proceedings including a trial?

THE DEFENDANT: Of my choice, yes, sir.

02:07 THE COURT: Do you understand?

THE DEFENDANT: Of my choice, yes, sir.

THE COURT: All right. Let's go back and start again.

Do you understand you have the right under the Sixth Amendment to the United States Constitution to effective

02:07 assistance of counsel throughout all proceedings including a trial? Do you understand that.

THE DEFENDANT: Yes, sir. I understand that it is my choice.

THE COURT: Well, actually you don't get your choice

02:07 here. You keep reading into the words that I didn't say, which

gives me some doubt as to whether you can understand this in order to represent yourself. So let me try it the third time, and why don't you try answering yes or no, and let me know if you don't understand.

02:08 Do you understand that you have the right under the Sixth Amendment to the United States Constitution to effective assistance of counsel throughout all proceedings including a trial? Do you understand that, yes or no?

THE DEFENDANT: Yes, I do, sir.

02:08 THE COURT: If you cannot afford to pay an attorney, appointed counsel will represent you through the conclusion of this case at no cost to you. Do you understand that?

THE DEFENDANT: Say that again.

THE COURT: If you cannot afford to pay an attorney,

02:08 appointed counsel will represent you through the conclusion of this case at no cost to you. Do you understand that?

THE DEFENDANT: Yes, sir. That is why I always maintained I can afford it.

THE COURT: Is it your decision and your decision

02:08 alone to proceed pro se in this case?

THE DEFENDANT: Yes, sir. As long as I understand the nature and the causes of the charges.

THE COURT: No. There is no qualifiers, so stop with the qualifiers and answer yes or no.

02:09 THE DEFENDANT: I am challenging personal

jurisdiction. I have to understand the nature --

THE COURT: First off --

THE DEFENDANT: -- charges.

THE COURT: -- if you continue -- we're going to trial on Tuesday, and I am not going to have this constant interruption of when this case is set for.

So answer the questions that I ask you, and the fact that you are unable to answer the questions gives me serious doubt as to whether or not you have the ability to represent yourself. Because so far you are not very good at answering the question that is asked to you, and that is a trend that has existed throughout this case.

THE DEFENDANT: This is very --

THE COURT: Try to concentrate again, and if you talk over me you'll be removed.

Has anyone suggested to you that you are better off in proceeding pro se in this case?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you that has influenced your decision to proceed pro se in this case?

THE DEFENDANT: No.

THE COURT: As anyone threatened you into deciding to proceed pro se in this case?

THE DEFENDANT: No.

THE COURT: Have you had any experience in dealing

with the Federal Rules of Criminal Procedure, Federal Rules of Evidence, the Sentencing Guidelines, and the local rules?

THE DEFENDANT: No.

THE COURT: Have you had any experience in citing relevant statutes and case law?

THE DEFENDANT: No.

THE COURT: Have you had any experience in trying a case before a court of law?

THE DEFENDANT: No.

02:10 THE COURT: Counsel, are you prepared to go over the nature of the charges including the elements of the charges?

MS. SERANO: Yes, Your Honor.

THE COURT: Please do so.

MS. SERANO: I for the record, I am reading from the filing that I filed on March 20th, 2017. It is Document Number 111, where I list the elements of the charges.

As to Count 1, which is the receipt count, there are five elements. The charge is receiving images of minors engaged in sexually explicit conduct.

First, the defendant knowingly received a visual depiction in interstate commerce by any means, or in or affecting interstate commerce, including by computer.

Second, that the production of the such visual depiction involved the use of a minor engaging in sexually explicit conduct.

Third, that such visual depiction was of a minor engaged in sexually explicit conduct.

Fourth, that the defendant knew that such visual depiction was of sexually explicit conduct.

02:11 And fifth, the defendant knew that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

THE DEFENDANT: I object. That is -- that is --

THE COURT: No -- there is no opportunity for you to

02:11 speak.

You may continue.

MS. SERANO: Your Honor, Count 2 alleges distribution of images of minors engaged in sexually explicit conduct, and there are five elements.

02:11 First, the defendant knowingly distributed a visual depiction in interstate commerce by any means in or in affecting interstate or foreign commerce, including a computer.

Second, the production of such visual depiction involved the use of a minor engaged in sexually explicit

02:11 conduct.

Third, that such visual depiction was of a minor engaged in sexually explicit conduct.

Fourth, the defendant knew that such visual depiction was of such sexually explicit conduct.

02:11 And last, that the defendant knew that at least one of

the persons engaged in sexually explicit conduct in such visual depiction was a minor.

THE DEFENDANT: Can I object now, sir?

THE COURT: No.

02:12 THE DEFENDANT: When can I object?

THE COURT: There is no opportunity to object. You are being advised what the elements are.

MS. SERANO: As to Count 3, Your Honor, which alleges possession of images of minors engaged in sexually explicit

02:12 conduct, there are four elements.

The defendant knowingly possessed matters which the defendant knew contained visual depictions of minors engaged in sexually explicit conduct.

Second, the defendant knew the visual depictions

02:12 contained in the matters depicted minors engaged in sexually explicit conduct.

Third, the defendant knew that the production of such visual depictions involved use of a minor in sexually explicit conduct.

02:12 And fourth, the visual depictions had mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer.

Would you like me to read the penalties?

02:12 THE COURT: I will in a second.

Do you understand the nature of the charges, including the elements of the charges?

THE DEFENDANT: I do not understand what the fact or facts that the DA relies upon that says I am subject to these.

02:13 THE COURT: Do you understand the nature of the charges?

THE DEFENDANT: The extraterritorial instrument and schedule does not indicate how I am subject to these charges, sir.

02:13 THE COURT: Do you understand the nature of the charges, including the elements?

THE DEFENDANT: I do not understand the nature and the cause.

THE COURT: All right.

02:13 THE DEFENDANT: I do not understand how I am being sued by damages by the US Corporation and how the US corporation is being damaged. I have a right to face my accuser rather than a representation of an artificial entity, sir.

02:13 The fact that I don't understand that a corporation of my name is all capital letters and the government district court is all in capital letters and how I became a corporation. It was discussed in the Federalist Papers that the Tenth Amendment only applies to the ten square miles of Washington, 02:13 DC, so I don't know how I am supposed to be a federal citizen,

lower case citizen, rather than a state, capital C, citizen.

THE COURT: All right. Mr. Gougher, I find that you do not understand the nature and circumstances of the -- or the nature of the charges, including the elements of the charges, and you are not capable of representing yourself.

So, Mr. Kraus, you'll continue to represent the defendant, so --

THE DEFENDANT: I object, Your Honor.

THE COURT: No, you don't --

THE DEFENDANT: He is ineffective, dishonest, and crooked. I gave him an opportunity --

THE COURT: I said don't --

THE DEFENDANT: -- to sign my --

THE COURT: -- don't talk over me.

THE DEFENDANT: I am not finished, sir.

THE COURT: You are finished.

THE DEFENDANT: Let me finish, please.

THE COURT: If you continue, you will be removed. Now, I told you, don't talk over me.

Now, Mr. Kraus, you are going to continue to represent the defendant. I made my ruling with any respect to any request to represent himself.

So let's talk about then what the issue --

THE DEFENDANT: I object, sir. What judge allows a court appointed attorney --

THE COURT: If you continue --

THE DEFENDANT: -- not to defend all a person's Constitutional Rights and those that you don't know about?

THE COURT: If you continue to talk over me, you'll be removed. Do you understand?

THE DEFENDANT: He is a less than honorable one, sir.

THE COURT: Do you understand what I just said?

THE DEFENDANT: You are being biased.

THE COURT: Do you understand what I just said?

THE DEFENDANT: You are being biased --

THE COURT: Do you understand?

THE DEFENDANT: -- toward her and against me, sir.

THE COURT: You have to remain quiet while I conduct this proceeding. I will not allow you to disrupt this proceeding.

THE DEFENDANT: I'll report you to the Bar, sir.

THE COURT: Do you understand what I just said, sir?

THE DEFENDANT: I have two letters here.

THE COURT: At this point Mr. Gougher is to be removed while I continue the proceeding.

Mr. Gougher, you can listen to the rest of the proceeding in the cell.

THE DEFENDANT: I object, sir. You are violating my Constitutional Rights, sir, to an honest attorney of my choice. Okay, sir. You don't have judicial meaning under --

(Defendant removed from the courtroom.)

THE COURT: All right. Mr. Gougher has been removed. He can hear the remainder of the proceeding in the cell block, which has -- the sound is piped into him.

02:15 So with respect to the issues that we have here before -- Ms. Serano.

MS. SERANO: I am happy to answer the Court's question, but I did want to interject this comment, and I spoke to Mr. Kraus just moments ago, the defendant towards the end of

02:16 his comments accused the Court of being biased, and I just want to make the -- the Court to make a finding that that is not the case. He has not -- he has not made any specific allegations other than the fact that he is disagreeing with the way the Court has handled the proceedings.

02:16 THE COURT: Well, obviously, there is no bias against the defendant. He continues to talk over the Court, and he can make whatever conclusions he wishes, but I find that the comments that he made with respect to bias by anyone lack merit.

02:16 MS. SERANO: Thank you, Your Honor.

With regard to the issues at hand, I think we had a few more motions in limine for the Court to rule on, including the ones that the Government filed, as well as the ones that Mr. Kraus filed, and I think the Court has had an opportunity

02:16 to view the clips of the child pornography. If the Court can

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	No. 14-CR-0635-WQH
v.	September 19, 2017
MARLIN LEE GOUGHER,	8:50 a.m.
Defendant.	San Diego, California

TRANSCRIPT OF JURY TRIAL - DAY ONE
BEFORE THE HONORABLE WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: United States Attorney's Office
By: ALESSANDRA SERANO, ESQ.
CONNIE WU, ESQ.
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San Diego, California 92101

For the Defendant: LAW OFFICE OF KRIS J. KRAUS
By: KRIS J. KRAUS, ESQ.
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District Court Clerk's Office
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THE COURT: All right. Well, that is his choice then.

MR. KRAUS: Your Honor, also then, yesterday I received a letter from Mr. Gougher in which he's, once again, threatening to sue me, and it also states that he reported me to the Bar Association, and there is a copy of the complaint here.

THE COURT: All right.

MR. KRAUS: I have to state that that is a conflict. I don't think Your Honor is going to relieve me at this stage, but I believe that that is a conflict.

THE COURT: I understand. I think you have an obligation to bring it to the attention of the Court if you feel that way. I don't share that view. And I understand the request to be relieved, but I am not going to grant the request. My view is that -- well, I am not going to grant your request.

MR. KRAUS: That's fine. I had to make the record.

THE COURT: That's fine. Let's get the defendant out.

MR. KRAUS: Also the Government and you should have received a letter from the defendant.

THE COURT: I will address those. Let's get the defendant out.

MR. KRAUS: Your Honor, before we do, I didn't use the restroom.

THE COURT: All right. Use the restroom, and we'll

address it when the defendant comes out.

MS. SERANO: Does Your Honor have the letter that you are referring to?

THE COURT: Yes. That is the affidavit of truth.

08:54 MS. SERANO: Yes.

THE COURT: Yes, I do have that.

MS. SERANO: Okay.

(Pause.)

MR. KRAUS: Thank you, Your Honor.

08:55 THE COURT: All right. Let's get the defendant. Let's bring out the defendant.

(Defendant present.)

THE COURT: Mr. Kraus, your client is present; is that correct?

08:56 MR. KRAUS: Yes. He is in orange, and it appears he would be in the SHU, and he as black eye.

THE COURT: Mr. Gougher, a few things to cover with you is your counsel has advised me you desire -- it is your desire not to dress out. You've been provided civilian

08:57 clothes.

It is your decision that you elect not to wear them; is that correct?

THE DEFENDANT: Yes. That is correct.

THE COURT: Your lawyer has also indicated to me that

08:57 a complaint had been filed -- you filed a complaint against him

and a complaint with the Bar. He has raised the issue that he thought he could have a conflict. He wanted to bring that to my attention.

I am not going to relieve Mr. Kraus. Mr. Kraus will continue to represent you.

And, Mr. Kraus, it is fair to say it has been a difficult representation so far with Mr. Gougher and that you haven't had the level of cooperation one would typically have; is that right?

MR. KRAUS: That is true. This is the first time that he's actually filed a Bar complaint.

THE COURT: But it is fair to say as well that you are prepared to go forward today and you can go forward and represent him and give him the best representation you possibly can give him; is that fair to say?

MR. KRAUS: That is true, Your Honor.

THE COURT: All right.

THE DEFENDANT: May I object for a minute, Your Honor?

THE COURT: Object to what?

THE DEFENDANT: Mr. Kraus has not informed me or explained to me the nature and the cause of the charges. I have a right to under the Sixth Amendment to understand the nature and cause of the charges, so basically we cannot move forward at this point. We're at a standstill here.

THE COURT: All right. Well, actually, on a number of

occasions you've indicated that you had refused to meet with Mr. Kraus, so that part of the difficulty, Mr. Gougher, is created by your actions.

THE DEFENDANT: He knows how to write, sir.

08:58 THE COURT: I am going to address -- you did file a --

MR. KRAUS: Not to interrupt, Your Honor, but to be clear, the Government did file a motion before Judge Huff that stated the charges, the elements, and the maximum penalties.

THE COURT: That was the Bill of Particulars.

08:58 MR. KRAUS: And I did forward that to Mr. Gougher. He has refused to meet with me, but I did write him a letter forwarding that.

THE COURT: All right.

MR. KRAUS: So that -- I attempted to do that, for

08:59 lack of a better term.

THE COURT: All right. Mr. Gougher, did -- I have reviewed your affidavit of truth, Mr. Gougher. It is entitled "affidavit of truth under penalty of perjury," and I am directing the clerk to file it in the record. However, you do

08:59 not represent yourself. You'll be represented by counsel, Mr. Kraus.

While the Sixth Amendment to the US Constitution grants a criminal defendant the right to refuse the assistance of counsel and to represent himself in criminal proceedings,

08:59 this right may be overridden if the defendant does not

knowingly and intentionally waive his right to counsel or he is not able and willing to abide by the rules of procedure and courtroom protocol.

In order to knowingly and intelligently waive the right to counsel, the defendant must understand the nature of the charges against him, the possible penalties, the dangers and disadvantages of self-representation.

In this case you have consistently and repeatedly informed the Court that you do not understand the charges against you, and in your affidavit of truth you say, "I understand the consequences of the charges, but I do not understand the nature and causes of the charges."

You are not able to represent yourself if you do not understand the nature of the charges.

Based upon your behavior throughout these proceedings, it is clear that your goal is simply to obstruct the proceedings and that is to prevent your trial from taking place. You are facing very serious charges with very serious consequences. You have not knowingly and intelligently waived your right to counsel, and you have not shown that you are able and willing to abide by the rules of procedure and courtroom protocol.

The trial is scheduled to take place today, and you continue to inform the Court that you do not understand the charges against you. Defense counsel will represent you at

trial. Your defense counsel is very competent and very experienced.

You refused to cooperate with him, so he is clearly at a disadvantage. However, that disadvantage is only because you have refused to cooperate with him.

When the Court has appointed an attorney for -- when the Court has appointed an attorney for an indigent defendant, the defendant, like all criminal defendants, has a constitutional right to effective counsel, but he does not have the right to a counsel of his choice, that is, to have a specific lawyer appointed by the Court and paid for by the public.

Your defense counsel has been providing effective assistance to you at all times.

I now want to address some other issues with you, Mr. Gougher. Today is the day set for your trial on the charges in the superseding indictment. You have a right under the Sixth Amendment to the United States Constitution to be present at your trial. At several prior hearings you have been disorderly, disruptive, and disrespectful of the Court proceedings.

You've refused to cooperate with counsel. You've refused to allow the proceedings to go forward without speaking out. Your conduct has required me to have you removed from the courtroom on at least two prior occasions.

I've had you evaluated by a psychologist and found you to be competent to proceed. Today is the day set for your trial, and the trial will proceed.

Do you understand that today is the date set for your trial?

THE DEFENDANT: Yes, sir. I understand that, sir.

THE COURT: Okay. You do understand?

THE DEFENDANT: Yes, I do.

THE COURT: All right. You can lose the right to be present at trial if after you have been warned that you will be removed if you continue disruptive behavior and you nevertheless insist on conducting yourself in a manner so disorderly, disruptive, and disrespectful of the Court that your trial cannot be carried on with you in the courtroom.

You cannot speak out in an abusive and disruptive manner towards the Court or towards counsel. You cannot proclaim that your counsel does not represent you or that your counsel is not competent.

You cannot argue with me. You are represented by counsel, and your lawyer will speak for you here in trial.

Do you understand, sir, that you could lose your right to be present at trial?

THE DEFENDANT: That is not nice, Your Honor.

THE COURT: Do you understand?

THE DEFENDANT: That is not nice though.

THE COURT: But do you understand?

THE DEFENDANT: No, I don't understand that because that is not right.

THE COURT: What don't you understand?

09:03 THE DEFENDANT: Because I have a right to speak, Your Honor.

THE COURT: You don't represent --

THE DEFENDANT: That is a fundamental right of the United States.

09:03 THE COURT: You don't represented yourself.

THE DEFENDANT: To speak in my -- to object and to speak and to defend myself in a manner --

THE COURT: No. I already ruled that you do not represent yourself.

09:03 THE DEFENDANT: Well, I want to represent myself, sir.

THE COURT: I've deny that.

THE DEFENDANT: I have told you that --

THE COURT: I denied that.

THE DEFENDANT: First, I need to understand the nature

09:03 and cause of the charges, and he still hasn't given me that. What he said he gave me was some kind of skeletal thing.

THE COURT: Mr. Gougher, do you understand that you can be removed from the trial if you act out? Do you understand?

09:04 THE DEFENDANT: I need to have my say, Your Honor.

THE COURT: No. You are not going to have your say.

Do you understand you -- answer the question. Do you understand?

THE DEFENDANT: No, I don't understand.

09:04 THE COURT: Well, actually I disagree. I think that you do understand --

THE DEFENDANT: That is not right, Your Honor. I have --

THE COURT: Don't interrupt -- because I removed you 09:04 on two prior occasions, so I think you do understand.

There are at least three constitutionally permissible ways for the trial to be conducted even if you persist in your disruptive and disrespectful behavior. One, I can bind and gag you to keep you present. Two, I can cite you for contempt. 09:04 And, three, I can have you taken out of the courtroom until you promise to conduct yourself properly.

The sight of shackles and gags might have an a significant affect on the jury's feeling about you, and the use of this technique is itself an affront to the very dignity and 09:04 decorum of the judicial proceedings that I am seeking to uphold. Because of this and because you will not be able to communicate with your counsel and you will be able to hear the trial in the cell outside the courtroom, I will not bind and gag you.

09:05 I also find that holding you in contempt will have no

affect on your behavior based on your prior behavior in this case and the length of the time that you could face in custody if convicted.

So I am warning you that if you persist in your disruptive and disrespectful behavior, I will have you taken out of the courtroom until you promise to conduct yourself properly. I have warned you about your behavior in a number of prior proceedings, and I have consistently informed you that you cannot disrupt the proceedings.

09:05 In my view, your prior -- your behavior in prior events, prior court proceedings, was solely for the purpose of frustrating the trial in your case. I am, again, warning you that if you persist in your disorderly and disruptive behavior, I'll have you taken out of the courtroom until you promise to conduct yourself properly.

Do you understand, Mr. Gougher?

THE DEFENDANT: Understood. I am just trying to stand up for my Constitutional Rights, sir. That is the only thing I am trying to do.

09:06 THE COURT: All right. Do you understand that I've told you you cannot represent yourself? You do not represent yourself. Do you understand that?

THE DEFENDANT: I am not allowed to stand up for my Constitutional Rights at all.

09:06 THE COURT: You can't represent yourself. You don't

represent yourself. Mr. Kraus represents --

THE DEFENDANT: He doesn't represent me, sir.

THE COURT: Well, actually he does. You are facing charges with very serious consequences. The maximum sentence on each of the three charges in custody is 20 years. I urge you -- and those sentences could run consecutively.

I urge you to stay present in the courtroom in order to assist your counsel at trail. I urge you to cooperate with your counsel. You have a right to be present during the process -- during the jury trial.

Obviously, Mr. Kraus -- it is in your best interest that you cooperate with Mr. Kraus. You have a right to be present during the jury selection process and through the entire trial.

THE DEFENDANT: He is not willing to uphold all my Constitutional Rights, sir, by signing my honest attorney contract.

THE COURT: So I do urge you to stay present in the courtroom in order to assist your counsel at trial. I urge you to cooperate with your counsel, but, again, I advise you that you are facing serious consequences, and if you continue to disrupt the proceedings, you could be removed and will be removed from the courtroom.

If that happens, if you are removed from the courtroom, I am advising you now that you can reclaim your

right to be present, of course, as soon as you are willing to conduct yourself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

All right. Mr. Gougher, do you understand that you can -- if you are removed, you can come back if you promise to not act out and abide by court proceedings? Do you understand?

THE DEFENDANT: Your Honor, Mr. Kraus didn't inform me of the nature and the causes of the charges, Your Honor, and I have a right to understand them under the Sixth Amendment, so we're at standstill here.

He also refused to sign my honest attorney contact willing to defend my Constitutional Rights and the ones I don't know about.

So that being said, he is not my counsel of choice. It is, at least, any attorney should be willing to do is to defend all my Constitutional Rights and the ones I don't know about.

THE COURT: Well, that wasn't responsive to my question, but I've advised you, Mr. Gougher, and that if you are removed from the courtroom, you can come back, and if Mr. -- if you are removed from the courtroom, I'll have Mr. Kraus consult with you at the breaks to see if you wish to come back into the courtroom and if you can promise to the Court that you'll behave yourself in an appropriate manner.

But at this time I don't have any additional warnings

for the defendant. You've been advised, Mr. Gougher, of what will happen if you act out. I also ruled on your request to represent yourself, which is denied.

Are there any other issues we need before we get the jury?

MR. KRAUS: Your Honor, may I have just a standing objection if he is removed, under the Sixth Amendment?

THE COURT: Sure, and actually --

MR. KRAUS: I don't want to say it in front of the jury.

THE COURT: I would give you an opportunity to do it outside the presence of the jury.

MR. KRAUS: Just based on the Sixth Amendment he has right to be here. I understand under certain circumstances he can be removed, but I would like a standing objection.

THE COURT: I understand.

Anything else before we get the jury?

MR. KRAUS: No.

MS. SERANO: No from the Government.

THE COURT: I intend to tell the jury that the case is about -- it is about two days; is that fair?

How long do you think the Government's case -- your case in chief is?

MS. SERANO: We anticipate being done tomorrow morning, Your Honor. Again, I -- obviously we don't know,

APPENDIX4

CA No. 17-50436
CA No. 18-50352

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARLIN LEE GOUGHER, Defendant-Appellant.	(D.Ct. #3:14-cr-00635-WQH)

APPELLANT'S OPENING BRIEF

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

HONORABLE WILLIAM Q. HAYES
United States District Judge

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CA No. 17-50436
CA No. 18-50352

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARLIN LEE GOUGHER, Defendant-Appellant.	(D.Ct. #3:14-cr-00635-WQH)

I.

STATEMENT OF JURISDICTION

The first of two consolidated appeals in this case is from convictions for distribution, receiving, and possession of child pornography, in violation of 18 U.S.C. § 2252. The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 28 U.S.C. § 1291. Mr. Gougher was sentenced on December 15, 2017, *see* ER 113-18, and filed a timely notice of appeal on December 22, 2017, *see* ER 112.

The second appeal is an appeal of a district court order denying a motion to correct transcripts which were filed for the first appeal. The district court had jurisdiction over the motion under Rule 10(e) of the Federal Rules of Appellate Procedure. This Court has jurisdiction over the appeal of the district court's ruling

under 28 U.S.C. § 1291. The district court filed its order denying the motion on September 21, 2018, *see* ER 1-2, and Mr. Gougher filed a timely notice of appeal on October 1, 2018, *see* ER 80.

II.

STATEMENT OF ISSUES PRESENTED

A. DID IT VIOLATE MR. GOUGHER'S SIXTH AMENDMENT RIGHTS TO, FIRST, ALLOW HIM TO REPRESENT HIMSELF AT A BAIL REVOCATION HEARING WHEN HE HAD NOT YET MADE AN UNEQUIVOCAL DECISION TO REPRESENT HIMSELF, AND, SECOND, NOT ALLOW HIM TO REPRESENT HIMSELF AT TRIAL ONCE HE HAD MADE AN UNEQUIVOCAL DECISION TO REPRESENT HIMSELF?

1. Did Allowing Mr. Gougher to Represent Himself at the Bail Revocation Hearing Without First Conducting a Faretta Colloquy Violate Mr. Gougher's Sixth Amendment Right to Counsel?

a. Was the bail revocation hearing a critical stage of the proceedings at which the right to counsel attached?

b. Did the court violate the right to counsel by allowing Mr. Gougher to represent himself at the bail revocation hearing without conducting a Faretta colloquy first?

c. Is the error structural error requiring reversal without any inquiry into prejudice?

3. Did Not Allowing Mr. Gougher to Represent Himself at Trial Once

He Did Make an Unequivocal Decision to Represent Himself Violate Mr. Gougher's Sixth Amendment Rights in a Second, Different Way?

a. Did the district court err in denying Mr. Gougher's request to represent himself on the ground he did not understand the nature of the charges?

b. Did the district court err in denying Mr. Gougher's request to represent himself on the ground he would not abide by the rules of procedure and courtroom protocol?

c. Is the denial of a self-representation request structural error which does not require a showing of prejudice?

B. DID THE SECOND DISTRICT COURT HANDLING THE CASE VIOLATE MR. GOUGHER'S FIRST AND SIXTH AMENDMENT RIGHTS BY PROHIBITING HIM FROM SPEAKING IN COURT?

C. DID A REFUSAL TO APPOINT SUBSTITUTE COUNSEL AFTER MR. GOUGHER FILED A BAR COMPLAINT AGAINST HIS ATTORNEY VIOLATE THE SIXTH AMENDMENT BECAUSE THE BAR COMPLAINT CREATED AN ACTUAL CONFLICT OF INTEREST, OR AT LEAST REQUIRED AN INQUIRY?

1. Did the Bar Complaint Create an Actual Conflict of Interest Requiring New Counsel, or at Least Require an Inquiry?

2. Did the Conflict Create a Presumption of Prejudice?

D. DID CROSS-EXAMINATION ABOUT CHILD PORNOGRAPHY ON COMPUTERS AND ARGUMENT THAT MR. GOUGHER'S NON-RESPONSIVE ANSWERS WERE EVIDENCE OF GUILT VIOLATE THE FIFTH AMENDMENT WHEN ALL MR. GOUGHER TESTIFIED ABOUT ON DIRECT EXAMINATION WAS HIS ATTORNEY'S FAILINGS AND EVEN THAT TESTIMONY WAS STRICKEN?

E. DID THE DISTRICT COURT MAKE ERRORS OF LAW AND THEREFORE ABUSE ITS DISCRETION IN DENYING MOTIONS FOR DISCOVERY AND AN EVIDENTIARY HEARING ABOUT CURRENT NAVAL CRIMINAL INVESTIGATIVE SERVICE PRACTICES WHEN THE CONTROLLING OPINION OF *UNITED STATES V. DREYER*, 804 F.3D 1266 (9TH CIR. 2015) (EN BANC), WAS BASED ON GOVERNMENT REPRESENTATIONS ABOUT THOSE PRACTICES?

F. DID THE DISTRICT COURT ERR IN DENYING A DEFENSE MOTION TO CORRECT TRANSCRIPTS WITHOUT REVIEWING AVAILABLE RECORDINGS OF THE PROCEEDINGS?

G. SHOULD THE COURT ORDER REASSIGNMENT OF THE CASE TO A DIFFERENT DISTRICT JUDGE?

III.

BAIL STATUS OF DEFENDANT

Mr. Gougher is presently serving the 200-month sentence imposed by the district court. His projected release date is August 13, 2031.

IV.

STATEMENT OF CASE

A. THE INVESTIGATION.

In the spring of 2012, Naval Criminal Investigation Service ("NCIS") agents instituted an investigation "targeting individuals that were trading child pornography on the internet in fleet concentration areas or areas with a high population of active duty Navy or Marine Corps members." RT(9/19/17) 217. NCIS Agent Steven Logan found an IP address sharing child pornography files in Oceanside, California, which is near the Camp Pendleton Marine Corps base, and downloaded four child pornography files. RT(9/19/17) 217-25.

This information was subsequently provided to an FBI agent named Nathaniel Dingle, who traced the IP address to an apartment tied to Mr. Gougher and his wife. RT(9/19/17) 257. Agent Dingle obtained and executed a search warrant and seized two computers on which he found child pornography. RT(9/19/17) 262-66. Mr. Gougher was subsequently charged with possession, receipt, and distribution of child pornography. *See* ER 457-60.

B. PRETRIAL MOTIONS.

The San Diego Federal Defender represented Mr. Gougher initially. It filed a motion seeking to suppress the computer evidence on the ground NCIS agents are not permitted to assist with civilian law enforcement. *See* CR 56. The motion initially argued there should be suppression as a matter of law, but the Ninth Circuit subsequently rejected this remedy, in *United States v. Dreyer*, 804 F.3d 1266 (9th Cir. 2015) (en banc), based in part on government representations that NCIS had changed its investigative practices to avoid civilians, *see id.* at 1280. The Federal Defender then modified its argument to seek an evidentiary hearing on whether the NCIS had in fact made the changes the government represented it had made. *See* CR 72.

The district court denied the motion on the grounds that (1) practice after the investigation of Mr. Gougher was irrelevant, *see* ER 73, and (2) the downloads from Mr. Gougher's IP address took place before the *Dreyer* opinion, *see* ER 76. The court indicated it might reconsider if provided with additional information, *see* ER 76, and the Federal Defender filed a renewed motion several months later based on a response to a Freedom of Information Act request, *see* ER 443-56. It revealed there had been 1,152 NCIS investigations of child sexual abuse, including child pornography, since 2013, with 1,185 subjects, of whom 215 were civilians. *See* ER 456. The motion renewed the request for an evidentiary hearing and sought discovery regarding the civilian subjects. *See* ER 447-49. The court denied this motion based on its prior reasoning. *See* ER 64-65.

C. REPRESENTATION ISSUES.

As the case dragged on, Mr. Gougher became dissatisfied. At the next status hearing, he indicated he wanted to discharge the Federal Defender because "there is no signed contract between . . . me and the San Diego Federal Defenders, Inc.," ER 430, and he had "waive[d] . . . time" without understanding the delay would be so long, ER 432. The court indicated it would appoint substitute counsel, but Mr. Gougher indicated he had "a ton of money to hire my own private attorney." ER 431. The court told Mr. Gougher he was free to hire his own attorney, *see* ER 433, but "provisionally appoint[ed]" an attorney nonetheless, ER 436.

At the next status hearing, the new attorney indicated Mr. Gougher did not want to communicate with him. *See* ER 413. Mr. Gougher reiterated he had "plenty of money to hire [an attorney]," though "[i]t's very frustrating to find one." ER 414. He also reiterated he did not want an appointed attorney, and the court told him he could continue trying to get a retained attorney. *See* ER 418-19.

Two weeks later, Mr. Gougher still had been unable to retain an attorney. The court told him he could either represent himself, retain counsel, or have appointed counsel. *See* ER 396-97. Mr. Gougher indicated he was not seeking to represent himself, did not want appointed counsel, and wanted additional time to find retained counsel. *See* ER 401-02. At a fourth status hearing, he stated he had recontacted four attorneys, called five new ones, and was "in contract negotiations with Mr. George Dedulin now." ER 386.

Mr. Gougher nonetheless appeared without counsel again at the next status

hearing. He explained none of the attorneys he had contacted "are willing to sign my simple contract" even though "[t]his is the most basic thing any attorney should be willing to do." ER 370-71. The court asked Mr. Gougher what he wanted to do, and he replied, "Still keep looking I guess, your Honor, or propria personam." ER 374-75. The court granted him additional time to find an attorney, *see* ER 375, but told him that "if you don't have retained counsel by that time, you have to come up with another plan as to whether you are going to represent yourself at this trial or not," ER 378.

D. BAIL REVOCATION HEARING.

Approximately a month later, Pretrial Services Agency ("PSA") filed a petition alleging violation of bail conditions. *See* CR 95. The appointed attorney appeared with Mr. Gougher, and Mr. Gougher "object[ed] to his presence." ER 257. The Court arraigned Mr. Gougher and Mr. Gougher stated, "I would like to say I deny [the allegations] because I have certain things to say." ER 259.

The court then held an evidentiary hearing. *See* ER 260-319. When the government offered its first exhibit, the appointed attorney said there was no objection, but Mr. Gougher interjected and the court let him make an objection, which it overruled. *See* ER 265-66. At the conclusion of the first witness's testimony, the appointed attorney said he had no questions, the court asked Mr. Gougher if he objected to the attorney asking questions, and Mr. Gougher stated he did object. *See* ER 274. The court then allowed Mr. Gougher to conduct cross-examination. *See* ER 275-96. After the government presented a second witness,

the court asked only Mr. Gougher if he wished to cross-examine, and Mr. Gougher conducted another cross-examination. *See* ER 303-19. When the court invited argument from the appointed attorney after the testimony, Mr. Gougher objected. *See* ER 326. The attorney responded, "If he does not want to utilize my services [and] [h]e wants to argue his own cause, I am willing to let him do that unless the Court directs me otherwise." ER 326-27.

The Court then began a colloquy about self-representation. After some preliminary questions, the court asked Mr. Gougher, "Is it your decision today to ask questions of the – on the pretrial violation on your own?" ER 330. Mr. Gougher responded by stating, "I'm not going to ask questions, Your Honor. I am just going to read a statement." ER 330. When asked if anyone had "threatened you into deciding to represent yourself in this case today," he responded, "I'm under duress to represent myself from the Court." ER 330. He also stated, "I got tricked into questioning witnesses when I wanted to read a statement." ER 331. As the court proceeded with further questioning and advice about self-representation, he stated: "I'm not going pro se, Your Honor. I'm still looking for an honest effective attorney." ER 332.

The court tried to convince Mr. Gougher the appointed attorney was qualified, but Mr. Gougher opined he was "not an honest effective winning attorney" and said, "No, thank you, your Honor. I appreciate it though." ER 334. He said he was still trying to hire an attorney and "have several on my list here that I have talked to." ER 335. The court responded, "But we do not have anybody here today to represent you, and so what we have is we've got a serious pretrial violation." ER 335. The court nonetheless allowed Mr. Gougher to argue

for himself, found him in violation, and remanded him to custody. *See* ER 356-57. The court also said it was going to appoint a new attorney and the new attorney could argue for reinstatement of the bond. *See* ER 357-59.

E. FURTHER REPRESENTATION ISSUES AND RECUSAL OF THE FIRST DISTRICT COURT.

The new appointed attorney appeared at a status hearing two days later. Mr. Gougher again objected, stating, "I don't want any more court attorney help," ER 222. The court stated there were additional alleged bond violations because PSA officers had observed Mr. Gougher in possession of an unauthorized cell phone at the prior hearing. ER 225. There was a discussion of this, and Mr. Gougher remained in custody, with no argument from the new attorney. *See* ER 225-39. The court and Mr. Gougher also discussed self-representation again, with Mr. Gougher initially saying he wanted to represent himself, *see* ER 239, but then complaining it was "under duress" because "I was still trying to . . . find an honest effective attorney who will sign my contract, but you're . . . pushing me here to do this right here." ER 243-44. The court said it would let Mr. Gougher "think about it." ER 245.

The court also allowed Mr. Gougher to file a "bill of particulars." *See* ER 246. This document asked questions about "the status of the accused"; various forms of "venue" and "jurisdiction," including "common law" venue and jurisdiction, "corporate" venue and jurisdiction, "Maritime/Admiralty" venue and jurisdiction, and "martial-law" venue and jurisdiction; and whether the "person" in

the "accusatory instrument" was a "natural" and/or "artificial" person. ER 211-17.

The court held another status hearing several weeks later, and Mr. Gougher again "object[ed] to [the appointed attorney's] presence." ER 181. When the court asked Mr. Gougher if he wanted to represent himself, he responded that he "need[ed] some answers first," ER 183, and "would if I could get some answers first," ER 186. He explained:

> I still don't understand the nature and cause of what the charges are, your Honor? I mean, I demand that you make the prosecutor answer the bill of particulars I filed last time.

ER 188-89. When the court asked Mr. Gougher again if he wished to represent himself, he responded, "Yes, it is a desire, but after I get the answers to this," and the court responded, "We can't do this conditionally." ER 202. The court decided it would resolve the question of self-representation at the next hearing and asked the prosecutor to file a response to the "bill of particulars." *See* ER 204-05. The subsequently filed response stated venue lay in the Southern District of California because that was where Mr. Gougher was alleged to have been at the time of the offenses, cited the statute giving district courts jurisdiction over federal criminal offenses, "contend[ed] the defendant is a living human being who can be charged with a federal crime," and simply answered, "No," to most of the remaining questions. ER 174-77.

At the next status hearing, Mr. Gougher again objected to the appointed attorney's presence. ER 147. He complained he couldn't get an "honest effective attorney" to sign his "one-page honest attorney contract." ER 150. The court listed the elements of the offenses, *see* ER 151-54, and when Mr. Gougher stated,

"I don't understand the nature and causes [or cause] of these charges," ER 154,[1] the court responded, "[T]he court believes that you do understand the nature of the charges," ER 155. The court again asked if Mr. Gougher wanted to represent himself, *see* ER 155, and Mr. Gougher again complained the nature of the charges had not been sufficiently explained, making references like those in his "bill of particulars" to "common law, corporate law, marshal [sic] law, maritime, or admiralty law," ER 157. There was further discussion of the government's response to the "bill of particulars" and access to discovery. *See* ER 161-70. Mr. Gougher eventually complained the court was biased and the court abruptly recused itself. *See* ER 170.

F. REPRESENTATION ISSUES IN THE SECOND DISTRICT COURT.

When Mr. Gougher appeared in front of the new district court, he again objected to the appointed attorney's presence, and the new court held an in camera hearing and appointed another attorney. *See* ER 139. The court told the prosecutor there had also been a discussion of possible self-representation, but Mr. Gougher did not understand the charges. *See* ER 139-40. Mr. Gougher explained when asked that "[t]he reason that I don't understand is because I don't understand how I am subject to the laws." ER 140.

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[1] The defense contends Mr. Gougher used the singular, "cause," in this statement rather than the plural, "causes." This is one of several disputed passages which the defense moved to correct in the district court. *See* ER 84-111. The district court denied the motion, but that order is the subject of the second appeal in the consolidated case – *United States v. Marlin Lee Gougher*, No. 18-50352.

The new attorney appeared at another status hearing the next day. Mr. Gougher objected and threatened to sue the new attorney. *See* ER 54. The district court told Mr. Gougher to remain quiet and threatened to have him removed from the courtroom. *See* ER 53-54.

This second court thereafter ordered a competency evaluation. *See* CR 128. At a hearing on July 25, 2017, the court received a competency report as evidence and found Mr. Gougher competent. *See* ER 38-42. Mr. Gougher said at the beginning of the hearing that he was "proceeding persona [sic] propria," had told the appointed attorney "not to do anything in my case," and had "the right to an attorney of my choice." ER 38-39. The court told Mr. Gougher he was not representing himself, was represented by the attorney, and not to "interrupt the proceedings." ER 39. The appointed attorney indicated Mr. Gougher had refused to meet with him, *see* ER 41, 42, and the court opined "he is not likely to," ER 42-43. Mr. Gougher asked if he could say something, and the court asked what his request was, but ordered him to stop speaking when he tried to make arguments about "null and void" "grants of the constitutional" and "operating outside the law under color of law," ER 47-48, or "grabs at power from the Constitution [that] make all laws produced by them null and void," ER 89 (motion to correct transcripts in district court presently being appealed, *see supra* p. 12 n.1). The court ordered Mr. Gougher removed from the courtroom when he kept trying to talk. *See* ER 48.

The next court hearings, regarding trial matters, were on August 16, 2017 and August 31, 2017. The appointed attorney indicated at the August 31 hearing that he had received an email from Mr. Gougher's wife suggesting Mr. Gougher

wanted to represent himself. *See* ER 23-24. When the court asked Mr. Gougher if that was correct, Mr. Gougher responded, "Yes, sir. I think I will request to represent myself, sir." ER 24. The court noted Mr. Gougher had never been able to understand the charges, and Mr. Gougher explained:

> The reason is because I submitted a Bill of Particulars which was answered, but the – by the prosecution, and unfortunately the prosecution didn't answer correctly, completely, and with a step-by-step facts of how they got there. I am challenging personal choice –

ER 24. *Cf.* ER 90 (motion to correct transcripts noting defense position that Mr. Gougher used the words "personal jurisdiction" rather than "personal choice," and trial prosecutors' agreement, but court reporter's disagreement).

The court then began a colloquy about self-representation with, "Question number one, are you requesting to represent yourself, yes or no?," to which Mr. Gougher responded, "Yes, sir." ER 25. The court asked if Mr. Gougher recalled telling the first district court he did not understand the nature of the charges, and Mr. Gougher explained this was "because the prosecution didn't answer my Bill of Particulars correctly." ER 25.

The court continued with its self-representation colloquy, *see* ER 27-30, and asked the prosecutor to go over "the nature of the charges including the elements of the charges," ER 30. When Mr. Gougher tried to object, the court told him there was no opportunity to object at that point, *see* ER 31, and allowed the prosecutor to finish, *see* ER 30-32. The court asked Mr. Gougher if he understood "the nature of the charges, including the elements of the charges," ER 33, and the following exchange took place:

> THE DEFENDANT: I do not understand what the fact or facts that the DA relies upon that says I am subject to these.

> THE COURT: Do you understand the nature of the charges?
>
> THE DEFENDANT: The extraterritorial instrument and schedule does not indicate how I am subject to these charges, sir.
>
> THE COURT: Do you understand the nature of the charges, including the elements?
>
> THE DEFENDANT: I do not understand the nature and the cause.
>
> THE COURT: All right.
>
> THE DEFENDANT: I do not understand how I am being sued by damages by the US Corporation and how the US corporation is being damaged. I have a right to face my accuser rather than a representation of an artificial entity, sir.
>
> The fact that I don't understand that a corporation of my name is all capital letters and the government district court is all in capital letters and how I became a corporation. It was discussed in the Federalist Papers that the Tenth Amendment only applies to the ten square miles of Washington, DC, so I don't know how I am supposed to be a federal citizen, lower case citizen, rather than a state, capital C, citizen.

ER 33-34. *Cf.* ER 91 (motion to correct transcripts noting defense position that Mr. Gougher added words, "of the charges," after "the nature and cause").

The court found Mr. Gougher did not understand "the nature of the charges, including the elements of the charges," and so was "not capable of representing [him]self." ER 34. Mr. Gougher tried to object, complained about the appointed attorney and that the court was biased, said he "ha[d] two letters here," and was removed from the courtroom again. *See* ER 34-36. The attorney noted Mr. Gougher was still refusing to meet with him, and the court told the attorney he would have to go forward nonetheless. *See* RT(8/31/17) 16-17.

Mr. Gougher thereafter mailed two "affidavits of truth" to the court. The first "affidavit of truth" noted, "I have not found one attorney willing to sign my simple one-page contract any first-year law student can understand," ER 132, and complained about not being allowed to speak in court, *see* ER 134. The second

"affidavit of truth" reiterated Mr. Gougher "wish[ed] to go pro se" and complained about the court's treatment of his attempt to "make the court understand my point as to why I don't understand the nature and cause of the charges." ER 129.

Prior to the commencement of trial on September 19, 2017, the appointed attorney told the court Mr. Gougher had sent him a letter threatening to sue and enclosing a bar complaint Mr. Gougher had filed. *See* ER 9. The attorney declared a conflict of interest and moved to be relieved, but the court denied the motion, with no inquiry about the complaint. *See* ER 9, 10-11. The court also told Mr. Gougher he had received the "affidavit of truth," but, "You have not knowingly and intelligently waived your right to counsel, and you have not shown that you are able and willing to abide by the rules of procedure and courtroom protocol." ER 13.

The court then warned Mr. Gougher he could lose his right to be present at trial if he "continue[d] disruptive behavior" and that "your lawyer will speak for you here in trial." ER 15. Mr. Gougher complained "that is not nice," "that is not right," and "I have a right to speak." ER 15-16. The court responded, "You don't represented [sic] yourself," Mr. Gougher reiterated, "I want to represent myself," and the court replied, "I denied that." ER 16. Mr. Gougher told the court, "I need to have my say," and the court replied, "No. You are not going to have your say." ER 16-17.

G. THE TRIAL.

At trial, the government presented testimony about the child pornography

See ER 85-86.

The court denied the motion just three days after it was filed, without waiting for a response from the government and with no reference to a review of the recordings. *See* ER 1-2. Appellate counsel filed a motion to clarify (1) whether the court reporter should at least make the corrections she did agree should be made, and (2) whether the court had reviewed the recordings. *See* ER 81-83. The court denied this motion in a minute entry stating the first request was "denied as moot on the grounds that the court reporter has filed amended transcripts," which the court reporter had done in the interim, and stating the second request was simply "denied." ER 499 (docket entry #230).

Appellate counsel then filed the second notice of appeal noted *supra* p. 2. This Court consolidated the second appeal with the original substantive appeal.

V.

SUMMARY OF ARGUMENT

The district courts violated Mr. Gougher's Sixth Amendment rights in multiple ways. In their treatment of self-representation, the courts essentially had their cake and ate it too, by allowing Mr. Gougher to represent himself when he did not want to and not allowing him to represent himself when he did want to. The first court let Mr. Gougher move forward with self-representation at a critical stage of the proceedings – the bail revocation hearing – without the inquiry required by *Faretta v. California*, 422 U.S. 806 (1975), and when Mr. Gougher had not made an unequivocal decision to represent himself. The second court then

denied Mr. Gougher the right to represent himself once Mr. Gougher did make an unequivocal decision to represent himself as the actual trial approached. The court's primary rationale – that Mr. Gougher did not understand the nature of the charges – ignored cases holding it is the court's responsibility to assure understanding, not the defendant's. The court's secondary rationale – that Mr. Gougher would not respect courtroom decorum – is a judgment that should be made only after self-representation has been tried.

The second court also violated Mr. Gougher's Sixth Amendment rights in two additional ways. First, it aggravated the denial of Mr. Gougher's self-representation request by placing what was essentially a flat prohibition on him saying anything at all in support of his defense. This ignored the general right of defendant autonomy that is the basis for the right of self-representation recognized in *Faretta* and was recently expanded in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Second, the court denied Mr. Gougher's Sixth Amendment right to conflict-free counsel when it forced the appointed attorney to continue representing Mr. Gougher after Mr. Gougher filed the bar complaint. It was certainly error to go forward with no inquiry about the complaint.

There was also a violation of Mr. Gougher's Fifth Amendment privilege against self-incrimination when the prosecutor cross-examined Mr. Gougher about the computers and the child pornography and argued in closing he had said "[n]othing." While a defendant does expose himself to cross-examination when he testifies, and thereby waives the privilege against self-incrimination to a limited extent, the cross-examination and waiver are limited by the scope of direct examination. All Mr. Gougher testified about in his direct examination were the

failings of his attorney, and the prosecutor's cross-examination had absolutely nothing to do with that testimony.

In addition to the Fifth and Sixth Amendment violations, there was error in the first court's ruling on the motions challenging the NCIS investigation. The court which considered those motions made errors of law and thereby abused its discretion in denying discovery and an evidentiary hearing. The court's first rationale – that the investigation of Mr. Gougher had taken place prior to *Dreyer* and so, by implication, the agents were not at fault – ignores this Court's case law which requires clear, binding appellate precedent to trigger a good faith exception. The court's second rationale – that post-*Dreyer* practice would be relevant only to post-*Dreyer* investigations – ignores (a) that the purpose of the exclusionary rule is to deter future conduct, not correct a harm already done, and (b) that a failure by NCIS to make the changes represented in *Dreyer* could lead to a different decision about application of the exclusionary rule.

There was also procedural error in the ruling that is the subject of the second appeal challenging the denial of the defense motion to make transcript corrections. While district court rulings on such motions are upheld unless clearly erroneous or plainly unreasonable, the district court does have to review available evidence before making its ruling. The district court made an error of law when it refused to review the court reporters' recordings, and an error of law necessarily makes a ruling clearly erroneous and plainly unreasonable.

Finally, this Court should order reassignment to a different district judge on remand. While reassignment is not the ordinary course, it is appropriate when one could reasonably expect the district court to have substantial difficulty putting

previously expressed views out of its mind and/or when advisable to maintain the appearance of justice. The district court's ruling on the motion to correct transcripts without even waiting for a government response and its general hostility toward Mr. Gougher warrant reassignment of at least review of the court reporters' recordings and the proposed transcript corrections. The continual conflict between Mr. Gougher and the court and the court's obvious frustration with Mr. Gougher warrant reassignment of the entire case.

VI.

ARGUMENT

A. IT VIOLATED MR. GOUGHER'S SIXTH AMENDMENT RIGHTS TO, FIRST, ALLOW HIM TO REPRESENT HIMSELF AT THE BAIL REVOCATION HEARING WHEN HE HAD NOT YET MADE AN UNEQUIVOCAL DECISION TO REPRESENT HIMSELF, AND, SECOND, NOT ALLOW HIM TO REPRESENT HIMSELF AT TRIAL ONCE HE HAD MADE AN UNEQUIVOCAL DECISION TO REPRESENT HIMSELF.

1. Reviewability and Standard of Review.

Mr. Gougher stated on multiple occasions during the month before trial that he wished to represent himself at that point, as summarized *supra* pp. 13-16. At the earlier bail revocation hearing, in contrast, he stated he felt "under duress" and "tricked into questioning witnesses." *Supra* p. 9. Though he did not object

because it put Mr. Gougher in custody rather than on bond, where it was difficult for him to contact attorneys to retain and left him with far more limited access to a law library and other resources. *See* ER 208-09 (difficulties getting access to law library in jail); RT(9/19/17) 277 (unable to go to library or get on phone); CR 174, at 2-3 (broken jail computer and problems with law library access). These consequences make a prejudice inquiry impractical because it is impossible to say how things might have been different if Mr. Gougher had had free contact with attorneys and/or better access to a law library and other resources.

3. Not Allowing Mr. Gougher to Represent Himself at Trial Once He Did Make an Unequivocal Decision to Represent Himself Violated Mr. Gougher's Sixth Amendment Rights in a Second, Different Way.

Mr. Gougher did make an unequivocal decision to represent himself after realizing he was not going to find an attorney who would sign his "honest services contract" and make the arguments he wanted made.[4] He stated twice during the August 31, 2017 status hearing that he wanted to represent himself. *See supra* p. 14. He reiterated that wish in one of his "affidavits of truth," *see* ER 129, and said again on the first day of trial, before jury selection, "I want to represent myself," ER 16.

The district court denied the request for two reasons. At the August 31 status hearing, it found Mr. Gougher did not understand "the nature of the charges,

[4] A decision to represent oneself based on dissatisfaction with attorney representation is still unequivocal. *United States v. Hernandez*, 203 F.3d at 621-22.

including the elements of the charges." *Supra* p. 15. It subsequently added, on the first day of trial, that Mr. Gougher had not shown be was "able and willing to abide by the rules of procedure and courtroom protocol." *Supra* p. 16.

Neither of these reasons justified the denial of Mr. Gougher's request, however.

a. The district court erred in denying Mr. Gougher's request to represent himself on the ground he did not understand the nature of the charges.

As noted *supra* p. 26, *Faretta* requires advice of three "elements": (1) the nature of the charges; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. The district court denied Mr. Gougher's request to represent himself because he did not understand the nature of the charges. This was error for two reasons.

First, it is not the responsibility of the defendant to show he understands the nature of the charges, but the responsibility of the district court to make sure he does. As this Court has explained:

> We do *require*, however, as a precondition to accepting the [self-representation] request that the defendant be made aware of the "three elements" of self-representation: he must be *made aware* of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. This requirement precludes the district court from denying a self-representation request on the ground that the defendant has not *independently* informed himself of these elements. Rather, as we have consistently stated, it is the responsibility of the district court to ensure that the defendant is informed of them by providing him with the requisite information.

Hernandez, 203 F.3d at 623-24 (emphasis in original) (citations, footnote, and internal quotations omitted). "Accordingly, if the court fails to fulfill its obligation to inform the defendant and then *denies* his request to represent himself, it violates the defendant's Sixth Amendment right of self-representation." *Id.* at 625 (emphasis in original). *See also United States v. Arlt*, 41 F.3d 516, 521 (9th Cir. 1994) (noting government is not entitled to affirmance if request for self-representation is denied because court fails to explain consequences).

And the reason for this rule "is clear." *Hernandez*, 203 F.3d at 625.

> Were the rule otherwise, the Sixth Amendment right to self-representation would be severely weakened. Its exercise would be wholly dependent on the whim of the district judge, or on how well the district judge understood the law. If the judge failed to perform his duties properly . . . [,] the defendant would be penalized: his right to self-representation would be forfeited by virtue of the court's error. To put it another way, the defendant's rights would be taken from him because the district judge failed to provide him with the information necessary to make an informed request. Such a rule would not only be arbitrary and unreasonable, but it would turn *Faretta* into a nonbinding advisory opinion for the benefit of judges instead of a constitutional rule that protects defendant's constitutional rights.

Id.

The district court also erred because it failed to recognize the difference between what Mr. Gougher meant when he stated, "I do not understand the nature and cause," *supra* pp. 15, 16, and what *Faretta* and its progeny mean by "the nature of the charges." The "nature of the charges" in the guilty plea context has been interpreted to mean the elements of the offense, *see United States v. Minore*, 292 F.3d 1109, 1115 (9th Cir. 2002), *and cases cited therein*, and *Faretta* cases use a similar standard, *see, e.g., Arrendondo v. Neven*, 763 F.3d 1122, 1127 (9th Cir. 2014) (holding advisement sufficient where court simply "outlined the

elements of the crimes"); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1199 (9th Cir. 2000) (holding advisement in illegal reentry case sufficient where court explained illegal reentry meant defendant was released, "came back" eight days later, and "[t]hat was illegal").

Certainly by the August 31, 2017 status hearing, it was apparent this was not what Mr. Gougher was talking about when he stated, "I do not understand the nature and the cause." When the court told Mr. Gougher at the beginning of the hearing that "[y]ou were never able to understand the charges," Mr. Gougher explained that was because the government had not answered his "Bill of Particulars" "correctly, completely, and with a step-by-step facts of how they got there" and he had "venue questions." ER 24. *See also* ER 25 (again explaining "the prosecution did not answer my Bill of Particulars correctly"). His different focus was also made clear by his later lengthy explanation referencing "the US Corporation," the Tenth Amendment, and the distinction between a "federal citizen, lower case citizen" and "a state, capital C, citizen." *Supra* p. 15.[5]

This made it apparent Mr. Gougher was *not* talking about the elements of the offense when he said, "I do not understand the nature and the cause." He was talking about other things he believed were required.[6] That he may have been

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[5] The difference in meaning was apparent to some extent even at the first hearing before the second district court, on April 18, 2017, when the district court asked Mr. Gougher if it was "fair to say" he "could not understand the nature of the charges" and Mr. Gougher replied, "I don't understand how I am subject to the laws." ER 140.

[6] The psychiatric report prepared for the competency evaluation suggested Mr. Gougher was consulting with an individual who was "feeding him information and talking points about the Federal Government's lack of authority over him and

mistaken in that belief did not mean he did not understand the nature of the charges in the sense of the elements of the offense. The first district court recognized this at its last hearing when it responded to Mr. Gougher's statement, "I don't understand the nature and causes [or "cause," *see supra* p. 12 n.1] of these charges" by telling him, "[T]he court believes you do understand the nature of the charges," *supra* p. 12.

In any event, it was the court's responsibility to make Mr. Gougher understand. If the court really thought Mr. Gougher did not understand the elements of the offense rather than simply disagreeing about what information the government had to provide, the court had to provide further explanation. The mere fact Mr. Gougher insisted on using his meaning of "nature and cause" in answering the court's questions did not mean he could not represent himself.

b. The district court erred in denying Mr. Gougher's request to represent himself on the ground he would not abide by the rules of procedure and courtroom protocol.

The district court also erred in denying Mr. Gougher's request to represent himself on the ground he would not abide by the rules of procedure and courtroom protocol. *Faretta* did recognize the right to self-representation "is not a license to abuse the dignity of the courtroom" or "a license not to comply with relevant rules of procedural and substantive law" and the court may terminate self-representation by a defendant "who deliberately engages in serious and obstructionist

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reliance on sovereign citizen ideals as his defense." CR 138, at 4.

misconduct." *Id.*, 422 U.S. at 835 n.46. Still, as one treatise notes, "[o]rdinarily, this authority would be exercised only after the defendant has begun to represent himself." 3 Wayne R. LaFave, *et al.*, *Criminal Procedure* 869 (4th ed. 2015). It is only in "exceptional situations" that self-representation may be denied on this ground before it has even started. *Id.*

The Fifth Circuit did approve such a preemptive denial in *United States v. Long*, 597 F.3d 720 (5th Cir. 2010), based on what the court characterized as "nonsensical statement[s]" that the magistrate judge had characterized as "ridiculous statements that carry no meaning in this court or any court of law." *Id.* at 727. But this conflicts with Ninth Circuit case law indicating "nonsensical," or, more charitably, "unorthodox," ideas are not a basis for denying self-representation. As this Court explained in upholding a Faretta waiver in *United States v. Neal*, 776 F.3d 645 (9th Cir. 2015):

> It is not disputed that [the defendant] made numerous comments and filed a variety of documents disputing jurisdiction and other "nonsensical" issues (e.g., [the] United States is a corporation. . . . as a corporation cannot interact with human beings; "the sale of bonds based on Petitioner's [sic] conviction by the court creates a financial conflict of interest".). However, [the defendant] also professed a "sovereign citizen" belief system. (Footnote omitted.) . . . "In the absence of any mental illness or uncontrollable behavior, [the defendant] has the right to present [his] unorthodox defenses and argue [his] theories to the bitter end." *See* [*United States v.*] *Johnson*, 610 F.3d [1138,] 1147 [(9th Cir. 2010)].

Neal, 776 F.3d at 657.

There was the district court's concern Mr. Gougher was not respecting courtroom decorum, which led the court to exclude him from the courtroom on two occasions. But these interruptions were largely because Mr. Gougher was not

allowed to present his arguments, which was in turn because he was not allowed to represent himself. As discussed *infra* pp. 37-38, the court continually told Mr. Gougher "to remain silent" because "you do not represent yourself," ER 54; "don't interrupt" because "you do not represent yourself," ER 38-39; and "[y]ou cannot argue with me" because "[y]ou are represented by counsel, and your lawyer will speak for you here in trial," ER 15. All Mr. Gougher was trying to do, as he explained at the beginning of the trial, was "stand up for my Constitutional Rights." ER 18. *See also* ER 39 (stating at status conference, "I'm sorry. I have to invoke my rights.").

This made it all the more necessary to give self-representation a try before concluding Mr. Gougher would not respect courtroom decorum, especially after he had been taught an initial lesson by being excluded from the courtroom at the July 25, 2017 hearing. *See* RT(8/16/17) 8, 10 (court noting Mr. Gougher "was disruptive" and "acted out a bit," at other proceedings, but at present proceeding, he "has behaved himself very well, and at some other proceedings as well"). Mr. Gougher might very well have been cooperative if given the chance to file his motions, present his unorthodox arguments, and simply, as he put it, "have my say," *supra* p. 16.

c. The denial of a self-representation request is structural error which does not require a showing of prejudice, but Mr. Gougher did suffer the prejudice with which *Faretta* is concerned.

The erroneous denial of a self-representation request is structural error

which mandates reversal without any inquiry into prejudice. As explained in *McKaskle v. Wiggins*, 465 U.S. 168 (1984), "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." *Id.* at 177 n.8, *quoted in United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004).

Further, though it need not be shown, there was prejudice in the present case to the interests *Faretta* is intended to protect. *Faretta* recognized:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S. Ct. 1057, 1064, 25 L. Ed. 2d 353 (Brennan, J., concurring).

Faretta, 422 U.S. at 834.

As Mr. Gougher talked about his "honest attorney contract," his "bill of particulars," and what he meant by the "nature and cause" of the charges, it became apparent that what was most important to him was controlling his defense. When he was not able to find an attorney to present his arguments, he was willing to do it on his own. When he was denied that right, he was saddled not just with a criminal conviction. He was saddled with an attorney who presented a defense entirely different from what he wanted. He was told he could not speak, told to be quiet when he did try to speak, and excluded from the courtroom when he wasn't quiet enough. His motions were stricken and not considered by the court. This included not only his "bill of particulars," "affidavits of truth," and other motions

which most courts would charitably label "unorthodox," but also a more mainstream motion alleging his attorneys had provided ineffective assistance by waiving his speedy trial rights for over three years, *see* CR 172, at 1.

In sum, Mr. Gougher was not just convicted of a crime. He was convicted of a crime without being permitted to control his own defense, without "that respect for the individual which is the lifeblood of the law." He is entitled to a new trial at which he is allowed to control his own defense.

B. THE SECOND DISTRICT COURT VIOLATED MR. GOUGHER'S FIRST AND SIXTH AMENDMENT RIGHTS BY PROHIBITING HIM FROM SPEAKING IN COURT.

1. Reviewability and Standard of Review.

In addition to denying Mr. Gougher the right to represent himself, the second district court placed essentially a flat prohibition on Mr. Gougher speaking in court about anything to do with his defense. At the April 19, 2017 hearing, the court stated, "Sir, you need to remain silent. Because at this point you do not represent yourself, Mr. Kraus does, and so do not interrupt the proceedings." ER 54. At the July 25, 2017 hearing, the court told Mr. Gougher, "Don't interrupt. You don't represent yourself." ER 38. Later in the same hearing, after Mr. Gougher asked if he could "say something," the court asked what it was, and when Mr. Gougher started to make one of his legal arguments, the court told him, "No, no. I am going to . . . order you to . . . [s]top, stop, Mr. Gougher." ER 47. On the

ground if not the others.

C. THE REFUSAL TO APPOINT SUBSTITUTE COUNSEL AFTER MR. GOUGHER FILED THE BAR COMPLAINT AGAINST HIS ATTORNEY VIOLATED THE SIXTH AMENDMENT BECAUSE THE BAR COMPLAINT CREATED AN ACTUAL CONFLICT OF INTEREST, OR AT LEAST REQUIRED AN INQUIRY.

1. Reviewability and Standard of Review.

Mr. Gougher's attorney declared a conflict and made a motion to be relieved after Mr. Gougher filed the bar complaint. *See* ER 9. The district court denied the motion. ER 9. The question of whether there is an actual conflict requiring new counsel is subject to de novo review. *United States v. Walter-Eze*, 869 F.3d 891, 900 (9th Cir. 2017).

2. The Bar Complaint Created an Actual Conflict of Interest Requiring New Counsel, or at Least Required an Inquiry.

Representation by an attorney laboring under "an actual conflict of interest [that] adversely affected [the] attorney's performance" is another way in which the Sixth Amendment right to counsel can be violated. *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). A defendant does have to show an actual conflict rather than just the

possibility of a conflict, but then need show "only 'that some effect on counsel's handling of particular aspects of the trial was "likely."'" *Moore*, 159 F.3d at 1157 (quoting *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992)).

Moore considered whether a defendant's threats to sue his attorney created an actual conflict. The Court held mere threats to sue did not create an actual conflict, but expressly distinguished two cases – *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976), and *Douglas v. United States*, 488 A.2d 121 (D.C. 1985) – holding *actual* complaints created an actual conflict, with apparent approval of the holdings in those different cases. *See Moore*, 159 F.3d at 1157-58. In *Hurt*, the D.C. Circuit found an actual conflict where a defendant's trial attorney had filed a libel suit against the defendant's appellate attorney for arguing ineffective assistance in the appellate briefing. *See id.*, 543 F.2d at 166-68. In *Douglas*, the District of Columbia Court of Appeals found an actual conflict where the defendant had filed a bar complaint still pending at the time of trial. *See id.*, 488 A.2d at 136-37. In describing the conflict, the court explained:

> [A]s soon as [the attorney] learned of Bar Counsel's intention to pursue an investigation of appellant's complaint, he acquired a personal interest in the way he conducted appellant's defense – an interest independent of, and in some respects in conflict with, appellant's interest in obtaining a judgment of acquittal. For instance, fearing that appellant's complaint to Bar Counsel might later be expanded to include claims of ineffective assistance at trial, [the attorney] would have an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for *post hoc* criticism of his efforts. This could compromise [the attorney's] professional judgment about the best means of defending this particular case; it could encourage the most standard or conservative trial strategy, as well as overcautious tactical decisions and courtroom demeanor. Furthermore, concerns about the pending investigation might impede communications between appellant and [the attorney]. [The attorney] might be apprehensive about sharing with appellant the reasons behind tactical defense

> decisions and refrain from disclosing to appellant any unexpected problem that arose during the course of the trial. (Footnote omitted.) Appellant, in turn, might be reluctant to question [the attorney's] trial decisions for fear of further alienating counsel in the midst of trial.

Id. at 136-37.

Other circuits have expressed concern that treating a bar complaint as creating an actual conflict "would invite criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial." *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993). *See also United States v. Holman*, 314 F.3d 837, 845-46 (7th Cir. 2002) (quoting *Burns*).[7] These cases are not persuasive in the present case for at least three reasons, however. First, the primary reasoning in *Burns* – that "[w]e do not think that [the] appointed attorney could have gleaned any advantage for himself in disciplinary proceedings before the state bar by failing to employ his best exertions on [the defendant's] behalf at trial," *id.*, 990 F.2d at 1438 – ignores the more subtle effects of the conflict recognized in the *Douglas* case which this Court cited in *Moore*. Second, Mr. Gougher was not exhibiting any regular pattern of filing bar complaints against his lawyers; rather, this was the first time he had done it. Third, there should have been at least some inquiry into the complaint. This need is suggested by *Moore*, in which the Court found the district court's failure to inquire "troubling" and suggested there would have been a need for an evidentiary hearing had the Court not reversed on other grounds. *See id.*,

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[7] The Eighth Circuit has also followed *Burns*. *See United States v. Rodriguez*, 612 F.3d 1049, 1054-55 (8th Cir. 2010). But the defendant in the Eighth Circuit case, unlike Mr. Gougher, was allowed the alternative of representing himself. *See id.* at 1052.

159 F.3d at 1157. The need to inquire is also suggested by a later Fourth Circuit case distinguishing *Burns*, in which the court found there *was* an actual conflict where there was "a seemingly non-frivolous grievance against [the attorney]." *United States v. Blackledge*, 751 F.3d 188, 196 (4th Cir. 2014).

3. The Conflict Created a Presumption of Prejudice.

The Supreme Court has held there is a presumption of prejudice when an attorney has an actual conflict in the joint representation of two clients. *See United States v. Walter-Eze*, 869 F.3d at 905 (discussing *Sullivan* and *Mickens v. Taylor*, 535 U.S. 162 (2002)). Whether other types of actual conflicts create a presumption of prejudice is a question the Supreme Court has left open. *Walter-Eze*, 869 F.3d at 905.

This Court considered one other type of conflict in *Walter-Eze* – between the client's interest in his attorney obtaining a continuance to prepare for trial and the attorney's pecuniary interest in avoiding sanctions the trial court said it would impose if the attorney insisted on the continuance. *See id.* at 903. The Court began by considering the reason for the presumption of prejudice in the joint representation context – that "the harm may not consist solely of what counsel does, but of what the advocate finds himself compelled to *refrain* from doing, not only at trial but also during pretrial proceedings and preparation." *Id.* at 905 (internal quotations omitted) (emphasis in original). "In other words, where counsel represents clients with conflicting interests throughout the trial, it is impossible to pinpoint at what point or to what extent counsel's performance on

behalf of one client was impaired, and consequently impossible to determine what impact such elusive defects had on the outcome of the trial." *Id.* at 905. The Court then distinguished the conflict before it:

> This case does not present an example of a situation – present in the case of a joint representation – where every interaction with or decision made by counsel is tainted by the conflict. Rather, where, as here, the actual conflict is relegated to a single moment of the representation and resulted in a single identifiable decision that adversely affected the defendant, the Supreme Court's reasoning regarding when prejudice should be presumed does not control. (Citation omitted.)

Id. at 906.

The impact of a conflict like that in the present case *is* like the conflict in a joint representation case, however. A pending bar complaint has the subtle, impossible-to-identify, and ongoing effects described in the *Douglas* opinion quoted *supra* pp. 42-43.

There therefore is a presumption of prejudice here. The conflict is another reason Mr. Gougher is entitled to a new trial.

* * *

APPENDIX5

Nos. 17-50436, 18-50352

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

MARLIN LEE GOUGHER,
DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California
14CR0205-H/14CR0635-WQH

ANSWERING BRIEF FOR THE UNITED STATES

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Nos. 17-50463, 18-50352

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

MARLIN LEE GOUGHER,
DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Southern District of California
14CR0205-H/14CR0635-WQH

JURISDICTION AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231, as Marlin Lee Gougher (Gougher) stood charged with offenses against the United States. Excerpts of Record (ER) 457. On December 18, 2017, the court entered final judgment, sentencing Gougher to 200 months' custody. ER 113-14. Gougher timely noticed his appeal, on December 22, 2017. Fed. R. App. P. 4(b)(2); ER 112. On September 18, 2018, Gougher filed a motion to correct transcripts, which the district court denied on September 21, 2018. ER 84. Gougher filed a timely notice of appeal from that order on October 1, 2018. ER 80. Fed. R. App. P. 4(b)(2); ER 49. This Court

has jurisdiction under 28 U.S.C. § 1291. Gougher is in custody with a scheduled release date of August 13, 2031.

QUESTIONS PRESENTED

1. Did the district court violate the Sixth Amendment by (a) allowing Gougher to participate in his pretrial bond revocation hearing after he refused all forms of counsel and (b) denying his request to proceed pro se at trial, after he maintained that he did not understand the nature of the charges against him, refused to follow the court's directions such that he had to be removed from the courtroom, and made the request for the purpose of delay?

2. Did the district court abuse its discretion by failing to appoint Gougher his fifth attorney the morning of trial, after Gougher filed a complaint against his attorney with the state bar when there was no evidence the bar complaint created any actual conflict?

3. Gougher voluntarily testified in his defense. Was it a Fifth Amendment violation to allow some limited cross-examination and did the prosecutor properly comment on the fact that Gougher testified in his defense without providing any answers that related to the crimes charged?

4. Did the district court abuse its discretion by declining to order discovery about the details of several hundred NCIS criminal investigations unrelated to Gougher's case?

5. Did the district court clearly err by denying Gougher's request to make changes to the certified trial transcript when the court reporter compared those proposed changes against the audio recording of the proceedings and explained why the proposed changes did not accurately reflect what was actually said at trial?

STATUTORY PROVISIONS

The relevant statutes are set forth in the addendum to this brief.

STATEMENT

1. In 2012, Marlin Lee Gougher was living in a small apartment in Oceanside, California with his wife and a roommate. Supplemental Excerpts of Record (SER) 229-30, Presentence Report (PSR) 5. Gougher kept two laptop computers in the apartment: one in the living room and the other on a dresser in his bedroom. On the living room laptop, Gougher maintained a number of peer-to-peer file sharing programs that allowed him to download files from other users. SER 221, 334, 674-84. Gougher used these programs to search for child pornography, using search terms including "pthc [pre-teen hardcore] incest," "children raped," and

"child rape and murder." SER 687. Gougher then downloaded videos of child pornography, saved them into various folders, and then manually transferred them to his second laptop, next to his bed, which he used to view the videos, using "Real Player" video software. SER 343, 348, 663.

SER 626. Over the course of several years, Gougher downloaded and saved over 300 child pornography videos on his two computers. SER 322.

In March 2012, agents with the Naval Criminal Investigative Service (NCIS) were conducting undercover searches of internet file sharing programs in the "fleet concentration area" around the Camp Pendleton Marine Base, in Oceanside, California. SER 217. Using peer-to-peer software, an agent identified and downloaded

four videos of child pornography from an internet protocol (IP) address registered to Gougher's wife at the residence they shared. SER 257-61. The videos each depicted young children being penetrated by adult males. SER 218, PSR 4-5. NCIS agents passed this information along to the FBI, which executed a search warrant on Gougher's apartment, seized his laptops, and discovered hundreds of videos of child pornography on them. ER 324, SER 322-24 PSR 5.

2. In August 2013, Gougher was charged in a complaint with the distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2). SER 688-92. At Gougher's initial appearance, the court imposed a $50,000 bond with a GPS monitoring condition. SER 498, ER 466. As part of his conditions, Gougher was prohibited from using any computer without monitoring software installed, unless approved in advance by pretrial services. *Id.*

Approximately three months after Gougher was placed on bond, a pretrial services officer conducted an "unannounced home visit" on his apartment. SER 495. During the visit, Gougher initially denied having a computer, but then admitted that there was a "computer under his bed which he [had] been using regularly," for "nearly his entire time on bond." SER 495. Gougher was "argumentative and aggressive" during the home visit and told

the officers that it was "insane" to think that "people will not use computers." *Id.* After the visit, pretrial services filed a petition for Gougher to be remanded to custody, but the court denied the request and allowed Gougher to remain on bond. SER 489. At Gougher's request, his case was then continued repeatedly—for over two years—while he remained out of custody.

3. On October 21, 2016, over three years after Gougher was charged, and only a few weeks before his case was scheduled for trial, Gougher requested a status hearing regarding counsel. ER 429. At a hearing, Gougher began by stating "I am speaking as myself but not for myself." *Id.* He then complained that his appointed attorney would not return his phone calls "in a timely manner" and suggested that the attorney was delaying the case to "defraud the taxpayers." ER 429-30. When the court accepted that there was a breakdown in communication and started to appoint a new attorney, Gougher responded "No, ma'am. I'm not finished yet. Okay. Let me finish." ER 430. He then recounted additional complaints about his attorney and told the court "I don't want him to be on the record. I don't want him to even stand around me as he give me the heeby jeebies, your Honor." *Id.* As the court attempted to appoint a new attorney, Gougher repeatedly interrupted. See, e.g., ER 431 ("I'm not done yet, your Honor. I

object. Let me finish, please. Let me finish, please"). Gougher insisted that his "friends and family" had recently given him "a ton of money" and he wanted to hire a private attorney. *Id.* The court responded that Gougher was free to "retain whoever you want," but "in the meantime" it would appoint an attorney to advise him and assist with finding retained counsel. ER 433. Gougher then continued to interrupt and speak over the court throughout the remainder of the hearing. ER 433-38. The court provisionally appointed a new attorney. ER 436.

The next week, Gougher appeared at a hearing to confirm the appointment of his new attorney. At the start of the hearing, Gougher told the court that he had been unable to "find a high quality attorney that is available with a winning record," and "[u]nder no uncertain terms" would he be willing to accept a court-appointed attorney. ER 413. He then asked the judge whether she had "ever tried to hire an attorney . . . on a case as such as big as this," and when the court responded "I don't answer the questions," Gougher offered that he would just keep looking for an attorney and would "call you up and schedule a hearing" when he found one. ER 414. The court stressed that Gougher had been "out on bond for a while," and he needed to either retain an attorney, represent himself, or use the services of his appointed attorney. ER 414-15.

Over the remainder of the hearing, Gougher continued to interrupt and speak over the court, insisting that he would only use the services of an attorney with a "winning record." ER 415-425. The court then set the matter for another hearing, but warned Gougher that while he was free to retain counsel, he needed to "get going on this ASAP." ER 420-21.

The next month, at a status hearing, the court asked Gougher to "report on your status of retention of counsel." Gougher asked if he could "file papers with the Court electronically." ER 393-94. When the court asked "[a]re you asking to represent yourself?" Gougher responded, "[n]o, not at this time, your Honor." ER 395. He then gave a lengthy statement complaining about his court-appointed attorneys, told the court that he was "working on a contract" to retain an attorney, and insisted that he did not want to represent himself. ER 398-402. The court noted that it could appoint "stand by" counsel who could assist Gougher with filing papers, if he did decide to represent himself, but encouraged him to try and find retained counsel before the next hearing. ER 405.

A few weeks later, the court held another status hearing and asked Gougher for "an update on your attempts to retain counsel." ER 386. In response, Gougher explained that he had contacted a number of attorneys and was in "contract negotiations" with one of

them. *Id.* When the court offered that it could simply appoint one of the attorneys with whom Gougher had previously spoken, he responded "no, your Honor, that wouldn't work" and then renewed his request to personally file papers with the court. ER 387. He also asked whether if he did "have to go pro se" whether he could use his "minister, who has two years of Berkeley Law school" as advisory counsel. *Id.* When the court declined, Gougher stated that he was "getting close to an agreement" to retain new counsel. *Id.* The court then agreed to continue the case an additional month and ordered Gougher to "use your best efforts to secure counsel or come up with an alternative plan." ER 388.

On January 9, 2017, Gougher appeared before the court for a fourth status hearing on retained counsel. At the start of the hearing, when the court asked "[c]an you tell me your attempts now to secure retained counsel," Gougher responded "What I'm going to do is I'm going to make a statement before the court." ER 369. When the court ordered Gougher to "just respond to the question," he explained that he had "done everything [in his] power . . . including interviewing like 60 attorneys and even writing the State Bar of San Francisco for assistance." ER 369-70. Nevertheless, he was unable to find even "one attorney willing to sign a simple one-page contract any first-year law student could understand." ER 370.

Gougher noted that he was "at a point I might consider accepting free help if it's not illegal for me to claim I'm indigent and accept free legal assistance when, in fact, I have large amounts of money set aside." ER 371. When the court asked Gougher for some proof that he even had the funds to retain an attorney, he responded that it was "squirreled away." ER 371-72. Gougher then gave a lengthy speech explaining that he did not "understand the nature and cause of the charges," and concluding with a description of himself as "Marvin Gougher, in propia persona." ER 372-73. When the court asked "[s]o now you want to represent yourself," Gougher responded "Propria personam." ER 374-75. Later, however, when the court asked Gougher whether he wished to represent himself, he responded "Not really." ER 375. He then asked for additional time to "keep looking" for a retained attorney. ER 374-75. The court agreed to give Gougher one additional continuance to allow him to find counsel. ER 375.

4. On February 7, 2017, pretrial services filed a petition alleging that Gougher had not been charging the battery on his GPS monitoring device, so that there were periods where he could not be accounted for. SER 553. The petition also noted that Gougher was "frequently confrontational" and "argumentative" and did not appear to be in compliance with his sex offender counseling

requirements. SER 554-55. As a result, pretrial services asked the court to order Gougher to "show cause why his bond should not be revoked." SER 555.

A few days later, Gougher appeared before the court for a status hearing on the petition. He immediately objected to the presence of his court-appointed attorney. ER 257 ("I object. I object to his presence, your Honor"). The court then placed Gougher under oath, read him the alleged violations, and asked "[d]o you admit or deny that you violated the conditions of your supervised release." ER 259. Gougher responded that he denied the allegations "because I have certain things to say." *Id.* The court then asked to "hear from the Pretrial services officer" about the allegations of non-compliance. *Id.*

A pretrial services officer took the stand, at which point Gougher moved away from counsel table while objecting to his attorney's presence. See ER 260 ("Mr. Gougher, you're supposed to be on that side, that side of the court"). The pretrial services officer testified that he had warned Gougher several times about charging his GPS tracker, but Gougher complained that he was unable to find time to charge the device during the day, and the charger would fall out at night while he was sleeping. ER 271.

After the pretrial services officer testified, the court asked Gougher's attorney if he had any cross-examination, and he responded "No, your honor." ER 274. The court then asked Gougher whether he objected to his attorney asking any questions and Gougher said "Yes. Yes, I do," explaining "[h]e's not my attorney of choice, your Honor." *Id.* Then, without further discussion, Gougher began to personally question the officer. ER 275. Gougher asked questions over the course of several pages of transcript, repeatedly asking about the strap on the GPS, the demands of his work schedule, and the availability of a "rapid charger." ER 275-96. After a second pretrial services officer testified about Gougher's non-compliance, the court again allowed Gougher to question him about the same topics. SER 300-303.

After hearing from the pretrial services officers, the court asked Gougher's attorney, Gary Burcham, for his position on whether Gougher should be remanded into custody, and the following exchange took place:

THE COURT: Mr. Burcham?

THE DEFENDANT: No.

MR. BURCHAM: Your Honor --

THE DEFENDANT: I object, your Honor.

MR. BURCHAM: -- in light of Mr. --

THE DEFENDANT:	I object.
MR. BURCHAM:	-- Gougher's repeated --
THE DEFENDANT:	I object.
MR. BURCHAM:	-- repeated --
THE DEFENDANT:	He's not my attorney, your Honor. I object.
MR. BURCHAM:	If he does not want to utilize my services --
THE DEFENDANT:	That's right.
MR. BURCHAM:	He wants to argue his own cause, I'm willing to let him do that unless the Court directs me otherwise.

ER 326-27.

Following this exchange, the court began advising Gougher of his right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975). In response, Gougher told the court "I'm not going pro se, your Honor. I'm still hunting for attorneys." ER 328. When the court continued to ask questions, he responded "I don't have an attorney to answer that question, your honor." *Id.* As the court went on, Gougher interrupted, objected, refused to answer, insisted that he wanted an attorney, and stated that he did not "understand the nature and causes of the charges." ER 329. Eventually he stopped giving audible answers altogether. ER 332-34. Finally, at the end of the colloquy, the court warned that Gougher was "trying to have

it both ways," by insisting on retaining his own counsel, but coming to court without an attorney. ER 337.

Based on the testimony by the pretrial services officers, the court revoked bond without prejudice. ER 359. The court then appointed a new attorney, and set the matter for another hearing so that Gougher's new attorney could "argue on [his] behalf for reinstatement of the bond." ER 355-59. When the court began choosing a date for the bond hearing, Gougher interrupted "What did you say this is for again, Honey? I mean, not Honey. . . . I don't need a status hearing." ER 360.

5. The next week, Gougher's new attorney (now his third) explained that Gougher was "not happy to see me." ER 222. Gougher confirmed, "I told him not to do anything on my case, your Honor. He doesn't represent me. I don't want any more court attorney help." *Id.* Gougher then told the court that he was "considering" representing himself. *Id.* In response, the court referenced the *Faretta* questions from the prior hearing and asked Gougher whether his decision to proceed pro se was "entirely voluntary." ER 243. In response, Gougher said that he was "under duress" because the court was forcing him to represent himself when he was still looking for retained counsel. *Id.* After another lengthy exchange, the court ultimately agreed to give Gougher one

more opportunity to either speak with his appointed counsel or find a retained attorney. ER 248.

On March 6, 2017, Gougher appeared for another status hearing. He continued to object to the presence of his appointed attorney and stated "I am proceeding in propria persona. I speak as myself but not for myself." ER 181. The court then reminded Gougher of the past *Faretta* advisal, and asked him questions to determine whether he wished to proceed without counsel. ER 182. When the court asked "Is it your decision and your decision alone to proceed pro se in this case," Gougher stated "I need some answers first, your Honor." ER 183. He then repeatedly interrupted the court and insisted that he still wanted to find an attorney that would be willing to sign his contract. ER 186.

The court attempted to advise Gougher of the charges against him and the maximum penalties he faced. *Id.* Gougher interrupted several times, insisting that he did not "understand the nature and causes of these charges." ER 188. Gougher "demand[ed]" that the court order "the prosecutor answer the bill of particulars I filed last time." ER 187-89; see ER 211 (Motion for Bill of Particulars filed Feb. 15, 2017). The court tried to ask additional questions, but Gougher responded with questions of his own, and then ultimately stopped answering altogether. ER 196-97. Instead, Gougher

continued to insist that the government answer his "bill of particulars." ER 189 ("I need it answered, your Honor, before I can decide to go pro se. So when do I expect to receive this?"). The court ultimately continued the hearing and asked the United States to file a response to Gougher's request. ER 207. The court promised Gougher that by the next hearing, it would "resolve the issue of whether you're going to represent yourself at trial." *Id.*

On April 3, 2017, Gougher appeared before the court for the seventh time for a status hearing regarding counsel. Gougher told the court that it could not force him to represent himself "under any circumstance unless I understand the nature and causes of the charges." ER 147. He then asked the court "[d]on't you think if you were charged with a crime that you would want an honest effective competent winning attorney that is willing to defend all your rights? That's a question, your Honor. . . .You going to answer that?" ER 149. Gougher concluded "[w]e seem to be at an impasse here, your Honor," and insisted, "I don't understand the nature and causes of these charges." ER 154. Finally, after numerous interruptions—extending over the course of several pages of transcript—Gougher accused the court of "being biased towards the prosecutors, biased against me." ER 170. The court then asked "you think that I am biased against you?" *Id.* When Gougher responded

"Yes," the court recused itself from the case, noting it had "gone over and above to make sure that you have quality counsel," but there were "plenty of other judges" who could handle the case. *Id.* The court reassigned the case to a different judge and ended the hearing. *Id.*

6. Gougher appeared before the new judge on April 18, 2017, and immediately objected to the presence of his attorney. In response, the court warned Gougher "you are to remain silent unless I speak to you. You don't represent yourself. This gentleman represents you." ER 138. When Gougher responded "No, he does not, Your Honor. I object," the court warned "don't speak over me. You are to remain silent, unless I call you on, because at this point you don't represent yourself." *Id.* Gougher's attorney then requested the appointment of new counsel; the court agreed to appoint Gougher a fourth attorney. ER 139. Gougher also told the court that he could not "understand the nature of the charges." ER 140. The court responded that it had read the transcripts from the earlier *Faretta* hearings and was familiar with Gougher's claims. ER 141. The court confirmed that Gougher was apparently still not able to understand the charges against him, and confirmed that he was to be represented by new appointed counsel. ER 142.

The next day, when Gougher's new attorney entered an appearance, the following exchange took place:

> THE DEFENDANT: You are not speaking on my behalf, sir. I'll sue you under Title 42 of the --
>
> THE COURT: Sir, you need to remain silent. Because at this point you don't represent yourself, Mr. Kraus does, and so don't interrupt the proceedings.
>
> THE DEFENDANT: Pursuant to --
>
> THE COURT: Do not interrupt the proceedings or you will be removed.
>
> THE DEFENDANT: -- violate my constitutional rights and my right to due process, sir.
>
> THE COURT: If you continue to interrupt the proceedings, you will be removed. You do not represent yourself. Mr. Kraus represents you.
>
> THE DEFENDANT: No, he does not, sir.
>
> THE COURT: So you need to remain seated.

ER 54. Gougher then continued to interrupt and speak over the court, despite repeated warnings, until the court was able to conclude the hearing and set the case for trial. ER 55-59.

After the hearing was complete, the court *sua sponte* ordered a competency evaluation. SER 561. After Gougher refused to meet with the examining physician, the court set a status hearing. *Id.* There, the court began by reminding Gougher "if you interrupt the proceedings and disrupt the proceedings, then you won't be permitted to remain." SER 560. At the last hearing, "[y]ou spoke

over me, and you did not follow the instructions of the Court"; it warned that if the behavior continued Gougher would be removed to a holding cell, where he could listen to the remaining proceedings over an audio speaker. *Id.* The court then explained the procedure for the competency evaluation and gave Gougher "one more opportunity" to meet with the evaluating doctor. SER 562.

At the end of the hearing, Gougher's attorney notified the court that Gougher had sent him a letter to fire him and "asking for a new attorney." SER 564. The court cleared the courtroom and asked Gougher whether he was seeking new counsel. Gougher responded "I honestly, Your Honor, I am not requesting a new lawyer. I just cannot find one willing to -- I can't find one to sign my one-page honest attorney contact." *Id.* When the court responded "I am not quite sure what you just said because it doesn't sound like you are requesting counsel," Gougher responded "[a]ctually, I am asking for dismissal of all the charges without prejudice, Your Honor." SER 565. The court confirmed that Gougher's appointed attorney would continue to represent him.

On July 25, 2017, the parties returned for a hearing on competency. At the start of the hearing, Gougher objected, and the court warned him not to interrupt the court. ER 38. Gougher then repeatedly interrupted and talked over the court, despite numerous

warnings. See, e.g. ER 39 ("This is a competency proceeding, so don't interrupt"); *id.* ("Do not interrupt the proceedings. Mr. Kraus represents you); *id.* ("If you continue to interrupt the proceedings, you'll hear the proceedings in the cell as I've explained to you before"); ER 40 ("Mr. Gougher, I told you more than once, don't interrupt the proceeding"). Eventually, as the hearing was concluding, Gougher referred to the earlier district court judge and told the court "Huff said this was a statutory court, Your Honor, and there is no such thing in the Constitution." ER 47. The court then cut him off "No, no. I am going to..." and the court and Gougher began speaking over each other, with the court reporter interrupting several times to say that she could not hear what Gougher was saying. *Id.* The exchange apparently grew heated:

> THE COURT: Stop, stop, Mr. Gougher.
>
> THE DEFENDANT: -- are null and void --
>
> THE COURT: No, Mr. Gougher.
>
> THE DEFENDANT: You are operating outside the law under color of law.
>
> THE COURT: Mr. Gougher –
>
> THE DEFENDANT: I move this Court to dismiss all charges right now, Your Honor.
>
> THE COURT: I am ordering you to stop speaking at this point, Mr. Gougher.
>
> THE DEFENDANT: I am going to sue you, the DEA, the

> United States incorporated, and all the United States Attorneys under Section 1983.

ER 47-48. The court then ordered Gougher removed from the courtroom and ended the hearing. ER 48-50.

On August 31, 2017, a few weeks before trial was scheduled to begin, Gougher's attorney informed the court that he had received an email from Gougher's wife, indicating that he wished to represent himself. ER 23-24. At the next hearing, when the court asked Gougher, "are you making a request to represent yourself?" he responded "Yes, sir. I think I will request to represent myself, sir." ER 24. The court noted that they had "gone through this before" and Gougher was "never able to understand the charges." *Id.* Gougher responded by claiming that the prosecution had never properly answered his "Bill of Particulars." *Id.*

The court then proceeded to ask the *Faretta* questions it had attempted to ask at the earlier hearings. Initially, when the court asked "Question number one, are you requesting to represent yourself, yes or no?" Gougher answered "Yes, sir." ER 25. In response to additional questions, however, Gougher began offering qualified or non-responsive answers:

> THE COURT: Is it your decision and your decision alone to proceed pro se in this case?
>
> THE DEFENDANT: Yes, sir. As long as I understand the nature and the causes of the charges.

> THE COURT: No. There is no qualifiers, so stop with the qualifiers and answer yes or no.
>
> THE DEFENDANT: I am challenging personal jurisdiction. I have to understand the nature --
>
> THE COURT: First off --
>
> THE DEFENDANT: -- charges.
>
> THE COURT: -- if you continue – we're going to trial on Tuesday, and I am not going to have this constant interruption

ER 28-29. Finally, after reading the charges and elements, the court asked Gougher four times whether he understood the "nature of the charges" against him. ER 33-34.Gougher repeatedly insisted that he did not. *Id.*

Based on these responses, the court denied Gougher's request to proceed pro se. ER 35. Gougher then repeatedly interrupted and talked over the court, for several pages of transcript, despite repeated warnings. See, e.g, ER 34 ("don't talk over me"); *id.* ("If you continue, you will be removed. Now, I told you, don't talk over me"); ER 35 ("If you continue to talk over me, you'll be removed. Do you understand?"); *id.* ("You have to remain quiet while I conduct this proceeding. I will not allow you to disrupt this proceeding"). Finally, after Gougher again refused to comply with the court's orders, the court ordered him removed from the courtroom, and confirmed the case for trial. *Id.* Afterwards, Gougher sent the court a type-written letter entitled "affidavit of truth" in which he

confirmed that he "made it clear that I wish to go [p]ro se," but he could not "understand the nature and cause of the charges." ER 129.

7. On September 19, 2017, the parties appeared for jury trial. At the outset, Gougher's attorney informed the court that he had received a letter from his client "in which he's, once again, threatening to sue me, and it also states that he reported me to the Bar Association." ER 9. Nevertheless, his attorney confirmed that he was "prepared to go forward today" and "give him the best representation [he] possibly can give him." ER 11. Gougher objected, and stated that because he still did not understand the nature of the charges, "basically we cannot move forward at this point. We're at a standstill here." *Id.* The court disagreed, and noted that Gougher had "consistently and repeatedly informed the Court" that he did not understand the charges orally and in writing. ER 13. The court concluded that based on Gougher's "behavior throughout these proceedings," it was clear that his goal was "simply to obstruct the proceedings" and prevent his "trial from taking place." *Id.* Therefore, because Gougher continued to insist that he could "not understand the charges," and because he had not shown that he was "able and willing to abide by the rules of procedure and courtroom protocol," the court confirmed that

Gougher could not represent himself and would be represented by his fourth appointed counsel. ER 13-14.

At trial, the United States began by calling the NCIS agent who downloaded four child pornography videos from a peer-to-peer service linked to an IP address associated with Gougher's residence. SER 224-26. Next, the United States called Zachariah Sesto, who rented a room from Gougher in 2013. SER 227. He testified that Gougher lived in the apartment with his wife, but that Gougher had his own laptop in his bedroom, which he never saw Gougher's wife use. SER 235-36. He also testified that Gougher and his wife watched TV on a laptop in the living room, but that Gougher "controlled" that computer when he was home. SER 241. Next, the United States called an FBI agent who testified he traced the IP address from the NCIS download to Gougher's address in Oceanside. SER 258. He explained that he conducted a forensic examination of the computers seized from Gougher's home and found over 300 videos of child pornography on the laptop from the living room as well as evidence that child pornography videos had been played on the laptop in Gougher's bedroom. SER 300-315, 343. He also testified that Gougher's resume, along with numerous photographs of Gougher, were also saved on the computer where the child pornography was found. SER 338-39.

At the close of the government's case, Gougher's attorney informed the court that Gougher wished to testify in his defense. Gougher then took the stand, but refused to provide any responsive answers to his attorney's questions or the questions from the prosecutor on cross-examination. Gougher did not present any more evidence. After closing arguments, the jury retired to deliberate and returned a verdict of guilty on all counts after less than two hours. SER 458.

At sentencing, Gougher continued to insist that he did not "understand the nature and cause of the charges" because "no one explained them to me as according to the Sixth Amendment of the Constitution by answering my Bill of Particulars, in Kings English, how I am subject to the statute and codes." SER 580. He then complained about the "psychological torture" he suffered during his time on pretrial release, and gave a lengthy statement about the impact the case had on him financially, how "the news media victimizes people," and the illegality of the criminal laws. He urged the court to "change the verdict to not guilty or suspend the sentence." SER 582. The court disagreed, noting the "horrific, heartbreaking nature of what happened to the victims" in the videos Gougher collected, and pointing out that Gougher spent most of the 20 minutes he spoke at sentencing discussing his own

difficulties, with only "six or seven words about the victims in the case." SER 596. After calculating the guidelines and considering the various § 3553 factors, the court imposed a sentence of 200 months' custody. SER 603-05. This appeal followed.

SUMMARY OF ARGUMENT

1. Gougher contends the court violated his Sixth Amendment rights by allowing him to speak at a bond revocation hearing (therefore denying him the assistance of counsel), and then by denying him the right to represent himself at trial. Neither is true. At the bond revocation proceeding, Gougher had appointed counsel. Gougher refused to let him speak. He then insisted on questioning the pre-trial services officer himself. The district court indulged Gougher's requests—gave Gougher's attorney an opportunity to address the allegations—and then told Gougher to raise the issue of bond again after it appointed another attorney. Even assuming that the bond hearing is a "critical stage" of proceedings to which the right to counsel attaches, Gougher had the assistance of a court-appointed attorney. Under the circumstances—created by Gougher's own unreasonable behavior—it was not a violation of the Sixth Amendment for the court to allow Gougher to participate in a limited fashion, and any error was harmless in any event.

The court also properly denied Gougher's request to represent himself at trial. On several occasions before trial, the court attempted to conduct a *Faretta* colloquy and confirm that Gougher's request to proceed pro se was knowing and voluntary. Each time, Gougher insisted that he did not understand the nature of the charges against him and could not make a knowing and voluntary waiver. Gougher also consistently interrupted, spoke over, and refused to follow the instructions of the court, such that he had to be physically removed from the courtroom on two occasions. Furthermore, Gougher's first, unequivocal request to proceed pro se came on the eve of trial, which the district court plausibly concluded was one more step in his years-long effort to obstruct proceedings and delay. For all these reasons, the court properly denied Gougher's request to proceed pro se, and was also within its discretion in denying any form of "hybrid" representation, to the extent Gougher even made such a request.

2. The court was also within its discretion in declining to appoint a fifth attorney on the morning of trial. For starters, Gougher never actually requested new counsel, and in fact repeatedly said he would never accept *any* attorney appointed by the court. Nor was the court required to substitute counsel due to an alleged conflict of interest analysis with his fourth appointed

attorney. While Gougher filed a bar complaint against his attorney shortly before trial, any conflict created by the complaint was entirely of Gougher's own making; his attorney confirmed that there was no "actual" conflict created by the complaint; and it was clear that his letter was just part of his continuing effort to obstruct the proceedings and delay his trial. Under these circumstances, it was not "illogical" or "implausible" for the court to decline to continue his trial yet another time in order to appoint another attorney.

3. It was not a plain violation of the Fifth Amendment right against compelled testimony for the court to allow the prosecution to impeach Gougher, after he voluntarily took the stand to testify. The Supreme Court has long held that although a defendant has an absolute right to refuse to testify at trial, once he waives that right and takes the stand, he does so "as any other witness" and is subject to impeachment and cross-examination. *Raffel v. United States*, 271 U.S. 494, 496-497 (1926). Here, Gougher took the stand to testify in his defense. Although he never provided any responsive answers to his attorney's questions on direct examination, he never invoked his Fifth Amendment rights, and never refused to answer any questions. It was therefore not a violation of the Fifth Amendment, much less a "plain" violation, for

the court to allow some limited cross-examination. Likewise, it was also not a Fifth Amendment violation for the prosecutor to comment on Gougher's testimony in closing argument. He never invoked his right to remain silent, and the law is clear that once a defendant takes the stand to testify, the government may properly comment on what he said—and by extension what he did *not* say—about the evidence presented against him. Finally, any violation of Gougher's Fifth Amendment rights would have been harmless beyond a reasonable doubt in this case, given the overwhelming and essentially uncontested evidence that he possessed child pornography.

4. The district court was within its discretion in denying Gougher's request for discovery regarding the details of several hundred NCIS investigation files unrelated to his offense. As Gougher admitted to the district court, he was seeking this evidence not to rebut the charges against him, or even as a "sword" to attack the conduct of the NCIS agents in his case, but only to try and demonstrate that a different prosecutor—at oral argument in a another case—may have "misled" this Court. Under these circumstances, the court was within its discretion in declining to order discovery.

5. Finally, the district court did not clearly err when it found that the trial transcripts were accurate and complete. By Gougher's own admission, several of the changes he proposed were merely aspirational, to reflect what he wished he had said at trial. In addition, the court reporter listened to the recording of trial, compared it to the transcript, and provided a detailed report explaining why each proposed change did not accurately reflect what was said. The court, having presided over the trial and reviewed the court reporter's summary, did not clearly err in concluding that the certified transcripts were accurate.

ARGUMENT

A. The District Court Did Not Violate Gougher's Sixth Amendment Right to Counsel or Self-Representation

1. *Standard of Review*

This Court has "not yet clarified whether the denial of a request to proceed pro se is reviewed de novo or for abuse of discretion." *United States v. Maness*, 566 F.3d 894, 896 n.2 (9th Cir. 2009). But the factual findings underlying the district court's decision—including findings regarding delay and non-compliance—are reviewed for clear error. *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001).

2. *Background Legal Principles*

As explained in *Faretta v. California*, the Sixth Amendment guarantees a criminal defendant the right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes . . . many of the traditional benefits associated with the right to counsel," however, a defendant seeking to proceed pro se "must 'knowingly and intelligently'" waive that right. 422 U.S. at 835 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938)). Accordingly, a defendant contemplating proceeding pro se "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* (quoting *Adams v. United States*, 317 U.S. 269, 279 (1942)).

"In order to deem a defendant's *Faretta* waiver knowing and intelligent, the district court must ensure that he understands 1) the nature of the charges against him; 2) the possible penalties; and 3) the dangers and disadvantages of self-representation." *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004) (internal citation and quotation omitted). "The preferable procedure for determining whether the waiver is made knowingly and intelligently is to discuss with the defendant in open court his understanding of the charges, the possible penalties, and the

dangers of self-representation." *Harding v. Lewis*, 834 F.2d 853, 857 (9th Cir. 1987). The court "must focus on what the *defendant* understood, rather than on what the court said or understood." *McCormick v. Adams*, 621 F.3d 970, 976 (9th Cir. 2010) (emphasis added).

When a defendant makes it impossible for the court to make a finding that his waiver was knowing and intelligent, courts have held it proper to continue with appointed counsel. For instance, in *United States v. Hausa*, 922 F.3d 129, 131 (2d Cir. 2019), the defendant "stated that he wanted to proceed without counsel," but then refused to answer the court's questions during a *Faretta* inquiry. On appeal, the Second Circuit held that the "trial court did not err in concluding that it was impossible" to determine whether the defendant's "request to waive his right to counsel was 'knowing and intelligent.'" *Id.* at135. The court noted that the "right to self-representation may run at cross-purposes to the right to effective assistance of counsel," and "it is not error to deny a defendant's purported waiver of the right to counsel," if he "prevents the court from fulfilling its obligation to ensure that a Sixth Amendment waiver is knowing and intelligent." *Id.* Likewise, in *United States v. Williams*, 428 F. App'x 723, 725 (9th Cir. 2011), this Court considered a defendant who "when asked by the magistrate judge

whether he understood the charges and consequences in his case," responded by giving "conflicting and nonsensical answers." *Id.* at 725. "Based on this record," this Court concluded that "the district court correctly found that [he] did not knowingly and intelligently waive his right to counsel." *Id*; see also *United States v. Harrison*, 293 F. App'x 929, 930 (3d Cir. 2008) (court properly denied request for self-representation when defendant "refused to answer questions relevant to whether he . . . understood the case").

3. *Gougher Was Represented By Counsel During his Pre-Trial Bond Hearing and The Court Did Not Violate His Sixth Amendment Rights*

Gougher first argues that the district court violated his Sixth Amendment rights by forcing him to represent himself at a pre-trial bond revocation hearing "when he did not want to." Appellant's Opening Brief (AOB) 20. But he has not established that a bond hearing is a critical stage, that he was actually deprived of the assistance of counsel, or that any error resulted in harm.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const., am. VI. Once the right to counsel attaches with the initiation of criminal proceedings, "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any

4. *The District Court Properly Denied Gougher's Request to Represent Himself at Trial*

The district court also properly denied Gougher's requests to represent himself at trial. First, as outlined above, the court was required to confirm that Gougher understood "the nature of the charges against him." *Erskine*, 355 F.3d at 1167. But Gougher made that finding impossible. Immediately after Gougher made an unequivocal request for self-representation, the following exchange occurred:

> THE COURT: Do you understand the nature of the charges, including the elements of the charges?
>
> THE DEFENDANT: I do not understand what the fact or facts that the DA relies upon that says I am subject to these.
>
> THE COURT: Do you understand the nature of the charges?
>
> THE DEFENDANT: The extraterritorial instrument and schedule does not indicate how I am subject to these charges, sir.
>
> THE COURT: Do you understand the nature of the charges, including the elements?
>
> THE DEFENDANT: I do not understand the nature and the cause.

ER 33. In addition, prior to this exchange, Gougher had insisted for months—over the course of several *Faretta* hearings—that he did not understand the nature of the charges and was not voluntarily choosing to proceed without an attorney. See ER 372 (January 8,

2017: "I do not understand the nature and cause of the charges against me, and I want to understand this because I have that right. . . I'm now being forced to represent myself"); ER 329 (February 13, 2017: "I don't understand the nature and causes of the charges, your Honor") ER 330 ("I'm under duress to represent myself from the Court"); ER 188 (March 6, 2017: "I still don't understand the nature and cause of what the charges are, your Honor"); ER 147 (April 3, 2017: "you cannot make me go pro se under any circumstance unless I understand the nature and causes of the charges"); ER 154 ("I don't understand the nature and causes of these charges").

Gougher claims that he "was *not* talking about the elements of the offense" when he repeatedly stated that he did not understand "the nature and the cause." AOB 32. Yet even when the court ordered the government to submit a bill of particulars outlining the charges and repeatedly attempted to read the elements of the offense, Gougher refused to acknowledge the charges. See, e.g., ER 33 ("THE COURT: Do you understand the nature of the charges, including the elements? THE DEFENDANT: I do not understand the nature and the cause."); ER 151-54 (similar); ER 191-99 (similar). Given this explicit and repeated insistence that Gougher did not understand—or at least refused to acknowledge that he could understand—the nature of the charges

against him, it was certainly not error for the court to "indulge in every reasonable presumption against waiver" and provide Gougher with appointed counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977).[2]

Second, even if the court had concluded that—despite Gougher's repeated insistence to the contrary—he actually *did* understand the nature of the charges against him, see ER 17, the court still would have been justified in denying the request based on Gougher's disruptive behavior in court. While a criminal defendant has a constitutional right to represent himself, that right "is not absolute," *United States v. Johnson*, 610 F.3d 1138, 1144 (9th Cir. 2010), and "the district court may deny [a defendant] the right of self-representation" if the defendant is not "able and willing to abide by the rules of procedure and courtroom protocol." *United*

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[2] In fact, had the court allowed Gougher to go *without* an attorney—while he was actively insisting that his Sixth Amendment wavier was not knowing and voluntary—it would have created a different appealable issue. See *Meeks v. Craven*, 482 F.2d 465, 468 (9th Cir. 1973) ("We can find no constitutional rationale for placing trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules"); *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989) (noting the possibility of a defendant "taking advantage of the mutual exclusivity of the rights to counsel and self-representation").

States v. Lopez-Osuna, 232 F.3d 657, 664 (9th Cir. 2000) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984)). "The right of self-representation is not a license to abuse the dignity of the courtroom." *Faretta*, 422 U.S. at 834 n.46.

Gougher made it clear throughout his lengthy pre-trial proceedings that he was unwilling to follow the directions of the court or abide by courtroom rules. Over the course of seven status hearings with the first district court judge, Gougher repeatedly interrupted proceedings, talked over the court, and behaved in a disrespectful and unprofessional manner. See, e.g. ER 149, 360-69, 430. Then, when the first judge recused herself and the case was reassigned, Gougher's behavior worsened. He continually argued with the court, interrupted, and refused to follow directions such that he had to be removed from the courtroom. See, e.g. ER 39-40, 47-48, 54-58, 138. In fact, even as the court was in the process of providing Gougher his *Faretta* warnings, after his first unequivocal request to proceed pro se, Gougher continued to interrupt and refuse to answer questions. ER 24-25. This behavior alone was sufficient for the court to decline to allow him to proceed to trial without an attorney. See *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (court properly revoked defendant's pro se status when, as here, he "stubbornly adhered to his policy of

insisting that the court provide a Bill of Particulars and state the basis for its authority," and refused to follow the court's direction); *United States v. Long*, 597 F.3d 720 (2010) (5th Cir. 2010) (court properly denied pro se status when "[e]ach time a magistrate judge had attempted to conduct a *Faretta* hearing, Long was extremely uncooperative" and responded to questions by repeating the same "nonsensical statement"); *United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989) (court properly terminated pro se proceedings because the defendant refused to act "in a manner befitting an officer of the court").[3]

Finally, the district court was also justified in denying Gougher pro se status based on the timing of his request. This Court

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[3] Gougher argues that a defendant should be denied the right to represent himself based on "serious and obstructionist misconduct" only *after* he had already "begun to represent himself." AOB 34 (citing 3 Wayne R. LaFave, et al, Criminal Procedure 869 (4th Ed. 2015)). Here, however, the court had seen Gougher's behavior over the course of years of pre-trial litigation, including several hearings where he was so disruptive that he had to be removed and placed in a cell. Even then, the court made several attempts at engaging in the *Faretta* colloquy, but could never complete it due to Gougher's behavior. Because Gougher made it impossible for the court to determine whether his waiver was knowing and intelligent, there was no way for the court to make the required findings to allow Gougher to represent himself. Under these facts, the court did not have the option of providing Gougher the opportunity to represent himself before terminating self-representation based on the obstructionist misconduct.

has held that in order to successfully invoke the right of self-representation, a defendant's waiver of counsel must not only be "knowing and intelligent" but also "timely," and "not for the purposes of delay." *United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019). Courts "may consider the effect of delay as evidence of a defendant's intent," as well as "events preceding the motion," in order to determine whether the request was "consistent with a good faith assertion of the *Faretta* right and whether the defendant could reasonably be expected to have made the motion at an earlier time." *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001) (citing *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982)).

Here, Gougher's request to represent himself was simply another step in his years-long effort to obstruct the proceedings and delay the start of his trial. Over the course of numerous pre-trial hearings, Gougher refused appointed counsel, refused to retain an attorney of his choice, but insisted that he did not want to represent himself. See ER 401 (Q. "Are you asking to represent yourself at this time[?]" A. "No, your Honor, but I don't want a court appointed attorney either); ER 375 (Q. "So would you like to represent yourself?" A. "Not really"); ER 328 ("I'm not going pro se, your Honor. I'm still hunting for attorneys"). Using this strategy, Gougher was able to delay his trial repeatedly over the course of

2016 and 2017. ER 243, 369, 386, 414, 398-402. It was only after this tactic failed—when his case was finally assigned to a new judge and confirmed for trial—that Gougher made his first, unequivocal request for an attorney a few weeks before his trial began. Even then, Gougher insisted that his inability to understand the proceedings meant that "we cannot move forward at this point. We're at a standstill here." ER 11. Under these circumstances, the court properly found that based on Gougher's "behavior throughout these proceedings," it was clear that his goal in requesting self-representation was "simply to obstruct the proceedings and . . . prevent [his] trial from taking place." ER 13. For all these reasons, the court properly denied Gougher's request and insisted that he proceed to trial with counsel.

5. *The Court Properly Denied Gougher the Opportunity to Speak on His Own Behalf During Trial*

It was also not an abuse of discretion for the court to decline to allow Gougher to speak out in court as part of some form of "hybrid" representation. AOB 37-39. Gougher made it impossible for the court to permit self-representation. Having properly determined that Gougher would be represented by appointed counsel, the court did not abuse its discretion in prohibiting Gougher from speaking on his own behalf—apart from his testimony—during trial.

B. The District Court Did Not Abuse Its Discretion in Declining to Find an Actual Conflict Between Gougher and His Fourth Appointed Attorney the Morning of Trial

1. *Standard of Review*

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011). "A claim that trial counsel had a conflict of interest with the defendant is a mixed question of law and fact and is reviewed de novo by the appellate court." *United States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (citation omitted).

2. *Background Legal Principles*

"An indigent defendant is entitled to appointed counsel, but not necessarily to appointed counsel of his choice." *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1380 n.2 (9th Cir. 1991), overruled on other grounds by *Bailey v. United States*, 516 U.S. 137 (1995). Nor is a defendant entitled to "a particular lawyer with whom he can, in his view, have a 'meaningful attorney-client relationship.'" *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983). Instead, the Sixth Amendment requires only that the district court appoint new counsel if it determines that "the defendant and his attorney are embroiled in an 'irreconcilable conflict.'" *United States v. Collins*, 782 F.2d 785, 789 (9th Cir. 1986) (citing *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970)). An "actual conflict" that requires a court to recuse a defense attorney is "a conflict that affected

counsel's performance—as opposed to a mere theoretical division of loyalties." *Walter-Eze*, 869 F.3d at 901 (citation omitted).

3. *The Court Properly Declined to Appoint New Counsel*

In this case, the district court was within its discretion in declining to find an actual conflict between Gougher and his fourth appointed attorney and refusing to appoint new counsel on the morning of trial. First, it was not clear that Gougher himself recognized a conflict, or was even requesting that he be appointed a new attorney. Over the course of several years of pre-trial litigation, he insisted that he would never accept *any* attorney appointed by the court. See, e.g. SER 265 ("I just don't want any court-appointed attorneys, period"). On the morning of trial, Gougher never complained of an actual conflict with his attorney, nor did he ask for a new one; he simply continued his obstructionist strategy of insisting that he could not go to trial because he did not have adequate representation. See ER 11 ("so basically we cannot move forward at this point. We're at a standstill here"). It was Gougher's attorney who raised the issue of the complaint to the bar, simply because he felt he "had to make the record." ER 9.

Moreover, even if the bar complaint did create a potential conflict with counsel, this Court has held that the Sixth Amendment does not require new counsel to be appointed when a

conflict arises only from the "general unreasonableness or manufactured discontent" of the defendant himself. *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002) (internal quotation omitted). In fact, this Court, and every court to consider the issue, has held that a defendant's mere filing of a bar complaint does not necessarily create the sort of "actual conflict" that would require appointment of new counsel. See *United States v. Plascencia-Orozco*, 852 F.3d 910, 918 (9th Cir. 2017) (court within its discretion in denying request for new counsel even after defendant filed a complaint with the bar); *United States v. Williamson*, 859 F.3d 843, 858 (10th Cir. 2017) ("a defendant's mere filing of a disciplinary inquiry or criminal complaint against his attorney is not enough to establish an actual conflict of interest"); *United States v. Rodriguez*, 612 F.3d 1049, 1054 (8th Cir. 2010) (same); *United States v. Holman*, 314 F.3d 837, 845 (7th Cir. 2002) (same); *United States v. Contractor*, 926 F.2d 128 (2d Cir. 1991) (same). "[T]o hold otherwise . . . would invite criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial." *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir.1993). At a minimum, the court was permitted to consider Gougher's repeated unreasonable behavior and refusal to consult with any attorney he was appointed in concluding that

the bar complaint did not create a conflict warranting another new attorney.[4]

Finally, Gougher's attorney confirmed that despite the complaint, and despite the "difficult" relationship to date, he was "prepared to go forward today . . . and give [Gougher] the best representation [he] can possibly give him." ER 11. He then proceeded to provide "outstanding representation," as the court found, "under difficult circumstances." SER 465. Gougher has not shown, or even argued, how his late-filed bar complaint in any way affected this representation. See *Rodriguez*, 612 F.3d 1049, 1055 (defendant "offers little in the way of serious argument that an actual conflict of interest arose" from the filing of a bar complaint, as "the record does not show appointed counsel failed to act zealously on his behalf"). Gougher cannot meet his burden of demonstrating an "adverse effect" on the representation as a result of the alleged conflict. *Walter-Eze*, 869 F.3d at 901 ("To establish an 'adverse effect' a defendant must show 'that some plausible alternative defense strategy or tactic might have been pursued but

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[4] Gougher had also threatened to sue his third attorney and insisted that he would never accept *any* court-appointed counsel. SER 565, ER 398. Even if the court had agreed to continue the trial, there is every reason to expect that Gougher would have simply raised the same complaints with his new counsel as his trial date approached again.

was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'") (citation omitted).

C. It Was Not Plain Error for the District Court to Allow the Prosecutor to Impeach Gougher After He Testified, and the Prosecutor Properly Commented on Gougher's Testimony in Rebuttal Argument

1. *Standard of Review*

In general, this Court reviews "potential violations of the Fifth Amendment de novo," including alleged violations arising from a prosecutor's comments on a defendant's silence. *United States v. Hulen*, 879 F.3d 1015, 1018 (9th Cir. 2018); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002). In this case, however, Gougher never asserted any Fifth Amendment claim nor did his attorney object to any of the prosecutor's questions on cross-examination. This Court should therefore review his argument regarding cross-examination only for plain error. See *United States v. Hernandez-Becerra*, 636 F. App'x 943, 944 (9th Cir. 2016) (when a "defendant does not object at trial, Fifth Amendment claims are reviewed for plain error") (citing *United States v. Sehnal*, 930 F.2d 1420, 1426 (9th Cir. 1991)).

2. *Relevant Facts*

After the United States finished its case-in-chief, Gougher's attorney notified the court that Gougher wished to testify in his

APPENDIX6

CA No. 17-50436
CA No. 18-50352

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARLIN LEE GOUGHER, Defendant-Appellant.	(D.Ct. #3:14-cr-00635-WQH)

APPELLANT'S REPLY BRIEF

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

HONORABLE WILLIAM Q. HAYES
United States District Judge

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CA No. 17-50436
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I.

INTRODUCTION

There were multiple errors in this case. There was error in denying the motion for further discovery relevant to the motion to suppress evidence. There were evidentiary and Fifth Amendment errors in allowing cross-examination of Mr. Gougher after his testimony was stricken and then allowing comment on the stricken testimony and cross-examination. There was Sixth Amendment error in the form of requiring an attorney to continue representing Mr. Gougher while Mr. Gougher's bar complaint was hanging over the attorney's head.

Then there was the most fundamental error – denying Mr. Gougher's autonomy in guiding his case. Mr. Gougher was a defendant with unorthodox, if put charitably, or "nonsensical," if put uncharitably, *United States v. Neal*, 776

F.3d 645, 657 (9th Cir. 2015), theories. He wanted an attorney who would present those theories and/or otherwise represent him as he wanted. When he realized he could not get such an attorney – but *only* when he realized that – he wanted to represent himself. For better or for worse, he had that right – and a more general right to control "the objective of the defense," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

Both district courts misapplied these rights – in different ways. The first district court misapplied the rights by having Mr. Gougher represent himself when he had not yet resigned himself to not finding a better alternative. The second district court misapplied the rights by denying self-representation when Mr. Gougher eventually decided that was the only way to get the defense he wanted. This error was aggravated by orders that Mr. Gougher not participate at all, but "remain silent," ER 54, and that he was "not going to have [his] say," ER 17.

The last errors deprived Mr. Gougher of more than just the 200 months of freedom taken by the sentence in this case. They deprived him of the "[a]utonomy to decide . . . the objective of the defense," *McCoy*, 138 S. Ct. at 1508, which "is the lifeblood of the law," *id.* at 1507 (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975), and *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (Brennan, J., concurring)). He must not only serve 200 months in prison, but must serve it without even having had his say.

II.

ARGUMENT

A. BOTH DISTRICT COURTS VIOLATED MR. GOUGHER'S SIXTH AMENDMENT RIGHTS.

1. Having Mr. Gougher Conduct the Cross-Examination and Present the Argument at the Bond Revocation Hearing Before He Decided to Exercise His Right to Self-Representation Violated the Sixth Amendment.

The government argues, first, that the bond revocation hearing was not a "critical stage" at which the right to counsel attached; second, that Mr. Gougher was represented by counsel in any event, and his participation was only "hybrid representation"; and, third, any error was harmless.[1] The government is wrong on all counts.

a. The bond revocation hearing was a "critical stage."

It is true the defense cites no case directly addressing whether a bond revocation hearing is a "critical stage" at which the right to counsel attaches. Neither does the government cite a case on the question, however. There is no

[1] The government does not argue there was a valid waiver of counsel. That argument is precluded by the absence of any Faretta colloquy until the completion of the cross-examination, and Mr. Gougher's statements on multiple occasions that he did not wish to represent himself. *See* Appellant's Opening Brief, at 26-27.

Detellis, 372 Fed. Appx. 105, 106 (2d Cir. 2010) (unpublished) (holding claims in post-conviction appeal regarding pretrial detention moot "because [the defendant] has completed his pretrial detention"); *United States v. Halliburton*, 870 F.2d 557, 562 (9th Cir. 1989) (holding that addressing claim of erroneous bond revocation after conviction and sentence "would merely produce an advisory opinion"); *Medina v. People of State of California*, 429 F.2d 1392 (9th Cir. 1970) (holding question of whether bail had been unconstitutionally revoked moot after defendant tried and convicted). These cases did not consider the absence of counsel at a bond revocation hearing and the ancillary effects of the resulting revocation of bond.[2]

2. Denying Mr. Gougher's Self-Representation Request When He Did Make the Request Violated the Sixth Amendment.

Mr. Gougher eventually realized the only way his defense would be presented in the way he wanted was for him to represent himself. He then made the multiple requests to represent himself described in Appellant's Opening Brief – at the status hearing several weeks before trial, in an "affidavit of truth" mailed to the court, and before jury selection on the first day of trial. The government acknowledges there was an unequivocal request, *see* Answering Brief, at 39

[2] The court did consider one ancillary effect in *Halliburton* – the jury having seen the defendant in handcuffs after his bond had been revoked during trial. *See id.*, 870 F.2d at 559. It declined to reverse on that ground only after in-depth consideration of the case law on jury viewing of defendants in restraints. *See id.* at 560-62.

(describing request for self-representation as "unequivocal"), but argues the request was properly denied because Mr. Gougher told the court he did not understand "the nature and the cause" when the court asked him if he understood "the nature of the charges, including the elements," Answering Brief, at 39 (quoting ER 33); Mr. Gougher was not able and willing to abide by the rules of procedure and courtroom protocol, Answering Brief, at 41; and the requests were not timely but intended "to obstruct the proceedings and delay the start of his trial," Answering Brief, at 44.

Again, the government is wrong on all counts.

a. Mr. Gougher's statement that he did not understand "the nature and the cause" was not a basis for denying the self-representation request.

First, Mr. Gougher's assertion that he did not understand "the nature and the cause" was not a basis for denying his request to represent himself – for at least two reasons. To begin, it was apparent Mr. Gougher was not talking about the "nature of the charges" that *Faretta* requires the defendant understand. What *Faretta* means by "nature of the charges" is the elements of the offense, i.e., the facts the government must prove to establish the offense. *See, e.g., Arrendondo v. Neven*, 763 F.3d 1122, 1127 (9th Cir. 2014) (holding advisement sufficient where court simply "outlined the elements of the crimes"). Mr. Gougher used different wording – "the nature and the cause" – and was referring to different things – like "venue questions," ER 24, the "bill of particulars" he asked for, ER 25, "the fact or

facts that the DA relies upon that says I am subject to these [charges]," ER 33, "how I am supposed to be a federal citizen, lower case citizen, rather than a state, capital C, citizen," ER 33-34, and "[t]he extraterritorial instrument and schedule," ER 33. What Mr. Gougher said he did not understand was not what *Faretta* required him to understand.

Secondly, this Court's case law is clear that the correct response to a defendant's lack of understanding is for the district court to make him understand. As stated in *United States v. Hernandez*, 203 F.3d 614 (9th Cir. 2000), "it is the responsibility of the district court to ensure that the defendant is informed . . . by providing him with the requisite information." *Id.* at 624. "Accordingly, if the court fails to fulfill its obligation to inform the defendant and then *denies* his request to represent himself, it violates the defendant's Sixth Amendment right of self-representation." *Id.* at 625 (emphasis in original). *See also United States v. Arlt*, 41 F.3d 516, 521 (9th Cir. 1994) (noting government is not entitled to affirmance if request for self-representation is denied because court fails to explain consequences). The government completely ignores this case law.

This is not a case like *United States v. Hausa*, 922 F.3d 129 (2d Cir. 2019), where the defendant would not answer any of the court's questions, *see id.* at 132-33. Mr. Gougher answered a multitude of questions during the Faretta colloquy, including questions about his age, education, and health, *see* ER 26, questions about whether he had been threatened or been promised anything, *see* ER 29, and questions about whether he had any experience with court rules, statutes, or case law, or experience trying a case, *see* ER 29-30. Mr. Gougher even asked for clarification of a question about the right to counsel, asking the court, "Say that

again, sir," and acknowledged he understood the right after the court broke the question up. ER 27-28.[3] Mr. Gougher also listened while the prosecutor described the charges as "distribution of images of minors engaged in sexually explicit conduct" and "possession of images of minors engaged in sexually explicit conduct" and recited the "five elements" of the first charge and the "four elements" of the second charge. ER 31-32.

The only question Mr. Gougher did not answer was the court's question after the prosecutor described the charges and recited the elements. The court asked, "Do you understand *the nature of the charges, including the elements*?," and Mr. Gougher responded," I do not understand *the nature and the cause*." ER 33 (emphasis added). He then made clear he meant something other than the elements:

> I do not understand how I am being sued by damages by the US Corporation and how the US corporation is being damaged. I have a right to face my accuser rather than a representation of an artificial entity, sir.
>
> The fact that I don't understand that a corporation of my name is all capital letters and the government district court is all in capital letters and how I became a corporation. It was discussed in the Federalist Papers that the Tenth Amendment only applies to the ten square miles of Washington, DC, so I don't know how I am supposed to be a federal citizen, lower case citizen, rather than a state, capital C, citizen.

ER 33-34.

What the court did at this point was simply stop trying and find Mr. Gougher "do[es] not understand the nature and circumstances of the – or the

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[3] Mr. Gougher did initially add the words, "of my choice," in his answer, but the court explained, "You actually don't get your choice," and Mr. Gougher eventually responded that he understood that. ER 27-28.

nature of the charges, including the elements of the charges, and [is] not capable of representing [him]self." ER 34. But what the court should have done is one of two things. First, it very easily could have recognized that what Mr. Gougher meant by "the nature and the cause" was something different than the elements of the offense, stated on the record that Mr. Gougher meant something different, and found Mr. Gougher did understand the elements because they had just been recited by the prosecutor. *See* ER 155 (first district court responding that "the court believes that you do understand the nature of the charges").[4] Second, the court could have avoided the "nature of" language that triggered Mr. Gougher's focus on other things. Instead of asking Mr. Gougher whether he understood "the nature of the charges, including the elements," the court could have simply asked questions that avoided the words, "nature of," and even "elements." Tracking the prosecutor's language in reciting the elements, the court could have asked, "Do you understand the government has to prove you distributed a visual depiction in interstate commerce or foreign commerce?," "Do you understand the government has to prove the production of such visual depiction involved the use of a minor engaged in sexually explicit conduct?," and so on. *Compare* ER 31 (prosecutor's recitation of elements).

What the district court was not entitled to do under this Court's case law was simply give up and deny the self-representation request. The court had a

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[4] The government implicitly recognizes the distinction by complaining that "Gougher did not understand – *or at least refused to acknowledge* that he could understand – the nature of the charges." Answering Brief, at 40 (emphasis added). But *Faretta* simply requires that there be understanding, not that the defendant acknowledge understanding.

responsibility to continue explaining until it could conclude Mr. Gougher did understand the nature of the charges.[5]

b. It was premature to deny the self-representation request on the ground Mr. Gougher would not abide by the rules of procedure and courtroom protocol.

It was also improper to deny the request for self-representation on the ground Mr. Gougher was "not able and willing to abide by the rules of procedure and courtroom protocol," ER 13. While a court does have authority to terminate a defendant's self-representation if he is not "able and willing to abide by the rules of procedure and courtroom protocol," *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1975), "[o]rdinarily, this authority would be exercised only after the defendant has begun to represent himself," 3 Wayne R. LaFave, *et al.*, *Criminal Procedure* 869 (4th ed. 2015). The Court stated earlier this year that "termination of [the defendant's] self-representation would have been warranted if [the defendant] was disruptive or engaged in obstructionist behavior *after* he was afforded the opportunity to represent himself." *United States v. Walthall*, ___ Fed. Appx. ___, 2019 U.S. App. LEXIS 22090, at *3 (9th Cir. July 24, 2019) (unpublished) (emphasis in original). It was such a *termination* of self-representation that the courts approved in two of three cases cited by the government, *see United States v.*

[5] This is not a case like *United States v. Williams*, 428 Fed. Appx. 723 (9th Cir. 2011) (unpublished), where the defendant gave completely nonsensical answers and "seemed to believe that the case was a private bankruptcy proceeding," *id.* at 725.

Brock, 159 F.3d 1077, 1079 (7th Cir. 1998); *United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989), and in the other case, the defendant responded with a nonsensical statement to "every question" the judge asked, *United States v. Long*, 597 F.3d 720, 727 (5th Cir. 2010), and ultimately decided he did not want to represent himself in any event, *see id.* at 723, 729.

Mr. Gougher's case illustrates why a court must wait until self-representation commences to make a judgment about whether the defendant will abide by procedural rules and courtroom protocol. The vast majority of Mr. Gougher's interruptions were to complain about being represented by an attorney he did not want or to try to make the arguments he could have made if he was representing himself. Had the court allowed him to object and told him when he could do so, he might well have complied with the court's instructions. This is illustrated by an exchange he had with the court while the prosecutor was reciting the elements of the offenses during the Faretta colloquy. He simply asked, "Can I object now, sir?," and, when the court said, "No," he simply asked, "When can I object?" ER 32. As he expressed it on the first day of trial, before jury selection, he simply wanted "a right to speak" and "need[ed] to have [his] say" at some point, ER 16.

It was only when self-representation was denied and Mr. Gougher was not allowed to make his arguments that he became obstreperous. The court should not have assumed he would behave that way if he was given a time to make his arguments. *See Walthall*, 2019 U.S. App. LEXIS 22090, at *2-3 (holding district court erred in relying on defendant's "antics during court appearances" before any Faretta colloquy). The court should have tested self-representation and kept

appointed counsel available as standby counsel if the court wanted backup representation in the event it had to terminate self-representation. *See Faretta*, 422 U.S. at 834-35 n.46 (recognizing that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct" and "may – even over objection by the accused – appoint a 'standby counsel' . . . to be available to represent the accused in the event that termination of the defendant's self-representation is necessary").

c. The timing of the self-representation request was not a basis for denying it.

Neither was the timing of the self-representation request a basis for denying it. There is a "bright-line rule" in this circuit for the *Faretta* timeliness requirement. *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997). The rule is that a request is timely if "made before meaningful trial proceedings have begun," which means prior to jury selection or empanelment. *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986) (citing *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982), and *Maxwell v. Sumner*, 673 F.2d 1031 (9th Cir. 1982)).

Mr. Gougher's request easily satisfied this bright-line rule. His request was made well before jury selection – at a status hearing almost three weeks before the trial. *See* ER 8 (commencement of trial on September 19, 2017); ER 22 (status hearing on August 31, 2017). The district court could have found Mr. Gougher's request untimely if he had requested a continuance and the court made a finding it was for the purpose of delay, *see, e.g., United States v. George*, 56 F.3d 1078,

1084 (9th Cir. 1995); *but cf. United States v. Farias*, 618 F.3d 1049, 1055 (9th Cir. 2010) ("express[ing] no opinion" on whether district court could refuse to grant continuance after finding purpose of delay), but Mr. Gougher made no such request and the district court made no such finding.[6] This prevented a finding of untimeliness and a purpose of delay. *See People v. Williams*, 111 Cal. Rptr. 2d 732, 742-45 (Cal. App. 2001) (depublished) (collecting published California cases holding request to represent self on eve of trial untimely when accompanied by request for continuance but timely when not accompanied by request for continuance).

Mr. Gougher did state on the first day of trial that "we cannot move forward," because his attorney "ha[d] not informed me or explained to me the nature and cause of the charges," ER 11, but that was well after the court had denied his self-representation request. The proper procedure would have been for the court to (1) allow Mr. Gougher to represent himself when he asked to do so several weeks before trial, (2) allow him to make his arguments about the "bill of particulars" and his position that the government had to further identify "the nature and cause of the charges," (3) rule on those arguments, and (4) go forward with the trial as scheduled. If Mr. Gougher had refused to proceed at that point, the court could have terminated his self-representation and forced him to go forward with appointed counsel, whom the court could have kept available as standby counsel, *see supra* p. 14.

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[6] The court did make a general comment while revisiting the self-representation issue on the first day of trial that "it is clear that your goal is simply to obstruct the proceedings and that is to prevent your trial from taking place," ER 13, but that was not the basis for its ruling three weeks earlier.

3. The Order That Mr. Gougher Remain Silent in Court Aggravated the Denial of Mr. Gougher's Self-Representation Request and Was a Further Violation of His Constitutional Rights.

The order that Mr. Gougher remain silent in court must be considered in conjunction with the denial of self-representation. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which the government completely ignores, recognizes the fundamental "autonomy" of a defendant to control "the objective of the defense" even when he does not represent himself. *Id.* at 1508. And the defendant's theory may be highly unorthodox, even "nonsensical." *United States v. Neal*, 776 F.3d 645, 657 (9th Cir. 2015). *See also United States v. Read*, 918 F.3d 712, 717, 720-21 (9th Cir. 2019) (holding *McCoy* gave right to prevent counsel from raising insanity defense in lieu of "demonic possession" theory). If the defense attorney will not present the defendant's theory, the defendant must be allowed to somehow present it himself.

The court may – and usually will – require that this be through self-representation, which Mr. Gougher did eventually seek. But the court must allow presentation of the theory in some other way if it does not allow self-representation. It does not have to be through general hybrid representation that creates the danger noted in the Seventh Circuit case quoted by the government. *See* Answering Brief, at 46 (quoting concern expressed in *United States v. Oakey*, 853 F.2d 551, 553 (7th Cir. 1988), about hybrid representation "allow[ing] a defendant to address the jury, in his capacity as counsel, without being cross-examined, in his capacity as a defendant"). Still, it must be enough to ensure the

defendant's theory is presented at some point. Examples can be found in *United States v. Williams*, 791 F.2d 1383 (9th Cir. 1986), where the district court allowed the defendant to make a statement supporting a duress defense in camera, *see id.* at 1389, and *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984), where the district court allowed the defendant to present pro se instructions to preserve constitutional theories for appeal, *see id.* at 239.

Here, the district court both denied self-representation and denied Mr. Gougher the right to present his theory as a supplement to representation by counsel. If it was not error to deny self-representation for the reasons set forth *supra* pp. 7-15, it was error to forbid Mr. Gougher from presenting his theories in some other way.

B. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR SUBSTITUTE COUNSEL BASED ON THE BAR COMPLAINT WITHOUT EVEN INQUIRING INTO THE NATURE OF THE COMPLAINT.

The government exaggerates the weight of authority on the bar complaint conflict of interest issue. Initially, it ignores the on-point authority on the other side discussed in Appellant's Opening Brief – *Douglas v. United States*, 488 A.2d 121 (D.C. 1985) – which this Court cited with apparent approval in *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998), *see id.* at 1158. The Ninth Circuit case the government cites – *United States v. Plascencia-Orozco*, 852 F.3d 910 (9th Cir.), *cert. denied*, 138 S. Ct. 412 (2017) – did not consider the conflict of interest question but considered only the general test for appointment of new counsel, *see*

id. at 917-18, so it is not precedent on the conflict of interest issue, *see United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (Quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925).)) *Plascencia-Orozco* is also distinguishable, because the defendant there had filed bar complaints against three successive attorneys, almost as a matter of course. *See id.*, 852 F.3d at 916-17.

The government also ignores qualifications and/or distinguishing facts in several of the out-of-circuit cases it cites. In two of the cases – *United States v. Williamson*, 859 F.3d 843 (10th Cir.), *cert. denied*, 138 S. Ct. 1324 (2017) and *United States v. Rodriguez*, 612 F.3d 1049 (8th Cir. 2010) – the defendant was allowed to represent himself, *see Williamson*, 859 F.3d at 850-51; *Rodriguez*, 612 F.3d at 1052, which Mr. Gougher was not. Other cases suggest it makes a difference whether the bar complaint is meritorious or frivolous. The Fourth Circuit in *United States v. Blackledge*, 751 F.3d 188 (4th Cir. 2014), distinguished its earlier opinion in *United States v. Burns*, 990 F.2d 1426 (4th Cir. 1993), on the ground that the bar complaint in *Blackledge* was "seemingly non-frivolous." *Blackledge*, 751 F.3d at 196. The most recent case to consider the question – *United States v. Gandy*, 926 F.3d 248 (6th Cir. 2019) – also placed weight on the merit of the complaint, noting the district court had been informed of its basis and found it to be "100 percent frivolous." *Id.* at 260. The early Second Circuit opinion in *United States v. Contractor*, 926 F.2d 128 (2d Cir. 1991), which analyzed the issue only briefly, drew a similar line, stating, "Allegations of

wrongdoing alone cannot rise to the level of an actual conflict *unless the charges have some foundation.*" *Id.* at 134 (quoting *United States v. Jones*, 900 F.2d 512, 519 (2d Cir. 1990)) (emphasis added).

This suggests the district court at least had to inquire into the merit of the bar complaint. And that is further suggested by this Court's opinion in *Moore*. In considering one of the alleged conflicts there, the Court acknowledged there was insufficient evidence in the record at the time, but found "the district court's failure to inquire further is troubling." *Id.*, 159 F.3d at 1157.

Here also, the failure to inquire is troubling. And there are concerns regardless of the complaint's merit. It is overly simplistic to simply assume, as have some courts, that, "[i]f anything, [the bar complaint] aligned the attorneys' interests with those of their clients and incentivized the attorneys to work even harder." *Gandy*, 926 F.3d at 261-62; *see also Burns*, 990 F.2d at 1438 (suggesting bar complaint would only encourage "best exertions on [the defendant's] behalf at trial."). There are a multitude of more subtle, adverse effects, as explained in *Douglas*.

> [The attorney] would have an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for *post hoc* criticism of his efforts. This could compromise [the attorney's] professional judgment about the best means of defending this particular case; it could encourage the most standard or conservative trial strategy, as well as overcautious tactical decisions and courtroom demeanor. Furthermore, concerns about the pending investigation might impede communications between appellant and [the attorney]. [The attorney] might be apprehensive about sharing with appellant the reasons behind tactical defense decisions and refrain from disclosing to appellant any unexpected problem that arose during the course of the trial. (Footnote omitted.) Appellant, in turn, might be reluctant to question [the attorney's] trial decisions for fear of further alienating counsel in the midst of trial.

Id., 488 A.2d at 136-37.

The bar complaint therefore did create a conflict – and even more so if it had merit. It was error to deny the motion for substitute counsel – especially without even inquiring into the nature of the complaint.[7]

C. IT WAS ERROR TO PERMIT CROSS-EXAMINATION OF MR. GOUGHER AFTER HIS TESTIMONY WAS STRICKEN AND THEN PERMIT CROSS-EXAMINATION AND COMMENT ON THE STRICKEN TESTIMONY.

The government misses the point about the cross-examination of Mr. Gougher after his testimony was stricken and the subsequent comment on the stricken testimony and cross-examination. Once the testimony was stricken, it was no longer evidence that could be considered. *See Alford v. United States*, 41 F.2d 157, 159 (9th Cir. 1930) (recognizing that "having been stricken out, [evidence] cannot be considered"); *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* § 3.7 (2010 ed.) ("Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence."). *Cf. United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018) (rejecting claim of improper government reference to stricken testimony because statements "did not refer to [defendant's] testimony and thus neither violated the district court's order that the testimony be stricken nor constituted prosecutorial misconduct").

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[7] That Mr. Gougher did not personally make the motion is irrelevant. Especially when the court had expressly told him to "remain silent," *supra* pp. 2, 16, the attorney's motion was sufficient.