APPENDIX

TABLE OF APPENDICES

Appendix A – Judgment & Memorandum Disposition

United States Court of Appeals for the Ninth Circuit

(January 28, 2025) (unpublished)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DANIEL FLINT, Defendant - Appellant.	No. 24-1807 D.C. No. 2:17-cr-00697-PA-1 Central District of California, Los Angeles ORDER

Before: CLIFTON, CALLAHAN, and BENNETT, Circuit Judges.

Appellee's motion (Docket Entry No. 20) to summarily affirm the district court's order denying appellant's petition for writ of error coram nobis and alternative motion for a new trial is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard). We agree with the district court that Flint is not entitled to coram nobis relief, *see United States v. Riedl*, 496 F.3d 1003, 1006 (9th Cir. 2007), or a new trial under Rule 33, *see* Fed. R. Crim. P. 33; *United States v. Hinkson*, 585 F.3d 1247, 1264-67 (9th Cir. 2009).

AFFIRMED.

Appendix B – Order & Opinion

United States District Court for the Central District of California

(February 16, 2024) (unpublished)

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:ecfnef@cacd.uscourts.gov Message-Id:<37415364@cacd.uscourts.gov>Subject:Activity in Case 2:17-cr-00697-PA USA v. Flint Order on Motion for Writ of Entry Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
The following transaction was entered on 2/20/2024 at 3:16 PM PST and filed on 2/16/2024

Case Name:	USA v. Flint
Case Number:	2:17-cr-00697-PA
Filer:	
Document Number:	207

Docket Text:
MINUTES IN CHAMBERS COURT ORDER by Judge Percy Anderson Denying [196] PETITION for a Writ of Error Coram Nobis as to Daniel Flint (1): For all of the foregoing reasons, the Court denies Defendant's Petition for a Writ of Error Coram Nobis, or in the Alternative, a New Trial. (see document for further details) (bm)

2:17-cr-00697-PA-1 Notice has been electronically mailed to:
Ian Yanniello ian.yanniello@usdoj.gov, usacac.criminal@usdoj.gov
Christine Ro caseview.ecf@usdoj.gov, usacac.criminal@usdoj.gov, christine.ro@usdoj.gov, usacac.civil@usdoj.gov
Gregory Nicolaysen gregnicolaysen@aol.com
Ethan Atticus Balogh eab@balcolaw.com, eab@ecf.courtdrive.com, nas@colemanbalogh.com
2:17-cr-00697-PA-1 Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :
Daniel Flint
61405 North Ridge Trail
Washington MI 48094
US

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. CR 17-697 PA Date February 16, 2024

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Interpreter None

Kamilla Sali-Suleyman	Not Reported	Christine M. Rho
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Daniel Flint							

Proceedings: IN CHAMBERS — COURT ORDER

This matter is before the Court on Defendant Daniel Flint's ("Defendant") Petition for Writ of Error Coram Nobis or, in the Alternative, Motion for a New Trial, filed on August 17, 2023. Defendant is proceeding pro se. (Docket No. 196.) Plaintiff United States of America (the "Government") opposed Defendant's Petition for a Writ of Error Coram Nobis, or in the Alternative, Motion for new Trial, on December 8, 2023 ("Opposition"). (Docket No. 205.) Defendant replied on December 22, 2023 ("Reply"). (Docket No. 206.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On July 20, 2017 Defendant presented himself as a diplomat with the International Human Rights Commission ("IHRC") to a Transportation Security Administration ("TSA") official at Chicago O'Hare International Airport ("O'Hare"). Defendant, intending to board a flight to Los Angeles International Airport ("LAX"), insisted his carry-on luggage was exempt from screening under the "Laws of the Vienna Convention" and presented an IHRC "Diplomatic Identification Card." TSA officials at O'Hare told Defendant that his credentials were insufficient to pass through security and that he was required to present a valid diplomatic passport in order to be exempt from screening. (RT 137-148.) After TSA informed Defendant that his documents were insufficient to exempt his baggage from inspection, he declined to submit his baggage to screening and did not board his flight. (RT 137, 139-48, 172-77 183; Trial Exhibits 2-6, 8-9, 11.)

Later that same day, Defendant booked a new flight from Chicago Midway International Airport ("Midway") to LAX for that afternoon. This flight included a connecting flight at Minneapolis-St. Paul International Airport ("MSP") before making its final arrival to LAX. Defendant again presented

himself as an IHRC diplomat to TSA at Midway. Midway TSA officials permitted Defendant to travel without submitting his baggage for TSA screening. (RT 189-96, 198-202.)

On July 25, 2017, Defendant again presented himself as a diplomat with the IHRC to Midway's TSA for a flight to MSP, with a later connecting flight to LAX. TSA officials accepted Defendant's representation, and he was allowed to travel without submitting his baggage for TSA security screening. (RT 250-53, 242, 248, 160-63.) TSA officials at Midway subsequently discovered that Defendant had not provided the correct credentials to be exempt from screening. (RT 227-29.) While Defendant was en route to LAX, TSA officials reported the incident to the FBI and law enforcement officials. FBI agents and other law enforcement officers arrived at Defendant's boarding gate approximately 15-20 minutes before his flight landed at LAX. Once the plane arrived at the terminal, an air marshal and another law enforcement officer boarded the plane to escort Defendant off the flight. (RT 336-37, 368, 386.)

After the authorities escorted Defendant to an interview room inside of LAX, the FBI (SA Rebecca Marriott) and the Air Marshall who had escorted Defendant from the plane, Wesley Williams, conducted an interview with him for approximately two hours. (Trial Exs. 47-55, 58.) Air Marshall Williams recorded the interview on his government issued cell phone. Defendant was cooperative throughout the interview and continued to assert that he was a bonafide diplomat with the IHRC. (Trial Exs. 3, 4-6, 8-9 & 38, 47.) Defendant presented the same credentials and documents to the interviewing agents and falsely represented that he had never been turned away from a screening checkpoint while attempting to travel with his diplomatic pouch. (RT 346-48; Trial Exs. 5, 53.) During the interview, Defendant admitted that he helped manufacture the "diplomatic immunity card." (RT 350; Trial Ex. 58.) He also asserted that he had no idea there was an issue with the State Department, despite his having been turned away from the security checkpoint at O'Hare just five days earlier. (Trial Ex. 54.)

The agents ultimately conducted a search of Defendant's bag and discovered approximately $148,145 in U.S. currency stuffed inside plastic shopping bags. (Trial Ex. 30.) Agents from the United States Department of State later confirmed that Defendant had no diplomatic status with the Department's Office of Foreign Missions ("OFM"), and that the ambassador Defendant claimed to be working for was not a recognized ambassador for any organization. (RT 266-83).

B. Procedural Background

On November 7, 2017, Defendant was indicted on one count of entering an airport area in violation of security requirements under 49 U.S.C. §§ 46314(a), (b)(2). (Docket No. 15.) Defendant's three-day jury trial began on October 16, 2019. (Docket No. 117.) On October 18, 2018, the Court delivered the following jury instructions as to the elements that the Government must prove beyond a reasonable doubt to sustain a conviction under 49 U.S.C. §§ 46314(a), (b)(2):

(1) the defendant entered an airport area that serves as an air carrier, namely, the sterile area of Terminal 3 at Los Angeles International Airport;
(2) the defendant did so in violation of security requirements and regulations prescribed under sections 44901, 44903(c) of Title 49 of the United States Code;
(3) the defendant acted knowingly and willfully; and
(4) the defendant also acted with the intent to evade the security regulation.

(Jury Instruction No. 14.)

The jury was instructed that the term "sterile area" is defined as meaning a "portion of an airport where passengers have access to boarding aircraft and to which the access generally is controlled by the Transportation Security Administration; an aircraft operator through the screening of persons and property." (Jury Instruction No. 13.) For a diplomatic pouch to be exempt from security screening at TSA, the diplomatic courier "must possess and present to TSA a valid diplomatic passport . . . a courier letter . . . and a diplomatic pouch . . . [.]" (Id.) "Individuals who are not diplomatic couriers and who do not possess valid diplomatic documentation must submit their items for screening and inspection before entering the sterile area of an airport." (Id.)

On October 19, 2018, the jury found Defendant guilty of intentionally evading airport security requirements, in violation of 49 U.S.C. §§ 46314(a), (b)(2). (Docket No. 115.) On March 3, 2019, Defendant filed a post-trial motion for a judgment of acquittal on two grounds: (1) the charged statute did not apply to Defendant's arrival at LAX; and (2) Defendant did not enter the terminal wilfully because he was escorted off the plane by law enforcement officers. (Docket No. 140.) On May 14, 2019, the district court denied Defendant's Motion for Judgment of Acquittal. (Docket No. 152.) On April 8, 2019 the district court issued an order relieving his trial counsel and appointing another attorney for all further proceedings. (Docket No. 149.)

On August 23, 2019, Defendant filed his first Writ of Coram Nobis Petition ("First Petition"). (Docket No. 158.) Although Defendant was represented by counsel at the time, he filed the First Petition "pro se." (Id.) In that Petition, Defendant argued, as he does in his current Petition, that "the government deleted relevant portions of [defendant]'s FBI interview to make it appear as though he was intentionally attempting to evade TSA security requirements." (Docket No. 158 at p. 9.) Defendant argued that his trial counsel did not raise this argument at trial, and thus premised his First Petition on an ineffective assistance of counsel claim. (Docket No. 158.) Defendant supported his First Petition with a three page expert report dated May 2019, referencing a nine millisecond "event" suggesting an "editing or an otherwise non-continuous recording," or an "editing or equipment malfunction." (Docket Nos. 158-2 at pp. 2-3, 158-7 at p. 3.) This "event" occurred at the time Defendant was asked in his interview about the last time he had tried to fly, and the Defendant argued that his answer to that question had been omitted or deleted from the audio recording. The Government did not seek to admit that portion of the audio recording at trial, but did present other portions of the audio recording, including Defendant's untruthful responses to the question of whether he had ever

been turned away from an airport security checkpoint before the day of his interview. (Trial Exs. 47-55, 58.)

The district court denied the First Petition on both procedural and substantive grounds on September 11, 2019 (Docket No. 169), prior to sentencing.[1/] In its ruling, the district court found that the First Petition lacked merit because: (1) Defendant had not identified an error of "the most fundamental character"; (2) Defendant failed to refute the Government's evidence that the audio files had not been altered or manipulated; and (3) any error was harmless given that the part of the recording at issue was not played for the jury, and any claimed alteration was not exculpatory. (Id.) The district court also held that the new trial motion lacked merit because the underlying evidence was not newly discovered and Defendant could have discovered the alleged frequency inconsistency before his trial began. (Id.) The district court further found that given the overwhelming evidence of intent, Defendant failed to show that the admission of the expert report would probably have resulted in acquittal. (Id.)

On September 16, 2019, the district court sentenced Defendant to 14 months in custody and a three-year term of supervised release. (Docket No. 170.) Defendant appealed his judgment of conviction. (Docket No. 167.) On May 20, 2021, the Ninth Circuit affirmed his conviction, ruling that the district court properly denied Defendant's First Petition on procedural grounds. (Docket No. 192.) On September 7, 2021, the North Carolina State Bar disbarred Defendant from the practice of law in the State of North Carolina. (Docket No. 205-9.) On March 22, 2022, the State of Michigan revoked Defendant's law license, effective October 19, 2022. (Docket No. 205-10.) In connection with the North Carolina state bar proceeding, on July 16, 2021, Defendant deposed SA Marriott, a trial witness in Defendant's criminal case, who testified regarding Defendant's responses during his interview at LAX on July 25, 2017. (Docket No. 199 at pp. 14-195.) SA Marriott also testified as a witness at the state bar disciplinary hearing on August 3, 2021. (Docket No. 200 at pp. 253-318.)

Defendant now files a Second Petition for a Writ of Coram Nobis, or in the Alternative, Motion for a New Trial ("Second Petition"), claiming that new evidence justifies a writ of coram nobis to correct his allegedly wrongful conviction.

II. LEGAL STANDARD

A. Petition for a Writ of Error Coram Nobis

"The writ of error coram nobis affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody. Specifically, the writ provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors." Estate of McKinney v. United States, 71 F.3d 779, 781 (9th Cir. 1995) (citations and quotations omitted)). The errors must be of "the most fundamental

---

[1/] This case was originally assigned to the now retired district court judge, and then reassigned to this Court on September 11, 2023. (Docket No. 201.)

character, such that the proceeding itself is rendered invalid. Id. (quotations and citations omitted). To qualify for coram nobis relief, four requirements must be satisfied: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character. Id. at 781-82 (citations omitted). "Because these requirements are conjunctive, failure to meet any one of them is fatal." Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002). A writ of coram nobis is a "highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable." United States v. Riedl, 496 F.3d 1003, 1005 (9th Cir. 2007); see also Matus-Leva, 287 F.3d at 760 ("Coram nobis is an extraordinary writ, used only to review errors of the most fundamental character.").

B. Motion for a New Trial

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interests of justice so requires." Fed. R. Crim. P. 33. "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Rule 33(b)(1). "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Rule 33(b)(2).

To prevail on a motion for a new trial, a criminal defendant must satisfy a five part test: "(1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal." United States v. Harrington, 410 F.3d 598, 601 (9th Cir. 2005). Moreover, there must be a showing of prejudice. Id. at 601 (Rule 33 requires a defendant to show "that a new trial would probably result in acquittal.").

III. ANALYSIS

A. Petition for Writ of Coram Nobis

The Government argues that Defendant's Second Petition fails because he is unable to satisfy the second and fourth requirements – Defendant has no valid reason for not seeking relief on these grounds earlier, and there was no error of the "most fundamental character" here. United States v. McClelland, 941 F.2d 999, 1002 (9th Cir 1991).

1. Timeliness

A petitioner must establish there are "valid or sound reasons explaining why they did not attack their sentences or convictions earlier." United States v. Kwan, 407 F.3d 1005, 1012 (9th Cir. 2005). In his Second Petition, Defendant relies on the same expert report that he presented in his First Petition, to challenge evidence that has been in his possession since before his first trial, the audio recording of his

interview with law enforcement at LAX. He claims, however, that his Second Petition is timely because it wasn't until during his North Carolina disbarment proceeding that SA Marriott, who interviewed him when he was questioned at LAX, testified inconsistently with her testimony at his criminal trial.

During his interview at LAX, Defendant was asked whether he had ever been turned away from a security checkpoint, and he answered "no," and when asked again, he replied "not that I recall," and then when asked again, he answered "no." (Trial Ex. 53A.) That portion of the audio recording was admitted at trial. (Trial Ex. 53.) The full transcript of the audio recordings, including portions not admitted at trial, reflects the following colloquy that occurred after the series of questions and responses regarding whether Defendant had ever been turned away from a security check point: SA Marriott asked Defendant "when was the last time you tried to fly?" Defendant responded "today?" and SA Marriott replied, "before today." The transcript does not indicate an answer to that question, it references something unintelligible (indicated by the term "UI") and then a request from an unidentified male to screen Defendant's bag. (Docket No. 196 at p. 13.) Defendant's expert report purports to show the "event" after SA Marriott states "before today" and before the unidentified male requests to screen Defendant's bag. (Id.)

Defendant contends that during the state bar hearing, Defendant asked SA Marriott whether during the interview Defendant had actually answered the question of "when was the last time you tried to fly?" SA Marriott testified "yes" although the transcript of the interview does not indicate an answer, and that SA Marriott had replied "no" to the same question at trial and during her deposition prior to the hearing. Defendant argues that this purported evidence of a missing answer, combined with the questions the expert report raised about the integrity of the audio recording at that point in time both establishes a fundamental error and justifies his delay in seeking relief.

As an initial matter, the Court does not agree with Defendant's characterization or the impact of this "new evidence." Defendant's questioning of SA Marriott at her deposition and her responsive testimony during the disciplinary hearing was confusing, and it fails to create the "bombshell" claimed by Defendant. To the contrary, SA Marriott specifically tells Defendant during his cross examination that she considered the two questions (about whether he been turned away and when was the last time he tried to fly) as one and the same, so that she believed he had provided an answer. (See Docket No. 200 at pp. 277, 280-83, 306-309.) The Court's review of the hearing transcript also confirms that SA Marriott was confused about which of the two questions Defendant was asking her about (whether he had been turned away from the security checkpoint or the last time he had flown by air). Defendant's questions lacked clarity, and they were interrupted by many objections and other distractions. (Id.) Accordingly, the Court rejects Defendant's characterization of SA Marriott's testimony as"false" or "inconsistent" as well as Defendant's attempt to rely on her state bar related testimony as a justification for his failure to seek relief earlier.

Moreover, this"new evidence" is not actually evidence – it is a new argument premised on the same evidence – evidence that has been in Defendant's possession for many years. Thus, even if the

Court were to consider that SA Marriott's testimony provides further support to the argument that the Government may have tampered with the audio recording to omit Defendant's answer to the question regarding the last time Defendant flew, that does not change the fact that Defendant could have raised the issue in a habeas petition under 28 U.S.C. § 2255 while he was still serving his sentence.[2/]

Accordingly, the Court finds that Defendant has provided no valid reason for not seeking relief earlier, and has thus failed to satisfy the requirement that his Petition for a Writ of Coram Nobis be filed in a timely manner.

2. Fundamental Error

"Coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range of cases." United States v. Riedl, 496 F.3d 1003, 1005 (9th Cir. 2007); Estate of McKinney, 71 F.3d at 781. The rare circumstances in which this extraordinary remedy is appropriate include when a defendant is factually innocent, the jury instructions relieved the prosecution from proving an essential element of the crime, or when some other "egregious" trial error occurred. See United States v. Walgren, 885 F.2d 1417, 1424 (9th Cir. 1989) (defendant had been convicted of crime premised on conduct that no longer violated mail fraud statute); McClelland, 941 F.2d at 1003 (flawed jury instructions); United States v. McNeill, 812 F. App'x 515, 516 (9th Cir. 2020) ("coram nobis relief is typically confined to addressing newly discovered fundamental errors (such as factual errors, egregious legal errors, or extraordinary exculpatory evidence) that existed at the time of trial and which are not otherwise subject to standard time constraints.").

The Government contends that Defendant fails to establish any error, let alone an "error of a fundamental character." Defendant argues that he has satisfied this requirement because: (1) the expert report shows that the Government intentionally deleted portions of his recorded interview "to make it appear as though [defendant] was intentionally lying to the FBI" and (2) SA Marriott testified untruthfully about whether Defendant responded to her interview question regarding the last the time he had flown during his criminal trial and again in her deposition testimony. Defendant asserts a due process violation based on the cumulative effect of alleged trial errors all relating to his interview and SA Marriott's testimony.

[2/] Defendant – who obtained the audio recording and transcript in discovery before his trial – had ample opportunity to review the audio recording and the transcript, to note a potential missing answer, and to then contest the reliability of this evidence. Defendant was a party to his interview, and presumably knew what he said in response to the FBI's questions. If an answer – or any other potentially exculpatory information – was missing from the recording or the transcript, Defendant could have raised those issues in a habeas petition while still serving his sentence. Indeed, Defendant did not even need SA Marriott's allegedly inconsistent testimony regarding whether he answered the question of when was the last time he flew – or the expert report for that matter – to request relief based on his arguments regarding the audio recording.

As a threshold matter, the Government argues that none of these purported errors can be considered "fundamental" given the overwhelming, unchallenged evidence, apart from the audio recording, that Defendant acted knowingly and wilfully and with the intent to evade a security regulation. At trial, the defense was that Defendant acted in good faith, and believed that he was acting lawfully. (Docket No. 205 at p. 23.) Evidence at trial, however, established that Defendant knew that he was acting illegally in his attempt to evade screening of his bag containing more than $148,000. That evidence included: (1) that Defendant used a false and manufactured "diplomatic identity card"; (2) that in actuality, Defendant did not have diplomatic status; (3) that Defendant told TSA officials that he was a lawyer and showed them his bar card in order to bolster his false claim of diplomatic status; (4) five days before the conduct in this case, TSA officials at Chicago O'Hare airport rejected his credentials and refused to allow Defendant to bypass airport security; (5) instead of going through TSA screening at O'Hare, and proceeding with his flight, Defendant left the airport and re-booked his travel for that same day through Midway airport; (6) at Midway, Defendant used the same fraudulent credentials, including the "diplomatic identity card" that had just been rejected, and a binder of documents that disproved certain of Defendant's representations on their face;[3/] and (7) Defendant had previously lied to a law enforcement officer in Michigan about being a diplomat during a traffic stop, and had been arrested and convicted as a result.[4/] Thus, the Court agrees with the Government that the jury was presented with overwhelming evidence of Defendant's guilt, even without the audio recording evidence.[5/] This alone justifies the denial of Defendant's Second Petition. See McKinney, 71 F.3d at

---

[3/] For instance, the document entitled "Vienna Convention" stated that it was "not yet in force" on the cover page, the international organization to which Defendant claimed affiliation was listed as headquartered at a post office box in Pakistan, and the "appointment notice" actually states that there is no formal diplomatic relationship between the United States and the IHRC. (RT 345-348.)

[4/] For the purpose of establishing Defendant's knowledge and intent, the Government called a Sheriff's Deputy from Ogema County, Michigan as a witness to testify that in September 2016, he stopped Defendant's vehicle because it had an expired registration tag. When the Deputy asked for Defendant's identification and proof of insurance, Defendant claimed that he was a civil rights attorney for the United States government with "diplomatic immunity." (RT 325-28.) Defendant was ultimately arrested and convicted because, the Deputy testified, Defendant did not actually have diplomatic status or immunity. (Trial Ex. 43.)

[5/] While Defendant argues that the jury's decision to convict him was dependent upon the audio recording excerpts of Defendant's interview, the Court has disregarded the evidence Defendant submitted regarding his counsel's conversation with the jury following the verdict. See Fed. R. Evid. 606(b)(1) (The Court "may not receive a juror's affidavit or evidence of a juror's statement" about, among other things, "the jury's deliberations" or "any juror's mental process concerning the verdict"); Warger v. Shauers, 574 U.S. 40, 47-48 (2014) ("Congress' enactment of Rule 606(b) was premised on the concerns that the use of deliberations evidence to challenge verdicts would represent a threat to both jurors and finality in those circumstances not covered by the Rule's express exceptions."); Smith v. City & Cty. of Honolulu, 887 F.3d 944, 954 (9th Cir. 2018) ("Rule 606 . . . establishes a no-impeachment

781 (Writ is available to those who were "unconstitutional[ly] or unlawful[ly] convicted based on errors of fact and egregious legal errors"); Walgren, 885 F.2d at 1424 (writ available to a defendant that is able to demonstrate he did not commit a crime).

Defendant's claimed fundamental "error" is the admission of portions of the audio recording of his interview with SA Marriott that he alleges was altered to omit his answer to the question of when was the last time he had traveled. In support of this argument, Defendant relies on the expert report he submitted to the district court in support of his First Petition, that he now claims is bolstered by SA Marriott's testimony during his 2021 disbarment proceeding. Defendant's argument repeats what he argued in his First Petition – that the alleged frequency inconsistency noted in the expert report occurred right after he was asked about when the last time he had traveled by airplane, suggesting that his answer was deleted from the audio recording.

The expert report, however, is speculative and conclusory. The expert concludes that because he cannot explain the "event," the recording must have been manipulated, despite the fact that the expert also indicates that the event could have been caused by other factors, such as a non continuous recording. Moreover, the report is directly contradicted by evidence presented by the Government in response to both Petitions, that the recordings were not altered in any way before being provided to the defense in discovery. Defendant argues that there are inconsistencies in the Government's representations of the way in which the files were uploaded and maintained. However, the actual evidence establishing that there was no alteration or manipulation before the audio recording was provided to the FBI and the US Attorney's Office, and maintained in the FBI case file is uncontroverted.[6/]

---

rule . . . to attack the validity of the verdict.").

[6/] The sworn evidence includes a declaration from Air Marshall Williams who interviewed Defendant and recorded the interview on his phone on July 25, 2017. (Docket No. 162-1 at ¶¶ 1-2.) Williams stated that after he recorded Defendant's interview, he uploaded the three audio files directly to the FBI's internal computer system, made copies, and sent them to the U.S. Attorney's Office. (Id. at ¶ 4.) Williams stated that the files he sent were identical to those recorded on his phone, and were not altered or manipulated in any way. (Id.) The Government confirmed that the audio recording Defendant received in discovery was the same audio recording which Williams immediately uploaded to the FBI's internal computer system. (Docket No. 158-3.) In denying Defendant's First Petition, the district court found that Defendant had not provided any evidence to refute these statements or show that the Government deleted any "original" audio recordings from Defendant's interview. (Docket No. 169 at p. 6.) The district court also noted that the disputed portion of the recording was not admitted at trial. (Id.) There is no basis for disturbing this conclusion.

Moreover, in its Opposition to Defendant's Second Petition, the Government provided the sworn declaration of FBI Supervisory SA David Gates, who supervised the agents handling Defendant's criminal case. SA Gates' declaration states that he reviewed the case file in this matter and that there is

Moreover, Defendant fails to identify the substantive response he made that is missing from the interview transcript, or even argue that the false statements he made to the FBI regarding never having been turned away from a security checkpoint before the "event" in the audio recording were themselves altered or taken out of context in some way. While it is true that it is the Government's burden at trial to demonstrate the reliability and admissibility of the evidence it presents, it is Defendant's burden in presenting his request for post conviction relief to show that a fundamental error occurred. Because Defendant has made no attempt to explain what his answer to that question was, or how it could have impacted any of his other false statements, he fails to meet this burden.

Finally, to the extent that Defendant relies on SA Marriott's testimony at the state bar proceeding as the "fundamental error," his argument that SA Marriott committed perjury or testified falsely at trial based on her testimony at Defendant's disbarment hearing is confused and convoluted. However, after close review of SA Marriot's testimony in both the criminal trial, the deposition, and the hearing, the Court does not see how the inconsistencies noted by Defendant amount to false statements, let alone perjury. The Court agrees with the Government that the inconsistencies – if any – are more a matter of confused questioning by the Defendant, the three year time period that had passed between the trial and the disbarment proceeding, and simple semantics.

The Court has already addressed the confusion in the questioning regarding whether Defendant had answered SA Marriott's question, "when was the last time you tried to fly?" Another example of how Defendant mis-characterizes SA Marriott's testimony relates to Defendant's confusing questions over whether Defendant traveled with a diplomatic passport identification card or an actual diplomatic passport – a fact that is not in dispute given that this whole case began because Defendant was turned away from the O'Hare checkpoint for not having a diplomatic passport. At trial, SA Marriott testified extensively regarding Defendant's use of a fraudulent diplomatic passport card – a card that was stamped with the term "DIPLOMAT" in red ink above the term "PASSPORT#," and that included an alleged passport identification number. During questioning about the card, the Government asked SA Marriott whether Defendant claimed that he had looked up things online and researched whether he could travel with this "diplomatic passport" (omitting the word "card") and she replied "that's correct." Defendant now claims that SA Marriott perjured herself at trial, and again during her deposition, because he did not have a "diplomatic passport," he had a "diplomatic passport card." The Court agrees with the Government that this does not evidence false testimony – semantics, or sloppy questioning at most, but not perjury. Similarly, none of the other alleged inconsistencies support the conclusion advanced by Defendant that a fundamental error exists because the Government knowingly used SA Marriott's false or deceptive testimony at trial.[7] (Docket No. 196.)

---

a physical copy of defendant's recorded interview maintained as evidence at the FBI's office in Long Beach. (Docket No. 205-11.)

[7] In addition to the testimony discussed above, Defendant also claims there are inconsistencies in SA Marriott's testimony regarding whether the audio recording of the interview was continuous or broken into three different files and in how the recordings were uploaded and maintained by the FBI.

Defendant may also satisfy the "fundamental error" requirement for coram nobis relief by establishing that he received ineffective assistance of counsel. Kwan, 407 F.3d at 1014. To prevail on an ineffective assistance of counsel claim, a defendant must show that: (1) counsel's actions were outside the wide range of professionally competent assistance, measured under a standard of "reasonably effective assistance"; and (2) he was prejudiced by reason of counsel's actions – that is, there is "reasonable probability" that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Hovey v. Ayers. 458 F.3d 892 904 (9th Cir. 2006) (quoting Strickland v. Washington, 466 U.S. 668, 687, 694 (1984)). The standard a defendant must meet is both "rigorous" and "highly demanding" and requires a showing of "gross incompetence" on the part of counsel. Kimmelman v. Morrison, 477 U.S. 365, 381-82 (1986).

Defendant argues that his prior counsel's strategic decision not to contest the authenticity of the audio recording fell outside the range of professionally competent assistance. Defendant, however, fails to show that his counsel's decision not to investigate or pursue a motion to suppress the audio recording was ineffective assistance, or that but for counsel's decision, the proceeding would have been different. As discussed above, the Government's evidence confirms that the audio file Defendant received in discovery is the same audio recording Air Marshal Williams recorded on his phone and then provided to the FBI and the US Attorney's Office. Nor was the allegedly compromised part of the recording even admitted at trial. Moreover, Defendant fails to credibly challenge the authenticity or accuracy of the overwhelming evidence of Defendant's guilt that was actually presented at trial. The Court thus finds that Defendant has not satisfied either prong of the Strickland test for ineffective assistance of counsel.

Accordingly, Defendant's Second Petition fails to establish that Defendant suffered a fundamental error and is entitled to coram nobis relief.

B. Motion for a New Trial

As discussed above, Defendant's "newly discovered evidence" is not new – it is a new argument regarding the same evidence Defendant has had in his possession for years.[8/] See Baumann v. United States, 692 F.2d 565, 580 (9th Cir. 1982) ("Because all of the underlying facts relevant to his present allegation of newly discovered evidence were within his knowledge at the time of trial and could have been substantiated with the exercise of reasonable diligence, the evidence is not newly discovered.").

After its review, the Court can only conclude that Defendant's Petition misrepresents SA Marriott's actual testimony in the state bar proceedings. The Court has reviewed the hearing transcript, and it is apparent that after Defendant's confusing and convoluted cross examination on these issues, SA Marriott explained any discrepancies and was able to clarify her testimony regarding the nature and handling of the audio recording on redirect. (See Docket No. 200 at pp. 309-311.)

8/ At most, the "new" evidence could be considered impeachment evidence that fails to satisfy the requirements for granting a motion for a new trial.

Moreover, Defendant has failed to show that admission of this evidence would have resulted in acquittal. Even without any of the audio recording evidence of Defendant's interview, the evidence presented at trial was more than sufficient for a jury to find Defendant guilty beyond a reasonable doubt of intentionally evading airport security requirements. See United States v. Jackson, 209 F.3d 1103, 1106-07 (9th Cir. 2000) (affirming denial of motion for new trial where new evidence was insufficient to create reasonable doubt).

Conclusion

For all of the foregoing reasons, the Court denies Defendant's Petition for a Writ of Error Coram Nobis, or in the Alternative, a New Trial.

IT IS SO ORDERED.

Appendix C – Memorandum Disposition

United States Court of Appeals for the Ninth Circuit

(May 20, 2021) (unpublished)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANIEL FLINT, Defendant-Appellant.	No. 19-50300 D.C. No. 2:17-cr-00697-SJO-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted May 3, 2021
Pasadena, California

Before: KLEINFELD, WARDLAW, and GOULD, Circuit Judges.

Daniel Flint challenges his conviction for knowingly and willfully entering a sterile airport area with the intent to evade security requirements under 49 U.S.C. § 46314(a), (b)(2).

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

Flint argues that venue in the Central District of California was improper. The district court's failure to instruct the jury on venue was error, but because no reasonable jury could find that venue in the Central District was improper for the crime of entering the Los Angeles International Airport in violation of security requirements, the error was harmless. *See United States v. Moran-Garcia*, 966 F.3d 966, 971 (9th Cir. 2020).

Flint further argues that the government presented insufficient evidence to sustain his conviction. Specifically, Flint argues that he did not commit any element of the crime charged because he did not violate any of Los Angeles International Airport's security procedures. The regulations, however, speak generally of complying with procedures used to control access to sterile areas, regardless of whether those procedures are at the departure or arrival airport. *See, e.g.*, 49 C.F.R. § 1540.107(a). Regardless of what occurred in Chicago, Flint was charged with and convicted of criminal conduct at Los Angeles International Airport.

Flint similarly claims that he did not "knowingly and willfully enter" the Los Angeles International Airport terminal because he was escorted off the plane by

law enforcement. A reasonable jury, however, could have concluded that Flint, having voluntarily boarded a plane bound for Los Angeles International Airport, intended to enter that airport, and did what he intended. It is generally permissible to assume one intends the natural consequences of one's actions. *United States v. Loera*, 923 F.2d 725, 728 (9th Cir. 1991). In this case, Flint voluntarily boarded a plane bound for Los Angeles International Airport, and a reasonable jury could have concluded he intended to enter the Los Angeles International Airport in violation of the procedures used to secure that area upon arrival. Furthermore, Flint does not dispute that he physically entered the airport, albeit under the watchful eye of law enforcement.

Flint also claims that the indictment was constructively amended because the specific regulations in the jury instructions were not included in the indictment. The indictment, however, tracked the statute of conviction, as did the jury instructions and the judgment of conviction. Thus, the indictment was not substantially altered at trial, such "that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *See United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017) (quoting *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002)). Flint further claims that the jury instructions

were defective because the regulations do not address deplaning procedures and were thus inapplicable. This contention, however, is based on Flint's erroneous contention that the relevant regulations do not apply at destination airports. *See, e.g.*, 49 C.F.R. § 1540.107(a) (containing no textual limitation to departure airports).

Additionally, Flint argues that the prosecution committed reversible misconduct by misconstruing testimonial and video evidence. Prosecutors, however, are allowed to make reasonable inferences when arguing before the jury. *United States v. Flores*, 802 F.3d 1028, 1035 (9th Cir. 2015) (citing *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997)). Furthermore, contrary to Flint's assertions, the prosecution did not commit cumulative errors sufficient to warrant reversal under plain error review. *See id.* at 1042.

Finally, Flint argues that the government may have altered an audio clip that possibly contained exculpatory information. This claim, however, was in Flint's joint post-trial petition for a writ of *coram nobis* and motion for a new trial. Because Flint had not yet been sentenced, *coram nobis* relief was not available to him. *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994). Furthermore,

because the audio recording was not new evidence, the motion for a new trial was late. Fed. R. Crim. P. 33(b). Thus, the district court properly denied this claim on procedural grounds.

AFFIRMED.

Appendix D – Order & Opinion

United States District Court for the Central District of California

(September 11, 2019) (unpublished)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Priority
Send
Enter
Closed
JS-5/JS-6
Scan Only

CRIMINAL MINUTES - GENERAL

Case No. CR 17-697 SJO Date September 11, 2019

Present: The Honorable S. James Otero

Interpreter Not Required

Victor Paul Cruz	Not Present	Not Present
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Daniel Flint	xx		xx	Gregory Nicolaysen	xx	xx	

PROCEEDINGS (in chambers): ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF ERROR CORAM NOBIS OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL [Docket No. 158.]

This matter is before the Court on Defendant Daniel Flint's ("Defendant") Petition for Writ of Error Coram Nobis or, in the alternative, Motion for New Trial ("Motion"), filed on August 23, 2019 ("Motion"). Plaintiff United States of America (the "Government") opposed Defendant's Motion on September 3, 2019 ("Opposition"). Plaintiff replied on September 6, 2019 "Reply"). For the following reasons, the Court **DENIES** Defendant's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On July 20, 2017 Defendant presented himself as a diplomat with the International Human Rights Commission ("IHRC") to a Transportation Security Administration ("TSA") official at Chicago O'Hare International Airport ("O'Hare"). (Mot. 2, ECF No. 140.) Defendant, intending to board a flight to Los Angeles International Airport ("LAX"), insisted his carry-on luggage was exempt from screening under the "Laws of the Geneva Convention" and presented an IHRC "Diplomatic Identification Card." (Mot. 2-3.) TSA officials at O'Hare told Defendant that his credentials were insufficient to pass through security and that he was required to present a valid diplomatic passport in order to be exempt from screening. (Opp'n. 6-7, ECF No. 147; Mot. 3.) After TSA informed Defendant that his documents were insufficient to exempt his baggage from inspection, he declined to submit his baggage to screening and did not board a flight. (Compl. ¶ 9, ECF No. 1.)

Later that same day, Defendant cancelled his flight out of O'Hare and booked a new flight from Chicago Midway International Airport ("Midway") to LAX for that same afternoon. (Mot. 3.) This flight included a connecting flight at Minneapolis-St. Paul International Airport ("MSP") before making its final arrival to LAX. (Mot. 3.) Defendant again presented himself as an IHRC diplomat to TSA at Midway. (Opp'n. 8-9.) Midway TSA officials permitted Defendant to travel without submitting his baggage for TSA screening. (Comp. ¶ 10.) On July 25, 2017, Defendant again presented himself as a diplomat with the IHRC to Midway's TSA for a flight to MSP, with a later connecting flight to LAX. (Mot. 4.) TSA officials accepted Defendant's representation, and he was allowed to travel without submitting his baggage for TSA security screening. (Mot. 4-5.) TSA officials at Midway subsequently discovered that Defendant had not provided the correct credentials to be exempt from screening.

(Opp'n. 10-11.) While Defendant was en route to LAX, TSA officials reported the incident to FBI and law enforcement officials. (Mot. 4-5; Compl. ¶ 11.)

FBI agents and other law enforcement officers arrived at Defendant's boarding gate approximately 15-20 minutes before his flight landed at LAX. (Mot. 5; Opp'n. 11.) Once the plane arrived at the terminal, an air marshal and another law enforcement officer boarded the plane to escort Defendant off the flight. (Mot. 5; Opp'n. 11.) Defendant cooperated with authorities and was observed "walking on his own accord" and "not fighting anyone." (Opp'n. 11; Reporter's Transcript of Trial Proceedings Day 2 ("RT2") 378, ECF No.118.) After the authorities escorted Defendant to an interview room inside of LAX, the FBI conducted an interview with him for approximately two hours. (Mot. 6.) Defendant was cooperative throughout the interview and continued to assert that he was a bonafide diplomat. (Mot. 6; Opp'n. 11-12.) Defendant presented the same credentials and documents to the interviewing agents and falsely told agents that he had never been turned away from a screening checkpoint while attempting to travel with his diplomatic pouch. (Mot. 6-7; Opp'n. 12-13.)

The agents ultimately conducted a search of Defendant's bag and discovered approximately $148,145 in U.S. currency stuffed inside plastic shopping bags. (Compl. ¶ 14.) Agents from the United States Department of State later confirmed that Defendant has no diplomatic status with the Department's Office of Foreign Missions ("OFM") and that the alleged ambassador Defendant claimed to be working for was not a recognized ambassador for any organization. (Comp. ¶ 17.)

B. Procedural Background

On November 7, 2017, Flint was indicted on one count for entering an airport area in violation of security requirements under 49 U.S.C. §§ 46314(a), (b)(2). (*See generally* Indictment, ECF No. 15.)

Defendant Flint's three-day jury trial began on October 16, 2018. (*See generally* Reporter's Transcript of Trial Proceedings Trial Day 1 ("RT1"), ECF No. 117.) On October 18, 2018, the Court delivered the following jury instructions as to the elements that the Government must prove beyond a reasonable doubt to sustain a conviction under 49 U.S.C. §§ 46314(a), (b)(2):

(1) the defendant entered an airport area that serves as an air carrier, namely, the sterile area of Terminal 3 at Los Angeles International Airport;

(2) the defendant did so in violation of security requirements and regulations prescribed under sections 44901, 44903(c) of Title 49 of the United States Code[1]; and

[1] The jury was also instructed that 49 U.S.C. § 44901 ("Section 44901") grants the head of the TSA (the "Administrator") the authority to enact security requirements which "provide for the screening of all passengers and property, including United States mail, cargo, carry-on, and checked baggage, and other articles that will be carried aboard a passenger aircraft operated by an air carrier ... in air transportation or intrastate air transportation." 49 U.S.C. § 44901(a). Similarly, 49 U.S.C. § 44903(c) ("Section 44903(c)") states that the Administrator shall prescribe regulations which require airport operators to "establish an air transportation security program that ... is adequate to ensure the safety of passengers." 49 U.S.C. § 44903(c). The relevant federal airport security regulations and requirements prescribed under these enabling statutes were stated as follows:

CASE NO.: CR 2:17-00697 SJO-1 DATE: September 25, 2019

(3) the defendant acted knowingly and willfully; and

(4) the defendant also acted with the intent to evade the security regulation.

(*See* Jury Instruction No. 14, ECF No. 131; RT3 445-48.)

The jury was instructed that the term "sterile area" is defined as meaning a "portion of an airport where passengers have access to boarding aircraft and to which the access generally is controlled by the Transportation Security Administration; an aircraft operator through the screening of persons and property." (*See* Jury Instruction No. 13.) For a diplomatic pouch to be exempt from security screening at TSA, the diplomatic courier "must possess and present to TSA a valid diplomatic passport ... a courier letter ... and a diplomatic pouch ...[.]" (*Id.*) "Individuals who are not diplomatic couriers and who do not possess valid diplomatic documentation must submit their items for screening and inspection **before entering the sterile area of an airport**." (RT3 at 447.)

On October 19, 2018, the jury found Defendant Daniel Flint guilty of intentionally evading airport security requirements, in violation of 49 U.S.C. §§ 46314(a), (b)(2). (*See generally* Reporter's Transcript of Trial Proceedings Trial Day 4 ("RT4"), ECF No. 120; Jury Verdict, ECF No. 130.) Sentencing is set for Monday, September 16, 2019. (*See* ECF No. 156.)

1. The Instant Motion

Defendant moves for the Court to vacate the jury's guilty verdict, dismiss all charges against him, or grant an evidentiary hearing to address the issues he presents. (*See* Mot., ECF No. 158.)[2] Alternatively, Defendant requests that the Court vacates the judgment against him and grant Defendant a new trial pursuant to Federal Rule of Criminal Procedure ("Rule") 33. (*Id.*) The Court addresses Defendant's requests in turn.

II. DISCUSSION

The federal regulations and security requirements prohibit any person from entering a sterile area of an airport or boarding an aircraft without submitting to screening and inspection of his or her person and accessible property; circumventing or attempting to circumvent any security system, measure, or procedure implemented to protect passengers and property on an aircraft; and/or entering a sterile area without complying with the procedures being applied to the area. (*See* Jury Instruction No. 13; RT3 445.)

[2] The Court admonishes Defendant for violating the Court's Standing Order, ¶ 16(c). (*See* ECF No. 23 at ¶16 ("Memoranda of points and authorities in support of motions shall not exceed twenty-five (25) pages").) Defendant's Motion is thirty-five (35) pages long. (*See* Mot.) In the future, the Court will strike or decline to consider portions of Defendant's briefs which exceed the page limit imposed by the Standing Order.

CASE NO.: CR 2:17-00697 SJO-1 DATE: September 25, 2019

A. Legal Standard

1. Petition for Writ of Error Coram Nobis

"Where the errors are of the most fundamental character, such that the proceeding itself is rendered invalid, the writ of coram nobis permits a court to vacate its judgments." *Estate of McKinney By & Through McKinney v. United States*, 71 F.3d 779, 781–82 (9th Cir. 1995) (quoting *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir.1987) (citation omitted)). District courts have authority to issue the writ under the All Writs Act, 28 U.S.C. 1651(a). *Id.* (internal citations omitted).

The writ of error coram nobis "affords a remedy to attack an unconstitutional or unlawful conviction in cases when the petitioner already has fully served a sentence." *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994). To qualify for coram nobis relief, a petitioner must demonstrate the following: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.'" *United States v. McClelland*, 941 F.2d 999, 1002 (9th Cir.1991) (quoting *Hirabayashi*, 828 F.2d at 604).

2. Motion For a New Trial

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." *Id.* at subd. (b)(1). "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." *Id.* at subd. (b)(2).

A criminal defendant must satisfy a five-part test in order to prevail on a motion for a new trial: "(1) [T]he evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal." *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005); *United States v. Hinkson*, 585 F.3d 1247, 1283–84 (9th Cir. 2009) (same).

B. Analysis

CASE NO.: CR 2:17-00697 SJO-1 **DATE:** September 25, 2019

1. Defendant's Petition for Writ of Error Coram Nobis is Denied

a. Defendant's Petition is Procedurally Barred

Defendant is not eligible for coram nobis relief because he has not yet been sentenced and therefore has not "fully served" any sentence. *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013) (Petition for writ of coram nobis provides a way to collaterally attack a criminal conviction for a person who is no longer in custody and therefore cannot seek habeas relief.); *United States v. Nosal*, 743 F. App'x 816, 817 (9th Cir. 2018) ("The district court properly denied Nosal's petition because the rare writ of coram nobis is not available until a petitioner already has fully served [his] sentence.") (citing *Telink*, 24 F.3d at 45).

Defendant argues that the Ninth Circuit and the Supreme Court have never explicitly limited coram nobis relief to "only" those petitioners who have already fully served their sentences, but this is not persuasive. The Ninth Circuit and Supreme Court have made it clear that coram nobis relief exists to fill a "very precise gap in federal criminal procedure"-it is meant for those who have already fully served their sentences and are therefore unable to pursue habeas relief under 28 U.S.C. § 2255 to remedy any "lingering collateral consequences" from their unlawful convictions. *Telink*, 24 F.3d at 45; *Chaidez*, 568 U.S. at 456 n.1. Defendant is not in that position. Defendant presents no case law, and the Court is not aware of any, granting coram nobis relief to petitioners who have not yet been sentenced.

Thus, Defendant is procedurally barred from seeking coram nobis relief.

b. Defendant's Petition Lacks Merit

Even if Defendant were eligible to petition for coram nobis relief, the petition would fail on the merits because there was no error of the "most fundamental character" here. *McClelland*, 941 F.2d at 1002.

Defendant requests coram nobis relief on a theory of ineffective assistance of counsel. (Mot. 15.) To prevail on an ineffective assistance of counsel claim, Defendant must show that: (1) counsel's actions were outside the wide range of professionally competent assistance, measured under a standard of "reasonably effective assistance," *Hovey v. Ayers*, 458 F.3d 892, 904 (9th Cir. 2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984); and that (2) he was prejudiced by reason of counsel's actions, that is, there is "a reasonable probability" that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694). The standard a defendant must meet is both "rigorous" and "highly demanding," and requires a showing of "gross incompetence" on the part of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986).

Here, Defendant claims he received ineffective assistance of counsel because his appointed counsel in the Federal Public Defender's Office (the "FPD") failed to contest the authenticity of the audio recording of his FBI interview, despite his urging. (Mot. 15-27.) However, his trial counsel's strategic decision not to investigate or pursue a motion to suppress the recording does not constitute ineffective assistance of counsel. In response to Defendant's accusation, the Government provides a sworn declaration from Federal Air Marshall Wesley Williams who interviewed Defendant on July 25, 2017/ (ECF No. 162-1 at ¶¶ 1-2.) Williams states that after he recorded Defendant's interview on his iphone, he uploaded the audio files directly to the FBI's internal computer system,

CASE NO.: CR 2:17-00697 SJO-1 DATE: September 25, 2019

made copies, and sent them to the Government. (*Id.* at ¶ 4.) Williams states that the files he sent were identical to those recorded on his phone, and were not altered or manipulated in any way. (*Id.*) The Government confirms that the audio recording Defendant received in discovery was the same audio recording which Williams immediately uploaded to the FBI's internal computer system. (Mot. Ex. B, ECF No. 158-3.) Defendant provides no evidence to refute these statements or show that the Government deleted any "original" audio recordings from Defendant's interrogation. (*See* Reply.) Moreover, this recording was not admitted at trial. (Opp'n. 6.) Thus, Defendant fails to show that his FPD's failure to investigate or pursue a motion to suppress was ineffective assistance, or that but for counsel's decision, the proceeding would have been different.

Defendant's petition for coram nobis relief fails on the merits.

c. Conclusion

Defendant's Petition for coram nobis relief is **DENIED.**

2. Defendant's Motion for a New Trial is Denied

a. Defendant's Motion for a New Trial is Untimely

Defendant argues that the expert report on the alleged "one-amplitude-frequency inconsistency" (the "Expert Report") is newly discovered evidence warranting a new trial. (*See* Mot. Ex. A, ECF No. 158-1.) The Government contends that all recorded audio was produced to counsel for Defendant on December 8, 2017, and produced the audio clips for trial[3] on October 10, 2018. (Opp'n. 7, ECF No. 162.) Defendant does not dispute that he received this audio on December 8, 2017. (*See* Reply, ECF No. 163.) Because the audio itself, which is the basis of the expert report, is not newly discovered, Defendant needed to hire an expert and if at all, file a Rule 33 Motion no later than 14 days after October 19, 2018, the day that the jury rendered its verdict. Fed. R. Crim. P. 33(b)(2).

Thus, Defendant's Motion for a New Trial is untimely.

b. Defendant's Motion for a New Trial Lacks Merit

As established, in order to receive a new trial: "(1) [T]he evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal." *Harrington*, 410 F.3d at 601.

[3] The evidence containing the alleged "one-amplitude-frequency inconsistency" was not admitted at trial. (Opp'n. 6.)

CASE NO.: CR 2:17-00697 SJO-1 **DATE:** September 25, 2019

Here, as the Government correctly points out and Defendant does not dispute, the underlying evidence is not newly discovered. (Opp'n. 6; *See* Reply.) Further, Defendant could have discovered the alleged "one-amplitude-frequency inconsistency" between December 8, 2017 and October 17, 2018, over ten months before his trial began. The evidence that Defendant presents now was not material to issues at trial because it was not exculpatory, and it was never presented. Moreover, Defendant does not challenge the accuracy of the audio exhibits that **were** introduced as evidence at trial. (*See* Mot.; *See* Reply.) Moreover, Defendant fails to show that admission of this allegedly newly discovered evidence would result in acquittal. Defendant does not challenge the authenticity or accuracy of any of the evidence that actually was presented at trial. The evidence presented at trial was sufficient for the jury to find Defendant guilty beyond a reasonable doubt of **intentionally** evading airport security requirements. As such, is unlikely that presentation of the allegedly newly discovered evidence would result in acquittal.

Defendant's Motion for a New Trial is without merit.

c. Conclusion

Defendant's Motion for a New Trial is **DENIED.**

III. RULING

For the foregoing reasons, the Court **DENIES** Defendant's Motion in its entirety.

IT IS SO ORDERED.

Appendix E – Visual Aids (Color)

Figures 1 & 2:

- Catch-22 Timeline (first *coram nobis* dismissal vs. second)
  - 318-Day Remedy Gap (Rule 33 & § 2255 availability)

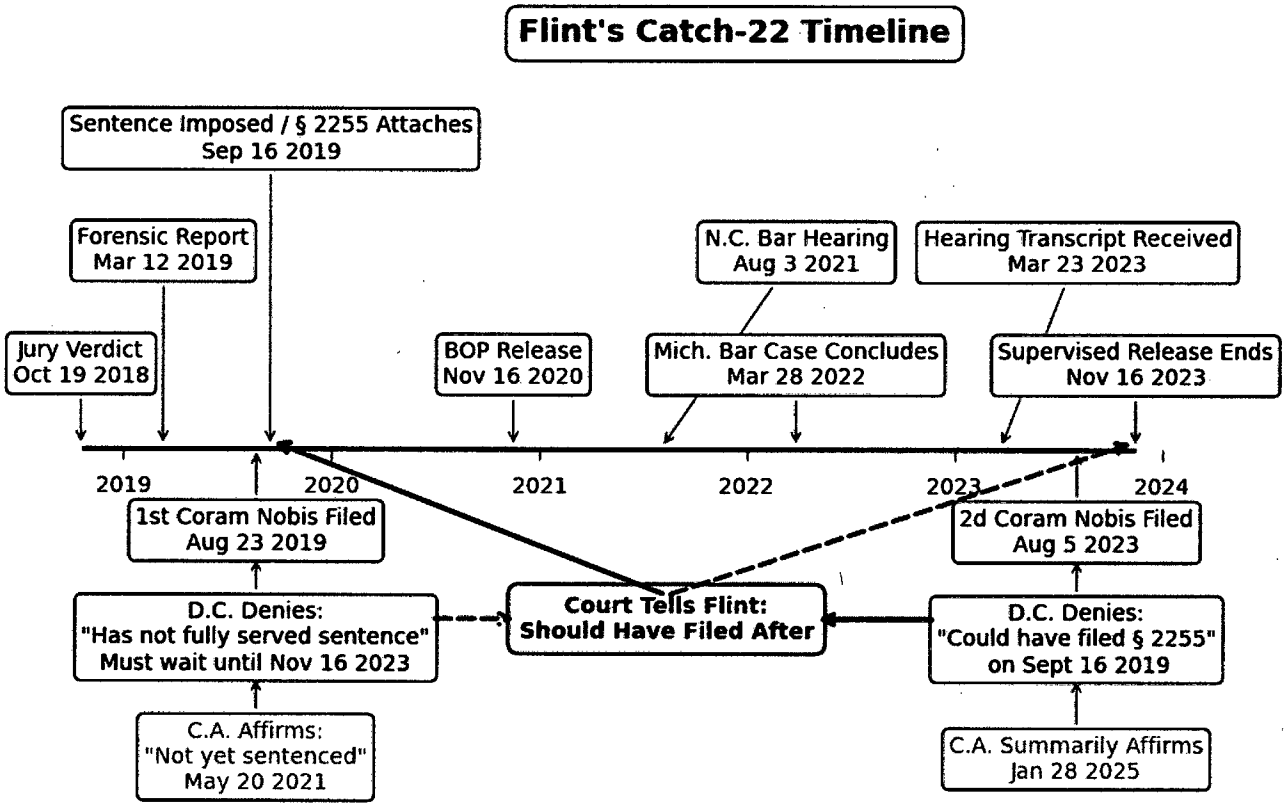

Figure 1. District court dismissed Flint's first coram-nobis petition as premature and his second as untimely, leaving the claim unreviewable.

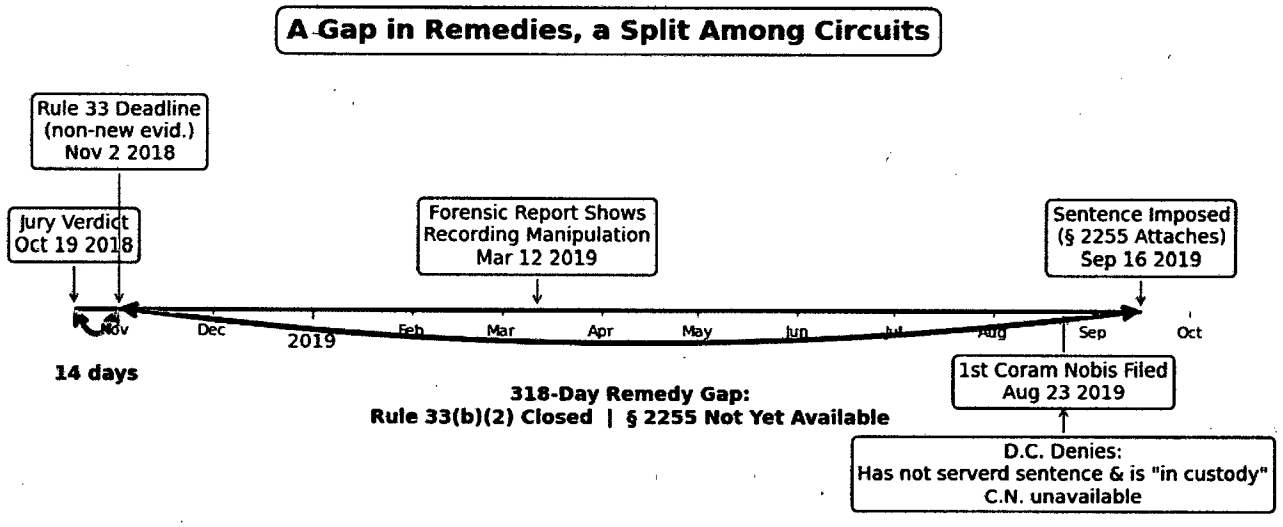

Figure 2. During this 318-day gap—after Rule 33(b)(2) closed but before § 2255 attached—coram nobis is barred in five circuits, allowed in three, and unsettled in four.

Appendix F – Email from Flint to Defense Counsel

(Pre-trial notice of missing transcript portion; October 2018)

-------- Original message --------

From: Craig Harbaugh [redacted]

Date: 10/14/18 4:44 PM (GMT-05:00)

To: d2flint [redacted]

Subject: Re: Hotels

We have it. I was planning to have you listen to it today when you arrive

Get Outlook for Android

On Sun, Oct 14, 2018 at 1:43 PM -0700, "d2flint" [redacted] wrote:

> hey Craig, I am in the air reading over the transcript. I am 100 percent certain a portion of the questioning that was done is not included in the transcript. Specifically the portion relating to if I was ever turned away before. The portion that is missing can be found on page 23 of the transcript. I will explain more when I see you. Just wanted to give you a heads up. maybe we can pull that tape and listen to it close
>
> Sent from my Galaxy Tab® E
>
> -------- Original message --------
>
> From: Craig Harbaugh [redacted]
>
> Date: 10/13/18 5:04 PM (GMT-05:00)
>
> To: d2flint [redacted], Courtney Bradford [redacted]
>
> Subject: RE: Hotels
>
> Ok thanks. What time do you arrive tomorrow?
>
> ---
>
> From: d2flint [redacted]
> Sent: Saturday, October 13, 2018 8:18 AM
> To: Courtney Bradford [redacted]

From: [redacted]

To: Craig_Harbaugh[redacted]

Date: Monday, October 15, 2018, 8:04 AM EDT

I was right about the transcript. You can hear that they cut the audio!
I was right about the transcript. You can hear that they cut the audio!

Appendix G – Email from Government to Defense Counsel

(Notice that interviewing air-marshal's phone was wiped; Feb 2019)

FW: USA v. Flint - Discovery Request

1 message

Craig Harbaugh [redacted] Fri, Feb 8, 2019 at 6:17 PM
To: d2flint <[redacted]

Hi, Dan Here is the Government's response. I can call you next week to discuss.

Craig/Georgina,

We wanted to close the loop on your post trial request "for access to the original audio recording" of Mr. Flint's FBI interview. As explained in my December email below, Air Marshall Williams recorded the Mirandized interview on his government issued cell phone, and that phone was later returned to TSA because Mr. Williams was due for an phone upgrade. TSA legal counsel confirmed that old phones turned into TSA are cleared of all data and then returned to headquarters for disposal, and that is what we believe happened here. As you know, the government produced a copy of Mr Flint' recorded interview on December 8 2017 a part of the government' fir t production Plea e give u a call if you would like to meet and confer about the issue or discuss it further.

Best,

Ian

From: Craig Harbaugh [redacted]
Sent Monday December 17 2018 2 03 PM
To: Yanniello, Ian (USACAC) [redacted]>; Ro, Christine (USACAC) [redacted]
Cc: Georgina Wakefield [redacted]
Subject: RE: USA v. Flint Discovery Request

Thanks!

From Yanniello Ian (USACAC) <[redacted]
Sent: Monday, December 17, 2018 1:30 PM
To: Craig Harbaugh <[redacted]>; Ro, Christine (USACAC) <[redacted]>
Cc: Georgina Wakefield [redacted]
Subject RE USA v Flint Di covery Reque t

Craig If you need additional time we don't oppo e your reque t for a hort continuance to the briefing chedule and sentencing date. Thanks, Ian.

From: Craig Harbaugh [redacted]
Sent Monday December 17 2018 10 06 AM

Appendix H – Expert Audio Authentication Report

United States Forensics, LLC (March 12, 2019)

UNITED STATES FORENSICS

Phone: 727-777-4323
www.unitedstatesforensics.com
6295 Gulf Blvd. Suite #7 St. Pete Beach, FL 33706

Audio Authentication Report

USF Case Number: 1902124 Court Case Number: CR 17-697-SJO
United States of America v. Daniel Flint

I, Doug Carner (hereafter referred to as "expert") am an Audio-Video Enhancement and Authentication Forensic Expert with United States Forensics, LLC. (Hereafter referred to as "USF"). I am a certified Audio Video Forensic Analyst, Certified Forensic HiTech Investigator, Certified Computer Forensics Examiner, Certified Protection Professional. Currently, I maintain the following Forensic Positions: Audio, Video & Photo Analysis expert (Los Angeles Superior Court Panel of Experts – ICDA), Chair of the Forensic Working Group (American Society for Photogrammetry and Remote Sensing), Digital and Multimedia Evidence subcommittee (American Society for Testing and Materials); Owner of "Forensic – Audio Video Innovations and Solutions". I am a member of the American Academy of Forensic Sciences, Forensic Expert Witness Association, International Association for Identification, International Association of Forensic & Security Metrology, and Scientific Association of Forensic Examiners. I have expertise in audio and video forensic enhancement, assessment, authentication, tamper detection, and audio and motion detection.

I have personal knowledge of the following facts, certify that the following is true to the best of my knowledge, have no personal interest as to the outcome of this case, performed all work in a forensically sound manner to reach the opinions stated herein, and if called as a witness could and would testify competently thereto.

CASE BACKGROUND:
On March 11, 2019, I was retained in the above case regarding evidence as described below. At issue is the integrity of the evidence provided and whether there are any signs of alteration or tampering of the audio contents within.

EVIDENCE:
EON: 9091601
Description: Subject Audio
File Name: FLINT 592 - Daniel Flint 2.m4a
Hash Value: 2d7746fe3e5589e818c07cdf327edf4056440ed2
(Hash values are industry accepted digital fingerprints used to uniquely identify electronic files)

EXAMINATION:
I performed identity, structural, meta, frequency and observational data analysis, inclusive of the tests listed upon the MAT form (Exhibit A) on the evidence file:

1. Observational analysis:
   A. Critical listening-viewing for synchronization inconsistencies, editing, or cloning.
   B. Naturalism of dialog, frequency, and playing speed.
   C. Detection of unexpected duplicate data.

   RESULTS: Audio content flows without detected breaks or duplication. The observable audio frequencies and the observed overall playing speed appear natural and consistent. No audio duplication was detected.

2. Metadata analysis:
   A. Define types of data streams, anomalies, and the cumulative percentage.

B. Compare the file naming and header/footer data, to known standards, the capturing equipment, and case facts.

RESULTS: The reviewed recording is in an open and unprotected format saved in a lossy compression. The reviewed recording's chain-of-custody, equipment information, and geo location data was not present. The model number of the capturing equipment is not known to me. Metadata indicates that the reviewed recording was created using Apple's VoiceMemos software, and is composed of one audio channel plus header/footer data. The reviewed recording is in an open format audio file saved in two identical channels written with Apple's VoiceMemos (iOS 10.3.2). The reviewed recording was created at 21:06:40 2017-07-27 UTC and modified 21:06:43 2017-07-27 UTC.

3. Audio analysis:
   A. Noise profile range inconsistency to detect splicing or up-sampling.
   B. DC ramping and subsonic spikes to detect stop-start events.
   C. Detect amplitude and frequency range and distribution inconsistencies to detect post-production.

RESULTS: Noise profiles remain consistent. DC ramping and subsonic spike events were not detected. One amplitude-frequency inconsistency was found at 5:58.14465 into the playing time, hereafter referred to as the "Event". Noise ceiling increases during the Event. The noise ceiling is maintained outside of the Event. Spike Event occurs between utterances.

OPINIONS:

The Event (Exhibit A, Image #2) detected in the reviewed recording is not a natural occurrence. The Event contains amplitude and spectral characteristics (Exhibit A, Image #1) that could not occur from normal file handling. The Event is unique within the reviewed recording and consistent with editing or an otherwise non-continuous recording. The Event occurs at five minutes and fifty-eight seconds into the reviewed recording's playing time.

In summary, to a reasonable degree of expert confidence, the reviewed recording is found to be a manipulated representation of the facts as they occurred.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct. I reserve the right to perform additional services and to amend my opinions should additional facts become known.

Executed on: 03/12/2019 By: Doug Carner

Executed in Los Angeles County Doug Carner

EXHIBIT A

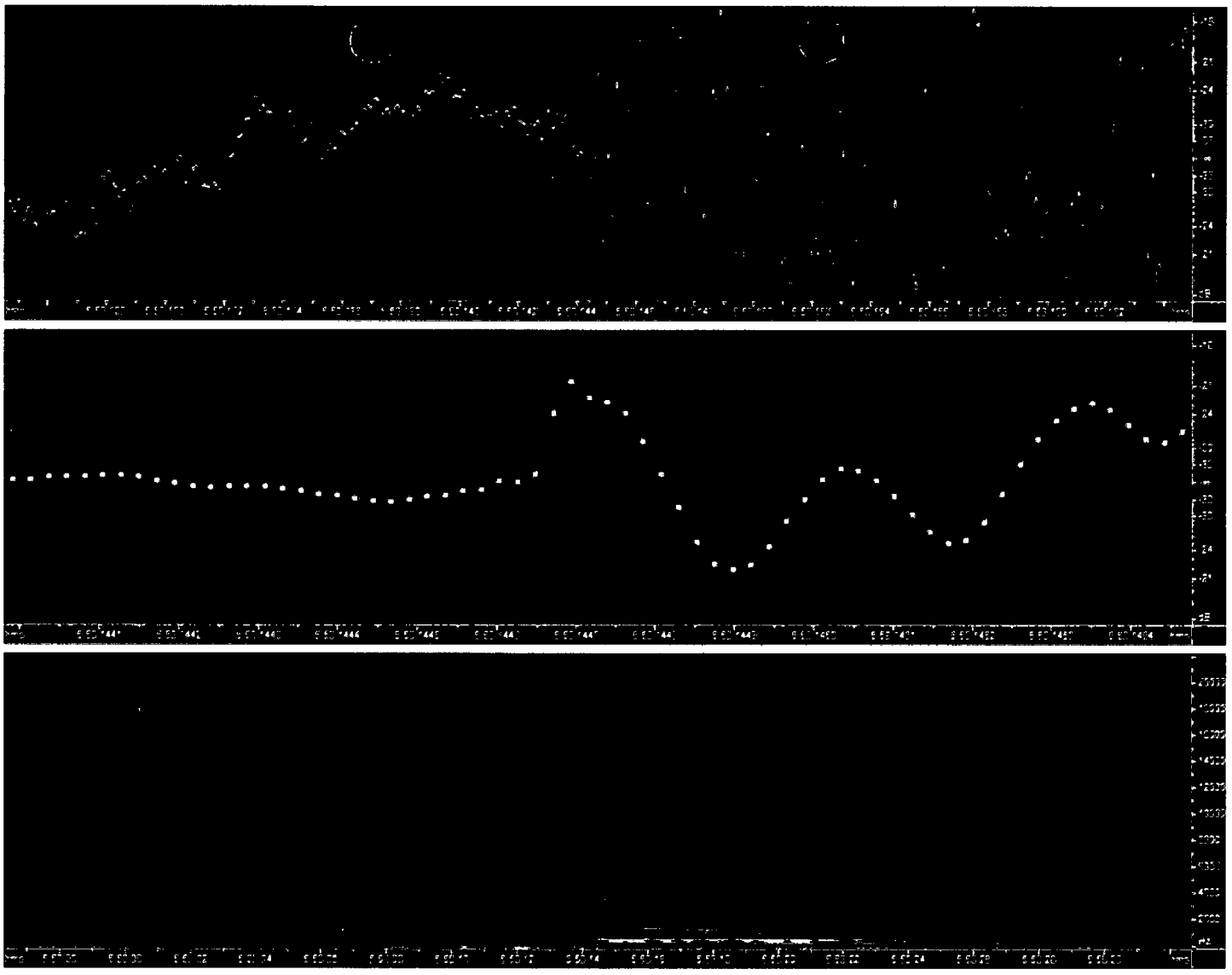

Image #1: Waveform and spectral spot testing results

ultimedia Authentication Te[illegible]g

MAT (ver#4)

Analyst(s) name(s) Doug Carner Testing date 03 / 11 / 2019
Tested file name FLINT 592 - Daniel Flint 2.m4a
Tested time range Entirety Size 12,966,606 bytes
MD5-[*SHA1*] hash 2d7746fe3e5589e818c07cdf327edf4056440ed2

File format [*Open*]-*Proprietary* in the m4a extension identified as M4A by file data
Data streams 0 % visual, 99 % audio (not entirely silent), and 1 % other data
Metadata GPS No data Hardware Apple
Date-times Created UTC 2017-07-27 21:06:40 Modified UTC 2017-07-27 21:06:43
Auditing data Writing application: com.apple.VoiceMemos (iOS 10.3.2)

Image or Video Stream Analysis (check if testing is applicable ☐)
Stream details _____ resized. _____ interlaced. _____ color space. _____x_____ resolution.
_____ kb/s. _____ codec using _____ writing library
Temporal analysis _____ fps speed _____ unnatural. _____ duplicate frames. _____ time skipping.
Pass-Fail tests PRNU _____. Data cloning _____. PCA editing _____. DCT editing _____.
JPEG editing _____. HSV-Lab histogram _____. Luminance gradient _____.
Chromatic aberrations_____. Double compression _____. ELA-VELA _____.
Thumbnail _____. Noise _____. Huffman table _____. JPEG dimples _____.
Threshold tests* _____
* e.g. Temporal contrast, temporal diffusion, spatial predictability, temporal noise diversion, temporal histogram correlation, non-monotonous motion, etc.

Audio Stream Analysis (check if testing is applicable ■)
Stream details 2 channels. 16 bit depth. 229 kb/s. 44.1 kHz sampling. mp4a-40-2 codec
Spectral limits Perceptible up to about 5 kHz Noise ceiling up to about 15.4 kHz
Simple analysis Resampling is detected Audio data cloning not detected
Acute transitions Bias transition not detected Noise profile transition not detected
Critical listening Speed inaccuracy _____ detected Stream de-synchronization no data detected
Amplitude tests No silence (no data absent noise) No clipping (no data in N/A time spans)
Signal tracking Not possible and found No temporally consistent signal frequencies to track
Subsonic impulse Not possible and found No substantial subsonic events detected

Spot Testing (check if applicable ■) Tested times are 5:58
Acute shifts in: Amplitude is detected. Content not detected. DC impulse not detected.
Frequency not detected. Noise profile not detected. Speed not detected.

Additional tests, notes and observations: (Reference relevant "Has", "Is" or "Fail" test results)
Amplitude spike detected at 5:58.14465 Noise ceiling increase anomaly detected at spike event.
Spike event is unique to the recording. Spike event occurs between utterances.
Metadata denotes single channel source. The reviewed file contains two identical channels.

OPINION: To a *definitive–high*-[*reasonable*] degree of expert confidence, the tested content is found to be a *faithful–questionable*-[*manipulated*] representation of the facts as they occurred.

Answer with ("No", "Not", "Pass") or ("Has", "Is", "Fail"), else "No data", where applicable. Select appropriate italic option. Forensic Working Group: 2018

Image #2: Multimedia Authentication Testing form

Appendix I – Expert Audio Authentication Report

United States Forensics, LLC (May 30, 2019)

UNITED STATES FORENSICS

Phone: 727-777-4323
www.unitedstatesforensics.com
6295 Gulf Blvd. Suite #7 St. Pete Beach, FL 33706

Audio Authentication Report

USF Case Number: 1902124 Court Case Number: CR 17-697-SJO
United States of America v. Daniel Flint

I, Doug Carner (hereafter referred to as "expert") am an Audio-Video Enhancement and Authentication Forensic Expert with United States Forensics, LLC. (Hereafter referred to as "USF"). I am a certified Audio Video Forensic Analyst, Certified Forensic HiTech Investigator, Certified Computer Forensics Examiner, Certified Protection Professional.
Currently, I maintain the following Forensic Positions: Audio, Video & Photo Analysis expert (Los Angeles Superior Court Panel of Experts – ICDA), Chair of the Forensic Working Group (American Society for Photogrammetry and Remote Sensing), Digital and Multimedia Evidence subcommittee (American Society for Testing and Materials); Owner of "Forensic – Audio Video Innovations and Solutions". I am a member of the American Academy of Forensic Sciences, Forensic Expert Witness Association, International Association for Identification, International Association of Forensic & Security Metrology, and Scientific Association of Forensic Examiners. I have expertise in audio and video forensic enhancement, assessment, authentication, tamper detection, and audio and motion detection.

I have personal knowledge of the following facts, certify that the following is true to the best of my awareness, have no personal interest as to the outcome of this case, performed all work in a forensically sound manner to reach the opinions stated herein, and if called as a witness could and would testify competently thereto.

CASE BACKGROUND:
On March 11, 2019, I was retained in the above case regarding evidence as described below. At issue is the integrity of the evidence provided and whether there are any signs of alteration or tampering of the audio contents within.

EVIDENCE:
EON: 9091601
Description: Subject Audio
File Name: FLINT 592 - Daniel Flint 2.m4a
Hash Value: 2d7746fe3e5589e818c07cdf327edf4056440ed2
(Hash values are industry accepted digital fingerprints used to uniquely identify electronic files)

Description: Verbatim transcription by the United States Department of Justice Federal Bureau of Investigation File Name: flint_000785_flint_interview_transcript_redacted-2.pdf (hereafter referred to as the "Transcript")

EXAMINATION:
I performed identity, structural, meta, frequency and observational data analysis, inclusive of the tests listed upon the MAT form (Exhibit A) on the evidence file:

1. Observational analysis:
   A. Critical listening-viewing for synchronization inconsistencies, editing, or cloning.
   B. Naturalism of dialog, frequency, and playing speed.
   C. Detection of unexpected duplicate data.

   RESULTS: Audio content flows without detected breaks or duplication. The observable audio frequencies and the observed overall playing speed appear natural and consistent. No audio duplication was detected.

2. Metadata analysis:
   A. Define types of data streams, anomalies, and the cumulative percentage.
   B. Compare the file naming and header/footer data, to known standards, the capturing equipment, and case facts.

RESULTS: The reviewed recording is in an open and unprotected format saved in a lossy compression. The reviewed recording's chain-of-custody, equipment information, and geo location data was not present. The model number of the capturing equipment is not known to me. Metadata indicates that the reviewed recording was created using Apple's VoiceMemos software, and is composed of one audio channel plus header/footer data. The reviewed recording is in an open format audio file saved in two identical channels written with Apple's VoiceMemos (iOS 10.3.2). The reviewed recording was created at 21:06:40 2017-07-27 UTC and modified 21:06:43 2017-07-27 UTC.

3. Audio analysis:
   A. Noise profile range inconsistency to detect splicing or up-sampling.
   B. DC ramping and subsonic spikes to detect stop-start events.
   C. Detect amplitude and frequency range and distribution inconsistencies to detect post-production.

   RESULTS: Noise profiles remain consistent. DC ramping and subsonic spike events were not detected. One amplitudefrequency inconsistency was found at 5:58.14465 into the playing time, hereafter referred to as the "Event". Noise ceiling increases during the Event. The noise ceiling is maintained outside of the Event. Spike Event occurs between utterances "Before today?" and "[UI] and see if we can get this screened." As defined by lines #17 and #19 respectively on page #23 of the Transcript.

4. The waveform and spectral views (detailed in Exhibit A of this report) depict the Event as spanning 9ms and deviating in both amplitude and frequency from the surrounding audio. During the Event, the auditory frequencies exceed the audio beyond the Event, and thus the Event could not originate from the recorder's microphone. The changes in amplitude and frequency during the Event cannot result from any known file saving or compression method. Thus the event can only originate from editing or equipment malfunction.

OPINIONS:

The Event occurs at five minutes and fifty-eight seconds into the reviewed recording's playing time, and is composed of unique spectral characteristics (Exhibit A of this report) that exceed the frequency ceiling of the non-Event audio. The characteristics of the Event cannot result from normal file handling or compression, nor result from an audible event.

There is lost audio spanning either the duration of the Event, or of some missing or out of sequence time duration spliced together, that resulted in the Event. Regardless of whether the Event is the result of recorder malfunction or human editing, the audio of the reviewed audio file is an incomplete representation of the facts as they occurred.

The existence of the Event is fact, and its audio profile is inconsistent with known types of equipment malfunction. However, it is possible to create the Event audio profile through audio editing manipulation. Since I am unable to explain the Event by equipment malfunction, and the Event can be explained by editing manipulation, an opinion of content manipulation is more likely than that of questionable content. Due to the absence of a definitive or high level of proof of editing manipulation, the strength of my summary opinion shall not exceed a finding to a reasonable degree of certainty.

In summary, to a reasonable degree of expert confidence, the reviewed recording is found to be a manipulated representation of the facts as they occurred.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct. I reserve the right to perform additional services and to amend my opinions should additional facts become known.

Executed on: 05/30/2019 By: Doug Carner

Executed in Los Angeles County

EXHIBIT A

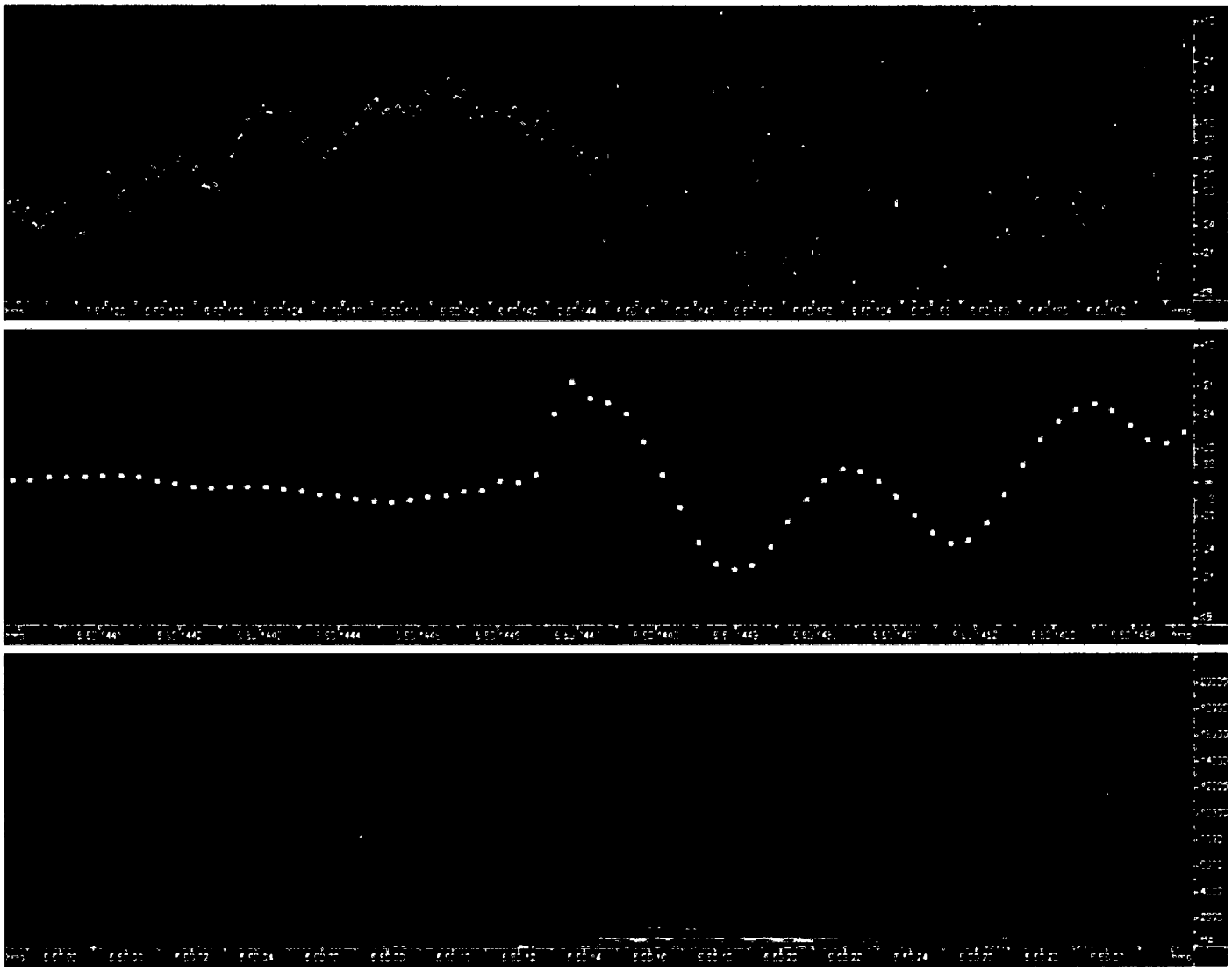

Image #1: Waveform and spectral spot testing results

Multimedia Authentication Testing

MAT (ver#4)

Analyst(s) name(s) Doug Carner Testing date 03 / 11 / 2019
Tested file name FLINT 592 - Daniel Flint 2.m4a
Tested time range Entirety Size 12,966,606 bytes
MD5-[*SHA1*] hash 2d7746fe3e5589e818c07cdf327edf4056440ed2

File format [*Open*]-*Proprietary* in the m4a extension identified as M4A by file data
Data streams 0 % visual, 99 % audio (not entirely silent), and 1 % other data
Metadata GPS No data Hardware Apple
Date-times Created UTC 2017-07-27 21:06:40 Modified UTC 2017-07-27 21:06:43
Auditing data Writing application: com.apple.VoiceMemos (iOS 10.3.2)

Image or Video Stream Analysis (check if testing is applicable ☐)
Stream details _____ resized. _____ interlaced. _____ color space. _____x_____ resolution.
_____ kb/s. _____ codec using _____ writing library
Temporal analysis _____ fps speed _____ unnatural. _____ duplicate frames. _____ time skipping.
Pass-Fail tests PRNU _____. Data cloning _____. PCA editing _____. DCT editing _____.
JPEG editing _____. HSV-Lab histogram _____. Luminance gradient _____.
Chromatic aberrations_____. Double compression _____. ELA-VELA _____.
Thumbnail _____. Noise _____. Huffman table _____. JPEG dimples _____.
Threshold tests* _____

* e.g. Temporal contrast, temporal diffusion, spatial predictability, temporal noise diversion, temporal histogram correlation, non-monotonous motion, etc.

Audio Stream Analysis (check if testing is applicable ■)
Stream details 2 channels. 16 bit depth. 229 kb/s. 44.1 kHz sampling. mp4a-40-2 codec
Spectral limits Perceptible up to about 5 kHz Noise ceiling up to about 15.4 kHz
Simple analysis Resampling is detected Audio data cloning not detected
Acute transitions Bias transition not detected Noise profile transition not detected
Critical listening Speed inaccuracy _____ detected Stream de-synchronization no data detected
Amplitude tests No silence (no data absent noise) No clipping (no data in N/A time spans)
Signal tracking Not possible and found No temporally consistent signal frequencies to track
Subsonic impulse Not possible and found No substantial subsonic events detected

Spot Testing (check if applicable ■) Tested times are 5:58
Acute shifts in: Amplitude is detected. Content not detected. DC impulse not detected.
Frequency not detected. Noise profile not detected. Speed not detected.

Additional tests, notes and observations: (Reference relevant "Has", "Is" or "Fail" test results)
Amplitude spike detected at 5:58.14465 Noise ceiling increase anomaly detected at spike event.
Spike event is unique to the recording. Spike event occurs between utterances.
Metadata denotes single channel source. The reviewed file contains two identical channels.

OPINION: To a *definitive–high*-[*reasonable*] degree of expert confidence, the tested content is found to be a *faithful–questionable*-[*manipulated*] representation of the facts as they occurred.

Answer with ("No", "Not", "Pass") or ("Has", "Is", "Fail"), else "No data", where applicable. Select appropriate italic option. Forensic Working Group: 2018

Image #2: Multimedia Authentication Testing form

Appendix J – Hearing Transcript Excerpt

North Carolina State Bar Hearing (August 3, 2021), pp. 97-101

Verbatim transcript. Are you on the verbatim transcript? Yeah. Page 20 -- oh, it's page 23 in the actual document, not pdf 23. So do down two more pages.

MS. PERRY: Okay, that's it.

MR. FLINT: Right there. Right there, yep.

Q So page 23 there, line 13, if you scroll up.

A Okay.

Q Can you read please --

A Okay.

Q -- starting at line 13.

A Line 13, "When was the last time you tried to fly?" "Today." "Before today." "Unknown male, and see if we can get this screened."

On line 21, it's back to you. "Do you want to put it through or do you just want to -- want to open it?" 23, me, "I need to see what's in the bag."

Do you want me to keep going?

Q Sure. You can read --

A How far down did you --

Q Read down to 27.

A Okay. To 27. Got it. Number 25, "Hello, Mr. Shumake. They just want to see what's in the bag. Would it be all right? They are saying that they are not going to let it go out anyway, but I just wanted to

double check with you first."

Q So where is my answer? You testified under oath twice today that I answered your question. Why is it not in the transcript?

A You did answer my question.

Q I know it. Sorry. So do you see my answer to your question? Do you see that in the transcript?

A Yes.

Q Is there an answer after "before today"? Is there an answer to that question?

A I'm sorry. Can you say that again?

Q Sure. Do you see where it says, "before today"?

A Okay.

Q That was your question to me, when you said, "When was the last time you tried to fly before today?" You've testified twice that I answered that question. I'm asking you why is my answer not in this transcript? It would come after "before today," correct?

A Well, I will say we're not seeing the entire transcript right now, and you're showing me a portion of it. You answered. I asked a question, and you did provide an answer, whether or not it's the answer that I wanted or you wanted to provide, but you did answer, and you were speaking, so you did answer.

And again, I would like to go through the entire transcript and not just a small portion of it.

Q Do you remember me telling you that I was turned away on June 20th?

A You did not tell me that you were turned away.

Q That's your testimony. So what is -- to the best of your recollection, and you've already testified twice that I in fact answered your question, "When was the last time you tried to fly before today?" To the best of your recollection, what was my answer?

A To the best of my recollection, you told me, "I do not recall," and you told me no.

Q Okay. That is what I said a few lines above. Can you see that on that same page?

A Okay.

Q So that was the answer to your question, but -- and this is line 2, "But you never -- but wait, you've never been turned away from a screening checkpoint." "For?" I said, "For?"

And you said, "For not wanting your bags to be screened." So that answer that you just gave was not to your question, "When was the last time you tried to fly?" The answer you just testified to was the answer to your previous question.

So my question again is, to the best to your recollection, what was my answer to your question, "When was the last time you tried to fly before today?"

Q Can -- okay. That was a lot. Can you break it down to your -- can I clarify to make sure that I'm answering the correct question?

Q Sure.

A Okay. You're wanting me to testify to my question about whether or not you had been turned away or the last time you flew. To me it's one and the same of you can provide me either one. You flying before or you being turned away, it was a broad -- all of this was broad questions to try to elicit an answer.

I realize that you're wanting a specific answer. However, me asking you if you'd been turned away or if you had flown before was me trying to elicit if you had been turned away from a screening checkpoint and if you were going to tell me that you had.

Q Let's go back just one last time. I asked you twice under oath a very simple question; I asked you --

A Okay.

Q I said -- when you asked me "When was the last time you tried to fly before today?" and I told you I answered you, and you agreed, and you said, "Yes, you

answered me." You testified to that twice under oath.

My simple question is, what was my answer to you when you asked me, "When was the last time you tried to fly before today?"

A If it's not in the transcript, then that answer to that question, I do not recall, if that's the question you're asking.

Q You just testified under oath twice --

MS. CLOUTIER: Objection. He's badgering.

Q -- that I did.

MS. DAVIS: Mr. Flint, can you go on to the next question.

MR. FLINT: We can move on. Okay, okay.

MS. DAVIS: She's answered that.

Q All right. Earlier or -- I'm sorry. This was a recorded conversation, correct?

A I couldn't -- just for the court's awareness, I couldn't hear that conversa -- I know there was a conversation going on. I just couldn't hear it.

MS. DAVIS: Yes, ma'am. There was an objection, and I told Mr. Flint to ask another question. You've already answered that question.

THE WITNESS: Okay.

MS. DAVIS: Ask your next question please.

THE WITNESS: Okay. Thank you.

Appendix K – Statutory Provisions

28 U.S.C. § 2241 & 28 U.S.C. § 2255

28 U.S. Code § 2241 - Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless-

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2255 - U.S. Code - Unannotated Title 28. Judiciary and Judicial Procedure § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose

such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory

authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Appendix L – Order Appointing Counsel