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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CLIVEN D. BUNDY,
RYAN C. BUNDY,
AMMON E. BUNDY, and
RYAN W. PAYNE,

Defendants.

2:16-CR-46-GMN-PAL

GOVERNMENT'S MOTION TO RECONSIDER ORDERS DISMISSING INDICTMENT WITH PREJUDICE [ECF Nos. 3116, 3117, 3122]

CERTIFICATION: This motion is timely.

The United States of America, by and through undersigned counsel, respectfully requests that this Court reconsider its orders [ECF Nos. 3116 (minutes of proceedings), 3117 (judgment of dismissal); *see* ECF No. 3122 (transcript of oral ruling)] dismissing with prejudice the superseding indictment against the above-named defendants in this criminal case. The government believes the Court's ruling is clearly erroneous in at least two ways,

1 *i.e.*, 1) it dismissed the superseding indictment with prejudice for "outrageous" and
2 "flagrant" government misconduct predicated on the government's failure to disclose
3 certain documents that could be used only to support the legally non-cognizable and
4 unsupportable defenses of self-defense, "provocation," and "intimidation"; or arguably to
5 rebut three overt acts (out of more than 70) in furtherance of the alleged conspiracy; and 2)
6 even assuming its findings of discovery violations were correct, the Court failed to consider
7 less drastic remedies or tailor the remedy to the violations, as required by Ninth Circuit
8 law. Reconsideration is therefore warranted.

9 **I. INTRODUCTION**

10 The defendants were charged in a 16-count superseding indictment with conspiring
11 to commit several federal offenses, conspiring to impede or injure a federal officer, and
12 committing or aiding and abetting several substantive crimes involving assault, threats,
13 extortion, obstruction, and using firearms during crimes of violence. As described below,
14 the conduct underlying most of the substantive charges squarely forecloses any possible
15 cognizable defense based on the materials the Court found were untimely produced. The
16 government concedes that, in light of a defense theory first articulated on November 8,
17 2017, some of that material is at least arguably relevant to rebut three of the 78 overt acts in
18 furtherance of the conspiracy alleged in the superseding indictment, but its disclosures after
19 that date constitute neither outrageous nor flagrant misconduct.

20 *1. The charges*

21 On April 12, 2014, as alleged in the indictment, BLM officers and civilian
22 contractors were rounding up Cliven Bundy's trespass cattle from public land pursuant to
23 two federal court orders and had about 400 head of cattle corralled at an impoundment site
24 awaiting shipment out of Nevada. ECF No. 27, at 30. At a staging area they had

constructed about five miles away from the impoundment site, the defendants gathered with hundreds of their followers, including armed gunmen who had answered the defendants' calls to come to Nevada to help "secure and return" Bundy's cattle and make the federal government "leave or else." *See id*. at 21-22, 23, 30. After telling them that "God [is] going to be with us," and it was time "to take our land back," Cliven Bundy commanded his followers to go get the cattle. *Id*. at 30.

The gunmen loaded themselves into cars and trucks and drove *en masse* five miles to the impoundment site where, brandishing assault rifles and other firearms, they closed in on the dangerously exposed law enforcement officers guarding a makeshift gate at the entrance to the impoundment site. *Id*. at 30-35. The gunmen assumed tactically superior over-watch positions on the sides of the wash and the bridges above, and moved in and among the unarmed followers, using them as human shields. *Ibid*. The defendants and their followers demanded that the law enforcement officers abandon their duties, abandon the cattle, and leave. For more than two hours, the followers ignored the officers' calls to disperse, and the armed gunmen ignored calls to lower their weapons. To prevent the disaster that was sure to follow if the officers remained, the special agent in charge of the law enforcement action was forced to give in to the defendants' demands, and he ordered his officers to leave. *Id*. at 32-27.

Based on their actions relating to the events at the impoundment site on April 12, 2014, the defendants were charged with assault on a federal officer (Count 5); threatening a law enforcement officer (Count 8); obstructing the due administration of justice (Count 12); interference with interstate commerce by extortion (Count 14); and using and carrying a firearm in relation to a crime of violence (Counts 6, 9, and 15).

1 The superseding indictment also alleged that on April 2, 2014, and again on April 9,
2 2014, Ryan Bundy and others travelled from Nevada to Utah to threaten the auctioneer
3 with whom the BLM had contracted to sell the trespass cattle it was impounding; and that
4 they entered the contractor's property, threatened and intimidated customers and
5 employees, and threatened to shut down the auctioneer's business if he fulfilled his
6 contractual obligations with the BLM. ECF No. 27, at 19-20. It further alleges that, on
7 April 11, 2014, co-defendant Pete Santilli travelled to the impoundment site to confront the
8 BLM special agent in charge, "relaying a message" that "we are going to have a face-to-
9 face confrontation" and warning that any officer who stands down "will not be retaliated
10 against," but "if you make the decision to go face-to-face and someone gets hurt we are
11 going to hold you responsible." *Id*. at 28-29. Based on those events, the defendants were
12 charged with interference with interstate commerce by extortion (Count 13), and
13 threatening a law enforcement officer (Count 7), respectively.
14 In addition, the superseding indictment alleges that, on April 6, 2014, Ryan Bundy
15 and co-defendant Dave Bundy positioned themselves to block a BLM convoy and refused
16 to leave the area when asked to do so, *id*. at 20; and that on April 9, 2014, Ammon Bundy
17 and others intercepted and blocked a convoy of BLM vehicles and, among other things,
18 collided an ATV into a truck in the convoy and threatened physical harm to officers who
19 were protecting the truck and the civilian passengers inside. *Id*. at 24-25. Based on the April
20 9 incident, the defendants were charged with assault on a federal officer (Count 4). Based
21 on both incidents, the defendants were charged with obstructing the due administration of
22 justice (Count 10 and 11).
23 Finally, the superseding indictment charges the defendants with conspiring to
24 commit the above-described federal offenses (Count 1); conspiring to impede or injure a

federal officer (Count 2); and interstate travel in aid of extortion (Count 16). The superseding indictment describes the manner and means of the conspiracy in 10 paragraphs and subparagraphs, *see* ECF No. 27, at 14-16, and articulates more than 78 overt acts in furtherance of the conspiracy, *see id*. at 19-38. Three of those 78 overt acts—paragraphs 84, 88, and 92—allege that the defendants made false claims over the internet to recruit gunmen, including claims that Bundy's ranch was "surrounded by BLM snipers," that the BLM "wanted Bundy dead," and that the Bundy family was "isolated." Count 16 alleges that the defendants travelled in interstate commerce and used the internet in aid of extortion.

2. Proposed defenses

From the beginning of this litigation, these defendants and their co-defendants sought to deflect responsibility and blame the federal government, and in particular the BLM, for their own conduct. Because neither "provocation" nor "intimidation" is a cognizable defense to the charged federal crimes, and because the law enforcement officers never used excessive force (and indeed, used no force at all at the impoundment site), thus foreclosing the availability of self-defense, this Court consistently, and correctly, rejected those efforts.

For example, in October 2016, Ryan Payne filed a discovery motion requesting, among other things, "disclosure of all evidence . . . includ[ing] . . . any information indicating the victim(s) contributed to provoking the offense behavior[.]" ECF No. 862, at 6-7. Without specifically addressing that aspect of Payne's motion, the magistrate judge issued its order, noting that "any request for relief not specifically addressed in this Order is denied." ECF No. 1017, at 8.

In April 2017, during the first trial of the Tier 3 defendants, this Court rejected the defendants' request for a self-defense jury instruction because "the record belies the defendants' contention that the agents used excessive force." ECF No. 2001, at 146-147. The Court explained:

> As far as I can gather, the defendants argue that the following actions by the agents amount to excessive force: Their militarization of Bunkerville; their war-like garb; their weapons; and primarily their raising of guns at the individuals in the wash. However, *this evidence does not support any reasonable inference that these actions constituted excessive force* by the agents in this particular situation under these circumstances.
>
> * * *
>
> The agents did not even attempt to seize or arrest the protestors and I therefore find that no reasonable jury could conclude that the agents' actions constituted excessive force.

Id. at 147, 148 (emphasis added). The Court further rejected those defendants' request for a jury instruction on "justification" explaining, among other things, that "any threat to the defendants was not unlawful. Law enforcement officers were executing their duties in good faith and cannot be unlawful." *Id.* at 150.[1]

Relying in part on those previous rulings, the government, before the trial at issue here, moved *in limine* to exclude evidence purporting to suggest that BLM officers were "militarized"; that they "occupied" the town of Bunkerville; and that they "brutalized" protestors on April 6 and 9, 2014; arguing that such evidence was "nothing more than

[1] The Court reiterated both points during the second trial of the remaining Tier 3 defendants. *See* ECF No. 2267, at 126-127 ("And it's clear that a law enforcement officer is permitted to be in uniform, to take a position during an operation, and to have a weapon. The pointing of the weapon when people are not cooperating and obeying legitimate orders and directions to leave the area, to move back, and so forth, that could not be excessive force. … There was not even any law enforcement officer putting hands on any of the individuals, no attempts, no attempts to arrest, no batons used, no violence, no—so the Court can't find that it's subjectively reasonable to define the force used as being excessive or that there's any evidence that the jury could reasonably find that there was excessive force.").

1 unfairly prejudicial and inadmissible attacks on the victims of these crimes." ECF No.
2 2514, at 16. In response, Cliven Bundy contended that he was entitled to argue
3 "preparation for self-defense to offer an innocent explanation as to why they were armed
4 and prepared to defen[d] themselves from excessive force." ECF No. 2555, at 15. In an
5 October 23, 2017 order, this Court correctly rejected that contention, explaining that the
6 Ninth Circuit recognizes two forms of self-defense to assault on a federal officer: (1)
7 "ignorance of the official status of the person assaulted," and (2) "an excessive force
8 defense." ECF No. 2770, at 5 n.2 (citing *United States* v. *Feola*, 420 U.S. 671, 686 (1975);
9 *United States* v. *Span*, 75 F.3d 1383, 1389 (9th Cir. 1996)). There was no dispute that the
10 defendants were aware of the official status of the person assaulted, and defendants had
11 "failed to establish the elements necessary for the defense." *Id.* at 5. This Court thus ruled
12 that evidence relating to a claim of self-defense "is irrelevant at trial unless Defendants can
13 provide an offer of proof outside the presence of the jury that the defense instruction should
14 apply." *Id.*

15 At the same time, however, the Court rejected the government's request to exclude
16 all evidence of "[p]erceived government misconduct." This Court noted that Payne sought
17 to admit evidence "of the extensive preparations, armament, and defensive capabilities" of
18 the BLM's conduct because it is "relevant to rebut testimony about the subjective fears of
19 the government agents in the wash." ECF No. 2770, at 7 (quoting ECF No. 2568, at 15).
20 Payne also claimed that evidence of alleged misconduct demonstrated bias because it
21 "provides an incentive for these same officers to falsely accuse the protesters and
22 defendants of being responsible for creating a danger in the wash and forcing them to
23 leave," and "is relevant to rebut the government's insistence that it did nothing wrong, and
24 to impeach the testimony of the government's witnesses." *Id.* at 7-8.

Without explanation, the Court found that "at least some of the subject matter pertaining to perceived government misconduct is relevant to defending against these charges." *Id*. at 8. Without specifying what evidence (or types of evidence) or which defense to which it was referring, the Court said "such evidence and testimony supports a defense to Count Sixteen, Interstate Travel in Aid of Extortion pursuant to 18 U.S.C. § 1952; Count Twelve, Obstruction pursuant to 18 U.S.C. § 1503; and Count Five, Assault on a Federal Officer pursuant to 18 U.S.C. § 111(a)(1) and (b)" and that "some of this evidence may be relevant to an excessive use of force defense to Count Five." *Ibid*.[2]

Although the defendants had long argued that evidence of government misconduct could support a claim of self-defense or some other undefined "defense," it was not until a November 8, 2017 hearing—well after both the October 1, 2017 discovery deadline and this Court's October 23, 2017 ruling on the motion *in limine*—that defendants asserted that evidence of a surveillance camera monitoring the Bundy ranch, and evidence of law enforcement officers near the ranch who defendants might perceive to be "snipers," could be used to rebut the overt acts alleged in paragraphs 84, 88, and 92 of the superseding indictment. *See* ECF No. 2886, at 32-35, 62-64.[3] At that November 8, 2017, hearing, the Court credited the defendants' new argument, noting (specifically with respect to the requested information about the surveillance camera) that

[2] One of these references to "Count Five" may have meant to refer to a different count.

[3] The government had by then produced significant discovery relating to the surveillance camera, and the defendants were clearly aware of its presence. *See*, *e.g.*, ECF No. 2902, at 10 (court referencing undercover agent's videotaped interview with defendant Ryan Bundy, which the government produced in discovery in May 2016, in which Ryan Bundy describes knocking down the camera with his ATV). The government had also previously disclosed numerous reports and memoranda documenting federal officers deployed in "tactical positions," "marksmen positions," and "sniper positions," *see* ECF No. 3081, at 33-34 (collecting examples).

> we had a finding by Judge Leen that there was no materiality that had been shown. ... And as I said, it appears from the Court's order that there was no apparent or readily apparent materiality of the item requested, and so the Government does not appear to have acted in bad faith by not providing that.
>
> *But, now*, I believe, this Court believes that the Defense has provided sufficient evidence of materiality and a basis for disclosure of information.

Id. at 91-92 (emphasis added). The Court extended that reasoning to the defendants' request for additional information about law enforcement officers in listening post/observation posts (LP/OP) and officers carrying firearms surveilling the Bundy ranch:

> [T]he materiality that the Court is accepting to be reasonable is that this information is relevant to developing a possible defense to the allegation that false statements were provided about the existence of snipers and being isolated and surrounded, feeling isolated and surrounded…. the fact that a surveillance was conducted, the locations, dates, and … things of that nature so that it could be used by the Defense to demonstrate the reasonableness of their clients' statements of their belief, their interpretation.

Id. at 104-105. To comply with the Court's November 8 order, the government began disclosing additional documents to the defendants, much of which was duplicative of information it had already disclosed, and most of which prompted the defendants to file additional motions to dismiss alleging *Brady* violations based on the government's failure to disclose those documents earlier. *See, e.g.*, ECF Nos. 2848, 2856, 2883, 2906.

3. The Court's December 20, 2017 and January 8, 2018 Orders

On December 20, 2017, this Court declared a mistrial, finding that the government had failed to disclose several items that were relevant to rebut overt acts in the indictment alleging that the defendants knowingly made false representations "about the Bundys being surrounded, about the BLM pointing guns at them, and using snipers." ECF No. 2902, at 8-9. In particular, the Court found the following documents relevant for the following reasons:

1
- *FBI Law Enforcement Operation order and Burke 302 about Agent Egbert*:

2 The Court grouped these two documents together as "information relating to the
3 surveillance camera," specifically referencing page seven of the Law Enforcement
4 Operation order (which includes a notation indicating surveillance via "Internet camera
5 with view of Bundy residence"), and the Burke 302, which summarized an April 6, 2014
6 incident in which Burke was dispatched to investigate the loss of the feed from a
7 surveillance camera monitoring the Bundy ranch and the surrounding area. The Court
8 found these documents "favorable to the accused and potentially exculpatory" because

9 evidence of a surveillance camera, its location, the proximity to the home, and
10 that its intended purpose was to surveil the Bundy home as opposed to incidentally viewing the Bundy home, this information potentially rebuts the
11 allegations of the defendants' deceit which is repeated in the superseding indictment numerous times, including the conspiracy count as an overt act in
12 allegations number 59 [sic], 84, 88, and 92 regarding false representations that were alleged about the Bundys being surrounded, about the BLM pointing guns
13 at them, and using snipers.

14 ECF No. 2902, at 8-9.

15
- *Delmolino 302, Felix 302, and Racker 302*:

16 The Court grouped these three documents together as relating to the BLM's use of
17 "snipers" or "individuals who could have reasonably appeared to be snipers whether or
18 not, in fact, they were," *id*. at 10-11, and found them "favorable to the accused and
19 potentially exculpatory" because

20 [f]or example, the [Delmolino 302] provides information regarding BLM individuals wearing tactical gear, not plain clothes, carrying AR-15s assigned
21 to the LPOP on April 5th and 6th of 2014, which bolsters the defense because it potentially rebuts the indictment's allegations of overt acts, including false
22 pretextual misrepresentations that the Government claims the Defense made about snipers, Government snipers, isolating the Bundy family and defendants
23 using deceit and deception to normally recruit gunmen.

24

1 ECF No. 2902, at 11-12.[4]

2 • *Unredacted FBI TOC log:*

3 The Court found this document "favorable" and "potentially exculpatory," because
4 "it provides information about the family being surveilled by a camera, and specifically lists
5 three log entries using the word 'snipers,' including snipers being inserted and that they
6 were on standby," and thus "would have been potentially useful to the Defense to rebut the
7 indictment's overt acts, specifically the allegations regarding false pretextual
8 misrepresentations." *Id*. at 13.[5]

9 • *Threat assessments:*

10 The Court identified five documents as having been untimely disclosed. It said the
11 2012 FBI BAU Threat Assessment "provided favorable information about the Bundys'
12 desire for a nonviolent resolution," and that the 2012 Southern Nevada Counterterrorism
13 Threat Assessment "noted that the BLM antagonizes the Bundy family, giving the
14 community an unfavorable opinion of the Federal Government, and that they are trying to
15 provoke a conflict, and that the likelihood of violence from Cliven Bundy is minimal." *Id*.
16 at 16. The Court further said the March 24, 2014 FBI order "relies on the 2012 assessment
17 that the Bundy family was not violent, but if backed into a corner, they could be," *id*. at 16-
18 17; that the "Gold Butte Impoundment Risk Assessment" included a "strategic
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20 [4] *But see* ECF No. 2159, at 6 (Ryan Payne acknowledging, in a July 2017 pleading, that a threat assessment report the government produced in May 2017 "makes clear that the
21 Bundy residence was being surveilled 24/7 by means of a covert LP/OP team…equipped with spotting scopes, night vision goggles, thermal imaging devices, and rifles at all times").
22
[5] The government disagrees with this Court's characterization of the government's
23 representations regarding the surveillance camera and snipers. *See* ECF No. 3081 (Gov't Br. re dismissal), at 18-21, 32-34. We believe our discussion of those matters in that brief
24 sufficiently presents our position, and thus we do not address it further here.

communication plan to allow the BLM and the … National Park Service, to educate the public and get ahead of negative publicity," *id*. at 17; and the "BLM OLES Threat Assessment drafted between 2011 and 2012 discusses the nonviolent nature of the Bundy family, quote, will probably get in your face, but not get into a shootout, end quote." *Ibid*.[6]

The Court found that the BLM's failure to implement its strategic communication plan "bolsters the Defense theory that even if the information received by Mr. Payne from the Bundy media campaign was incorrect, that no alternative information was available for him to discover the truth directly from the Government"; and that the assessments collectively "undermine[] the Government theory and the witness testimony about whether the Bundys actually posed a threat in relation to the 2012 and 2014 cattle impoundment operations and whether the BLM acted reasonably." *Id*. at 17.[7]

- *JTTF report prepared on March 14, 2014/IA Report:*[8]

The Court found that the minutes of a Joint Terrorism Task Force meeting dated March 14, 2014 were "favorable to the accused" and "potentially exculpatory" because they showed that the BLM special agent in charge "requested for the FBI to place a surveillance camera"; and that an internal affairs report was likewise favorable and potentially exculpatory because it "suggests that there was no documented injury to the

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[6] The government disagrees with this Court's characterization of the findings in those threat assessments, *see* ECF No. 3081, at 37-43. We believe our discussion of the assessments in that brief sufficiently presents our position, and thus we do not address it further here.

[7] Moreover, discovery produced to the defendants in March 2017 belies any assertion that the government failed to disclose that pre-impoundment threat assessments anticipated a low risk for violent action. *See* Sealed Exh. 1, at 13-15.

[8] The Court noted it had previously misidentified the JTTF report as an internal affairs report. ECF No. 3122, at 14.

tortoises by grazing, and this information would have been useful to potentially impeach Ms. Rugwell who testified that there had been a detrimental impact on the desert tortoise habitat." ECF No. 2902, at 19.

In addition to the above, the Court also found that "maps provided on December 15th of 2017" which "were in existence for dates in question… do appear to be *Brady* information" and "do appear to have been withheld willfully and they do prejudice the Defense." *Id*. at 15.[9] The Court gave no explanation for those findings.

On January 8, 2018, the Court dismissed the indictment against these defendants with prejudice, finding that the *Brady* violations it identified on December 20, 2017 constituted "outrageous government conduct" amounting to "a due process violation," and "flagrant prosecutorial misconduct" warranting dismissal under the court's supervisory powers. Although the Court's December 20 findings based the relevance of these documents on their value in rebutting specific overt acts in the indictment, it found in its January 8 ruling that the government's "representations that it was unaware of the materiality of the *Brady* evidence is grossly shocking," because it was "on notice" after the Court's October 23, 2017 order "that a self-defense theory may become relevant if the defense was able to provide an offer of proof." ECF No. 3122, at 10 (citing ECF No. 2770). Thus, the Court said, "the government was well aware that theories of self-defense, provocation, and intimidation might become relevant if the defense could provide a sufficient offer of proof to the Court."[10]

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[9] *But see* ECF No. 3081, at 35 & Exh. 13 thereto (maps the government produced in June 2016 showing the drop point locations and LP/OP near the Bundy residence).

[10] *But see* ECF No. 2770 (order containing no reference to defense theories of "provocation" or "intimidation," and reference to self-defense correctly citing the requirements under *Span*).

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II. POINTS AND AUTHORITIES

A. Standards for Reconsideration

The district court has inherent jurisdiction within the time allowed for appeal to modify its judgment for errors of fact or law or even to revoke a judgment. *United States* v. *Villapudua-Perada*, 896 F.2d 1154, 1156 (9th Cir. 1990) (citing *United States* v. *Jones*, 608 F.2d 386, 390 (9th Cir. 1979)).[11] "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law." *Frasure* v. *United States*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2004) (quoting *School Dist. No. 1J, Mutlnomah County, Or.* v. *ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

B. The Court Erred When It Dismissed the Indictment with Prejudice on the Ground That the Government Failed to Disclose Information That Could Be Used Only to Support Non-Cognizable and Unsupportable Defenses, or Arguably to Rebut Three Alleged Overt Acts.

There has never been any dispute that armed federal officers positioned themselves on public land so they could surveil the Bundy ranch to watch for signs of impending interference with the operation, and that at least for a time, they used a camera to assist with that surveillance. Whether those actions were necessary or reasonable, or whether the surveilling officers could be viewed as snipers, does not justify the defendants' criminal acts in interfering with the officers' lawful actions as charged in the indictment. It is undisputed

[11] Because this motion for reconsideration is filed within the time allowed for the government to appeal the Court's ruling, *see* Fed. R. App. P. 4(b)(1)(B), any notice of appeal from that ruling will be timely if filed within 30 days of the Court's ruling on this motion. *See United States* v. *Dieter*, 429 U.S. 6, 8 (1976) ("the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending") (citing *United States* v. *Healy*, 376 U.S. 75 (1964)); *United States* v. *Ibarra*, 502 U.S. 1, 2 (1991) (same).

1 that the surveilling officers never used force against defendants while conducting
2 surveillance; they were merely present in proximity to Bundy ranch. Settled law makes
3 clear that there is no defense of self-defense in the absence of an actual use of excessive
4 force; mere presence is insufficient. In these circumstances, the Court erred in holding that
5 the late-disclosed information would support any cognizable defenses.

6 *1. Analytical framework for the affirmative defense of self-defense, and the purported affirmative defenses of "provocation" and "intimidation"*

7 This Court's January 8, 2018 determination that the government's failure to disclose
8 information was "grossly shocking" and "flagrant misconduct" rested on its determination
9 that, after October 23, 2017, "the government was well aware that theories of self-defense,
10 provocation, and intimidation might become relevant if the defense could provide a
11 sufficient offer of proof to the Court" and that "the prosecution denied the defense its
12 opportunity to provide favorable evidence to support their theories as a result of the
13 government's withholding of evidence." ECF No. 3122, at 10-11.

14 But federal law does not recognize an affirmative defense of "provocation" or
15 "intimidation" to any of the charges in the indictment. Indeed, defendants have never cited
16 any cases supporting their "provocation" or "intimidation" arguments. And the
17 government has only been able to find cases rejecting similar arguments. *See United States* v.
18 *Taylor*, 680 F.2d 378, 380 (5th Cir. 1982) (federal officer's words to a defendant, no matter
19 how outrageous or provoking, provide no legal basis for assaulting the federal officer);
20 *United States* v. *Sovie*, 122 F.3d 122, 126 (2d Cir. 1997) ("Insofar as [the defendant] claims
21 that provocation is a justification or excuse constituting a legal defense to the crime
22 [threats], we disagree."); *United States* v. *Wilson*, 698 F.3d 969, 972 (7th Cir. 2012) (a claim
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1 of self-defense resting on an impermissible basis, such as being provoked by the victim's
2 race, is a motive that aggravates, rather than mitigates, the defendant's culpability).

3 To be sure, federal law does recognize an affirmative defense of self-defense to the
4 charge of assault on a federal officer (though not to extortion, obstructing the
5 administration of justice, or other charges in the indictment). But that affirmative defense is
6 available only in two limited circumstances: 1) when a defendant uses force to resist an
7 attack by someone he or she honestly and reasonably believes is not a law enforcement
8 officer;[12] or 2) when a defendant resists an excessive use of force by a law enforcement
9 officer, and in doing so uses no more force than appeared reasonably necessary in the
10 circumstances. *See generally United States* v. *Span*, 970 F.2d 573 (9th Cir. 1992). As to the
11 former, there has never been any dispute that the defendants were fully aware of the status
12 of the law enforcement officers here. As to the latter, there has never been any dispute that
13 the officers used no force, let alone excessive force, on April 12.[13] And while officers did
14 use force during the April 9 incident, the defendants never linked their self-defense theory
15 to Count Four, charging assault on April 9. Defendants have neither claimed nor produced
16 evidence that the force used on April 9 was excessive, nor have they disputed that Ammon
17 Bundy first attacked the officers. "An individual who is the attacker cannot make out a
18 claim of self-defense as a justification for an assault." *United States* v. *Acosta-Sierra*, 690 F.3d
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20 [12] Although a defendant's knowledge that a victim is a federal officer is not an element of 18 U.S.C. § 111 and need not be proven beyond a reasonable doubt, *see*, *e.g.*, *United States*
21 v. *Feola*, 420 U.S. 671, 684 (1975), the Ninth Circuit recognizes "a defense to assaulting a federal agent based on the defendant's honest mistake of fact or lack of knowledge that the
22 victim was a law enforcement officer." *Span*, 970 F.2d at 576–77.

23 [13] *Cf. California* v. *Hodari D.,* 499 U.S. 621, 625-26 (1991) (explaining that the mere show of authority, without the application of physical force by the police, does not
24 constitute a seizure). Similarly, the presence of armed officers on the scene does not constitute excessive force absent the application of physical force.

1111, 1126 (9th Cir. 2012); *accord United States* v. *Branch*, 91 F.3d 699, 714 (5th Cir. 1996) ("It is a necessary precondition to the claim of self-defense that the defendants be free from fault in prompting [law enforcement's] use of force."); *United States* v. *Wagner,* 834 F.2d 1474, 1486 (9th Cir. 1987) ("Wagner's role as the aggressor . . . deprives him of the right to assert [self-defense]."); *United States* v. *Urena*, 659 F.3d 903, 907 (9th Cir. 2011) ("the evidence was undisputed that it was [the defendant] who was the attacker, and thus he could not in those circumstances successfully urge a self-defense theory").[14]

None of the information at issue in the Court's dismissal Order relates to self-defense. The information about LP/OP, a surveillance camera, and the presence of FBI SWAT or snipers relates to events that occurred between April 5 and April 8, 2014, long before any of the events of April 9 and April 12, altogether failing the immediacy requirement of a self-defense defense. But even more to the point, none of this information shows that *any* federal officer used *any* force at all against *any* of the defendants. The presence of law enforcement officers engaged in lawful law enforcement activity cannot legally justify an assault on or interference with the officers, even if the defendant believes the officers are rogue or "over-militarized." *See Branch*, 91 F.3d at 714 ("We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers. Other, non-violent remedies are available.") (citation omitted).

Although not directly on point, *Kentucky* v. *King*, 563 U.S. 452 (2011), is instructive. There, the Supreme Court held that by knocking and announcing on the door of an

[14] Moreover, even assuming that defendants had a potentially cognizable self-defense theory in relation to assault charge for the April 9 incident, none of the late-disclosed information was relevant to show either that the officers first used force on April 9 or that, if they did, such force was excessive. Instead, the evidence in question relates only to the government's preparations for impoundment, and officers' activities from April 5 to April 8.

apartment, an entirely lawful action, officers do not impermissibly create an exigency, whether or not their actions were contrary to "standard or good law enforcement practices." *Id*. at 467. Thus, the Court held that the occupants of the apartment cannot blame the officers for their unlawful response of destroying evidence merely because the officers knocked loudly. Likewise, in *County of Los Angeles* v. *Mendez*, 137 S. Ct. 1539 (2017), the Supreme Court rejected the Ninth Circuit's provocation rule, which had permitted an excessive force claim where an officer "provoked" the confrontation—and then reasonably fired in self-defense—by violating the Fourth Amendment through an illegal entry. As the Court explained, excessive force claims require the claimant to show that the use of force itself was unreasonable, and the lawfulness of police activity leading up to the use of force is irrelevant. *Id*. at 1547 ("An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry."). The Supreme Court explained that "[b]y conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms." *Ibid*. *Mendez* is an apt analogy here, as the defendants appear to be arguing they are entitled to evidence to support their allegations of earlier "unreasonable" conduct by the law enforcement officers, and allegedly "provocative" actions between April 5 and April 8, to mount a self-defense (or "provocation" or "intimidation") defense to the events underlying the substantive charged crimes which occurred at times and in places where officers used no excessive force.

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2. The Court's ruling is erroneous to the extent it was based on a premise that Brady *requires the government to produce discovery to help defendants "develop" non-cognizable defenses.*

3 To the extent the Court's dismissal with prejudice is predicated on the materiality of
4 the late-disclosed evidence to defendant's theories of "self-defense, provocation, and
5 intimidation," it is in error. Because these theories are not cognizable on the undisputed
6 facts, they cannot form the basis of a *Brady* violation.

7 *United States* v. *Isgro*, 974 F.2d 1091 (9th Cir. 1992), *as amended on denial of reh'g*
8 (Nov. 25, 1992), is instructive. There, a government witness (DiRicco) had been convicted
9 in a different federal court a few years earlier, at a trial in which he testified and proclaimed
10 both his own innocence and the innocence of Isgro and his co-defendants. *Id*. at 1093.
11 DiRicco later testified in a grand jury against Isgro and the others. The prosecutor had a
12 transcript of DiRicco's earlier (inconsistent) trial testimony, but he did not provide it to the
13 grand jury, did not disclose it to the defense, and misrepresented its contents to the district
14 court. *Ibid*. When the district court learned of this, it dismissed the indictment with
15 prejudice, finding that the government "had misled the grand jury by not presenting
16 DiRicco's testimony, had lied to the court about the existence and nature of the *Brady*
17 material, and had intended to keep the material from the defense even through trial," and
18 that dismissal with prejudice was warranted "[o]n the basis of this cumulative misconduct."
19 *Id*. at 1094.

20 The Ninth Circuit reversed the dismissal. Among other things, the court of appeals
21 found that the district court erred in concluding that the government "violated the
22 defendants' constitutional rights to a fair Grand Jury hearing," because "prosecutors
23 simply have no duty to present exculpatory evidence to grand juries." *Id*. at 1096. Because
24 the defendants' constitutional claim was that "the grand jury was deprived of its ability to

1 make an informed or independent decision" by the prosecutor's actions, but in fact the case
2 law squarely "rejects the idea that there exists a right to such 'fair' or 'objective' grand jury
3 deliberations," the court of appeals found "no abrogation of constitutional rights sufficient
4 to support the dismissal of the indictment." *Ibid*.[15]

5 Similarly, in *United States* v. *Vallie*, 284 F.3d 917 (8th Cir. 2002), the court of appeals
6 found no *Brady* violation in the government's failure to produce the victim's toxicology
7 report before trial. The court reiterated that "[t]o prove a *Brady* violation a defendant must
8 show that the prosecution suppressed the evidence, the evidence was favorable to the
9 accused, and the evidence was material to the issue of guilt or punishment," *id*. at 920
10 (internal quotation marks and citation omitted). The court of appeals found no *Brady*
11 violation "because [the victim's] intoxication was not a defense to the crimes with which
12 Vallie was charged." *Id*. at 920-921. *See also Zimmerman* v. *United States*, No. 3:02-CR-156-3,
13 2011 WL 744509, at *15 (W.D.N.C. Feb. 23, 2011) (no *Brady* violation in the
14 government's failure to disclose documents conditionally authorizing the petitioner to issue
15 certain loans because such authorization "is not relevant to the issue of whether the
16 Petitioner and his codefendants were authorized to engage in the practices at issue in the
17 trial").

18 So too here. This Court concluded that the government violated the defendants'
19 constitutional rights by failing to disclose information from which they might have been
20

21 [15] The Court also reversed the district court's dismissal under its supervisory powers. *Isgro*, 974 F.2d at 1099. It emphasized that "dismissal of an indictment, particularly with
22 prejudice, is a drastic measure" that "implicates separation-of-powers principles," and that "dismissal exercised under the guise of 'supervisory power' is impermissible absent 'a clear
23 basis in fact and law for doing so.'" *Id*. at 1097-1099. Although the court of appeals found the prosecutor's misrepresentations to the district court and the defendants "intolerable" and
24 worthy of sanction, it concluded that, under the circumstances presented, "dismissing the indictment is simply an unwarranted 'windfall' to the defendants." *Id*. at 1099.

1 able to develop theories of "self-defense," "provocation," and "intimidation." But
2 provocation and intimidation simply are not cognizable defenses. And while self-defense is
3 cognizable to a charge of assaulting a federal officer if the defendant shows that he used no
4 more force than appeared reasonably necessary to resist an excessive use of force by a law
5 enforcement officer, none of the untimely produced discovery shows *any* use of force by
6 law enforcement. The government's "failure" to produce information to help the
7 defendants develop a "defense" they had no right to make does not violate *Brady*.
8 Indeed, even when defendants assert a *Brady* violation based on the government's
9 alleged failure to produce information regarding a legally cognizable defense (such as
10 entrapment, duress, or self-defense), courts routinely reject such arguments where there are
11 simply no facts to support such defense. In *United States* v. *Ross*, 372 F.3d 1097 (9th Cir.
12 2004), for example, the defendant argued that the government's failure to disclose that an
13 agent had illegally procured a green card for an informant violated *Brady* because he could
14 have used the information to support an entrapment defense. The Ninth Circuit rejected
15 that argument, noting that the information was "only relevant, if at all, to the inducement
16 element of the entrapment defense," and the defendant did not argue that the agent's
17 conduct itself constituted inducement, but "only that it was indicia of a pattern of
18 government misconduct in the course of Ross's prosecution." The court of appeals held
19 that "[s]uch an attenuated argument is insufficient 'to put the whole case in such a different
20 light as to undermine confidence in the verdict.'" *Id*. at 1109 (*quoting Kyles* v. *Whitley*, 514
21 U.S. 419, 435 (1995)); *see also United States* v. *Sangalang*, No. 2:08-CR-163-JCM-GWF, 2012
22 WL 1574822, at *3 (D. Nev. May 3, 2012), aff'd, 580 F. App'x 597 (9th Cir. 2014) (citing
23 *Ross* and rejecting *Brady* claim concerning nondisclosed information about an informant
24 that said nothing about defendants' predisposition); *United States* v. *Esposito*, 834 F.2d 272

1 (2d Cir. 1987) (where defendant was charged with criminal contempt for refusing to obey a
2 court order to testify before a federal grand jury and alleged the government had
3 improperly failed to disclose evidence in its possession concerning his fear of testifying
4 which, he argued, would have supported a defense of duress, the court rejected his *Brady*
5 claim because a duress defense "requires actual or threatened force of such nature as to
6 induce a well-founded fear of impending death or serious bodily harm coupled with no
7 reasonable opportunity to escape the compulsion without committing a crime," and the
8 nondisclosed evidence would not have supported that defense) (internal quotation marks
9 omitted); *Gutierrez* v. *Thaler*, No. A-06-CA-917-SS, 2011 WL 3606794, at *5 (W.D. Tex.
10 Aug. 16, 2011) (rejecting state habeas petitioner's *Brady* claim based on state's failure to
11 disclose reports which allegedly would reveal witnesses who might testify to the victim's
12 violent character, because "the use of deadly force is only justified under a self-defense
13 theory if the victim first used or attempted to use deadly force" and the "witnesses could
14 not have testified to this question of fact").

15 *3. The Court's finding of "shocking" and "outrageous" misconduct that offends "a*
16 *universal sense of justice" is unwarranted to the extent that it was based on the*
government's failure to anticipate a theory the defendants first raised on November 8,
17 *2017, and which the Court also did not anticipate prior to that date.*

18 The Court's January 8 ruling was predicated on the government's purported failure
19 to produce materials relevant to theories of self-defense, provocation, and intimidation.
20 Conversely, its December 20 order found *Brady* violations based on the government's
21 failure to produce evidence potentially relevant to rebut the overt acts alleged in paragraphs
22 84, 88, and 92 of the superseding indictment. Dismissal with prejudice is an inappropriate
23 sanction for any such violations relating to the overt acts.

24

First, the defendants did not suggest (and the Court did not accept) that basis for the information's relevance or materiality until November 8, 2017. *See* ECF No. 2886, at 32-35, 62-64. Second, the overt acts in question were but three of the 78 charged overt acts, and were unnecessary to establish the elements of any of the charged offenses. Third, the Court itself explicitly found that this potential value of the information was not readily apparent until the defendants identified that new basis. *See id*. at 91-92 (noting that "there was no apparent or readily apparent materiality" to information regarding the surveillance camera prior to the defendants raising the issue of the overt acts at the November 8 hearing, "*But, now*, … the Defense has provided sufficient evidence of materiality and a basis for disclosure of information") (emphasis added).

Once the defendants articulated the potential value of the material to rebut those three overt acts in the superseding indictment, and the Court accepted that basis and ordered disclosure, the government quickly began reviewing its database and disclosing additional information to comply with that order. And, as the government previously explained, *see* ECF No. 3081, most of the information the government subsequently produced was duplicative of evidence it had timely produced before trial. With respect to the overt acts, then, the government's conduct was neither shocking nor flagrant.

C. The Court Erred By Failing to Consider Lesser Sanctions.

Both the Supreme Court and the Ninth Circuit have "repeatedly pointed out that dismissal of an indictment, particularly with prejudice, is a drastic measure." *Isgro*, 974 F.2d at 1098. "Accordingly, the Supreme Court has cautioned that when faced with prosecutorial misconduct, a court should "tailor[ ] relief appropriate in the circumstances." *Ibid*. (quoting *United States* v. *Morrison*, 449 U.S. 361, 365 (1981)); *see Morrison*, 229 U.S. at 365 ("Our

approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances…").

As explained above, the government's untimely disclosure of mostly duplicative information regarding law enforcement's preparation for the impoundment and security activities during the impoundment did not hamper the defendants' ability to "develop" any valid claim of self-defense, "provocation," or "intimidation." And the government's failure to anticipate the defendants' argument regarding that information's value in rebutting three overt acts alleged in the indictment was neither flagrant nor outrageous because, as this Court itself noted, the materiality of the evidence was not apparent until the defendants advanced that argument. But even if remedies are required or sanctions are warranted, several lesser sanctions would have been sufficient to remedy any violations.

To the extent the Court concluded that the nondisclosure hampered the defense's ability to rebut specific allegations in the indictment, it could have ordered those allegations stricken from the indictment and precluded the government from introducing evidence to support those claims. If the government were precluded from arguing that the defendants' representations about being "surrounded by snipers" and "isolated" were false, late disclosure of material with which the defendants could dispute the falsity of those representations would not be prejudicial.

If the Court deemed that remedy insufficient, it could have considered dismissing Count 1, the conspiracy count which requires proof of an overt act. Even though proof of any of the other 75 overt acts alleged in the superseding indictment could have satisfied the overt act element in Count 1, the Court might have found dismissal of that count appropriate to remedy any prejudice the defendants suffered to their ability to rebut the acts alleged in paragraphs 84, 88, and 92. The Court might also have concluded that dismissal

of Count 16, which makes reference to the defendants' use of the internet in aid of extortion, was necessary to remedy any prejudice. Indeed, the Court might have considered dismissing both conspiracy counts and Count 16.

Dismissal of one or more counts would be an extreme sanction, to be sure, but less drastic than dismissing the entire indictment, and more appropriate given the nature of the *Brady* violations the Court found. Even under the Court's interpretation of the government's *Brady* obligations, and its stated findings regarding the potential value of the late-disclosed material, dismissal of the counts to which that material related would have entirely remedied the violations. As explained above, nothing in the untimely produced material could possibly assist the defendants in developing any legally cognizable defense to the remaining counts.

Finally, of course, the Court could have dismissed the case against these defendants without prejudice as a sanction. *See*, *e.g.*, *United States* v. *Taylor*, 487 U.S. 326, 342 (1988) ("Dismissal without prejudice is not a toothless sanction" because, among other things, "it forces the Government to obtain a new indictment if it decides to re-prosecute").

Accepting the defendants' argument, the Court found that retrying the case would "only advantage the government," because the prosecution could strengthen its witnesses' testimony "based on the knowledge gained from the information provided by the defense and revealed thus far," "perfect its opening statements based on the revealed defense strategy," and "conduct more strategic *voir dire*." ECF No. 3122, at 20. In reaching those conclusions, however, the Court was considering only two options: dismissal with prejudice, or retrying the case on the same charges. It must go without saying that if the Court were to tailor the relief to "neutralize the taint" of the misconduct the Court found by precluding the government from making any arguments based on the overt acts alleged in

paragraphs 84, 88, and 92, or dismissing the counts to which those allegations related, those identified advantages to the government would disappear.

D. Dismissal with Prejudice Is Unwarranted and Unjust.

The defendants in this case have repeatedly asserted that they do not recognize the federal government's authority over them or its regulatory authority over the public lands. In this country, they have the right to hold those beliefs, and to espouse them in any lawful manner. But they are not—and were not—entitled to obstruct federal officers' enforcement of lawful court orders, threaten force against those officers, or extort civilian contractors supporting the officers simply because they disagree with the court order or thought the officers used "intimidating" or "provocative" tactics in preparing to enforce it. Just as a defendant cannot threaten with an assault rifle a SWAT team preparing to execute a search warrant because he thinks the warrant lacks probable cause or because he believes the deployment of a SWAT team is an unnecessarily aggressive method of executing a warrant, the defendants here cannot excuse their threats to officers based on their disagreement with the court orders or the officers' manner of conducting pre-impoundment surveillance and security.

The grand jury alleged that these defendants threatened the lives of more than 20 law enforcement officers in an effort to rid themselves of the BLM and the regulatory authority it represented. They risked injury and death to innocent men, women, and children in the wash and to the everyday line officers who were simply doing what they were told to do, none of whom had anything to do with the policies or enforcement decisions that brought them there. The defendants and their supporters demonized the uniformed men and women in the wash, conflated their jobs with their identities, and claimed that their work was immoral.

This case has major ramifications for all public lands law enforcement officers. These officers often work alone in remote rural areas of the country with no available back-up if confronted with danger. Dismissing this entire case with prejudice, based on the government's non-disclosure of mostly duplicative evidence of law enforcement's pre-impoundment surveillance and preparation, would encourage the defendants, their supporters, and the public to disrespect the law and the lawful orders of the courts. More importantly, predicating dismissal of the indictment on the non-cognizable defenses of "provocation" and "intimidation" removes the "maximum protections" that the Congress afforded federal officers under the law. *See Feola*, 420 U.S. at 1264. Dismissal predicated on this basis increases the risk of danger to federal officers executing their duties, subjecting them to assaults and threats that can be defended beyond the limited right of self-defense afforded under *Span*, and extending to any claim by an assailant that he or she was irritated or frightened into attacking the officer simply because of the officer's presence. Given the nature of the violations the Court found, and the availability of more carefully tailored remedies, such dismissal is unnecessary and unwarranted. Reconsideration is appropriate.

1 **III. Conclusion**

2 **WHEREFORE**, for all the foregoing reasons, the government

3 respectfully requests that the Court reconsider its Order dismissing with prejudice the

4 superseding indictment against these defendants, and either reinstate the entire

5 indictment, or tailor a remedy to the violations.

6 **DATED** this 7th day of February, 2018.

7 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **GOVERNMENT'S MOTION TO RECONSIDER ORDERS DISMISSING INDICTMENT WITH PREJUDICE** was served upon counsel of record via em/ecf and to Pro Se Defendant, Ryan C. Bundy, at the following email address:

c4cfforall@gmail.com

DATED this 7th day of February, 2018.

s/Elizabeth O. White
ELIZABETH O. WHITE
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