No. 13-30000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

FRANCIS SCHAEFFER COX,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
THE HONORABLE ROBERT J. BRYAN

ANSWERING BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA,	)	CA No. 13-30000
	)	
Plaintiff/Appellee,	)	DC No. 3:11-cr-00022-RJB
	)	U.S. District Court for Alaska,
vs.	)	Anchorage
	)	
FRANCIS SCHAEFFER COX,	)	
	)	
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ER.....Excerpt of Record

AOB .....Appellant's Opening Brief

PSR .....Pre-Sentence Report

SER.....Supplemental Excerpts of Record

AER .....Appellee's Excerpts of Record

TABLE OF AUTHORITIES

Cases

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STATEMENT OF ISSUES PRESENTED

I. Whether the trial court committed plain error in instructing the jury on the conspiracy to murder federal officials.

II. Whether this Court should decline to consider Cox's ineffective assistance of counsel claim on direct appeal when there is no evidence that Cox was denied effective assistance of counsel.

III. Whether, viewing the evidence in the light most favorable to the United States, any rational juror could have found Cox guilty of conspiring to murder federal officials and soliciting others to murder a federal official.

IV. Whether the trial court properly admitted evidence of Cox's statements and information about groups with which he was involved.

STATEMENT OF JURISDICTION & BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on January 8, 2013. ER 2-8. On January 9, 2013, Cox filed a timely Notice of Appeal. ER 1.

This Court has jurisdiction to review the defendant's convictions under 28 U.S.C. § 1291.

Cox is serving his sentence, and his projected release date is October 3, 2033.

STATEMENT OF THE CASE

I. INTRODUCTION

Cox was indicted with two co-defendants, Coleman Barney and Lonnie Vernon, in a 16-count indictment charging a conspiracy to murder federal officers and employees, solicitation to murder a federal official, conspiracy to possess unregistered silencers and destructive devices, and other weapons violations. ER 9-32. After a lengthy jury trial, Cox was convicted of all counts, except those charging Cox with carrying a firearm during a crime of violence. SER 1-4. The case was presided over by Senior United States District Judge Robert J. Bryan (W.D. Washington).

Cox was the commander and leader of the Alaska Peacemakers Militia, a "sovereign citizen" group, based in Fairbanks, Alaska. Co-defendant Barney had the rank of "major" in Cox's militia and co-defendant Vernon was a "sergeant." Between 2009 and 2011 when they were arrested, Cox and the others conspired and planned to murder federal officials, including federal law enforcement officers, U.S. Marshals, Transportation and Security Administration (TSA) employees, and a Department of Homeland Security (DHS) employee,

as well as state officials including Alaska State Troopers, state court judges, and a State of Alaska Office of Children's Services (OCS) employee.

During the conspiracies and until they were arrested, Cox, Barney, and Vernon possessed a number of illegal and unregistered firearms and destructive devices and were trying to get more. Cox and Barney had a trailer that contained a fully automatic machinegun, a silencer attached to a .22 pistol, numerous semi-automatic assault rifles, thousands of rounds of ammunition, tannerite, 17 grenade bodies, grenade fuses, 28 OC gas canisters, CS gas canisters, 37mm launchers, and "Hornet's Nest" anti-personnel rounds. In addition, the defendants had weapons, legal and illegal, in their homes and vehicles.

Cox repeatedly threatened federal and state officials during the conspiracies and took steps to act upon those threats. For instance, Cox gathered information about federal and state employees that he wanted killed in the event he was arrested or in case of a "government collapse." The defendants shared beliefs that the current government was no longer operating under the rule of law, but under the rule of force. They considered themselves sovereign citizens. Cox and others developed a

plan they called "2-4-1" which entailed, in the event that Cox or any militia members were killed, Cox and the others killing two other people (such as federal law enforcement officers and judges) in return. Cox also believed that there was a federal plot to kill him and his family and that the federal government was behind OCS's efforts to take his son away from him.

Because Cox challenges the sufficiency of the evidence, the details of the conspiracy need to be laid out in some detail. As will be seen below, Cox began with rhetoric and angry encounters with federal and state personnel, but by the time of his arrest he had developed a plan for the imminent murder of federal officials, stockpiled his arsenal of weapons, and enlisted others to join him.

II. FACTS OF THE CASE

A. Fall 2009 – March 2011

In the fall of 2009, Cox traveled outside Alaska and made a number of speeches related to the right to bear arms at meetings and

conventions. *See* Exs. 917-921;[1] ER 652, 704, 707; AER 236-45, 1065-69, 1091, 1094-96, 1144-67, 1613-20; Cox Ex. FSC-6. Cox spoke about his previous interactions with law enforcement, including the TSA. AER 1613-20. He also described his development of the "Liberty Bell network," a functioning "common law court," and a militia. *Id*. He discussed the command structure of his militia and claimed that he had a 3500-man force that was equipped with GPS jammers, cell phone jammers, bombs, rocket launchers, grenade launchers, claymores, machine guns, and other items. *Id*.

1. Cox tasks others to compile information on federal and state officers and employees to kill

Back in Alaska, Cox and Michael Anderson met in Fairbanks and plotted their strategy if the government declared martial law. AER 266-67. Cox and Anderson agreed government leaders would have to be killed. AER 268-69. Anderson testified: "It was just generally if it

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[1] Unless otherwise noted, the citations are to the government's trial exhibits. The recordings were the evidence at trial. For ease of reference, the government includes the transcripts in the record, however the recordings are available should the Court wish to review them.

comes to that, you know, we'd have to identify who was doing it and take them out before they could come for us, and – I mean, kill them before they could come for us." AER 268. Cox and Anderson decided to create a list or database that would contain the names of government officials, together with their home address information, they would kill when martial law took effect. AER 268, 271-75.

In spring 2010, Cox asked Anderson about the progress of the database, and told Anderson that he thought there was a federal "hit team after [Cox] and [Cox] wanted to know who they might be and where they might be." AER 315-16. Anderson and Cox discussed how to gather information about federal officials. AER 317-18, 321-22. During that conversation, Anderson sketched the federal building in Fairbanks, and the men discussed conducting surveillance. AER 321-23; AER 1571. Also at that meeting, Cox provided Anderson with the names of Alaska State Troopers G.T., B.B., and R.W. to include in the database. AER 317-20, 1571. Cox also provided Anderson with the names of three federal officials, N.C. with "DHS border control," T.S. with "DHS," and T.B. with "TSA." AER 323-25, 1571. Anderson wrote down this information from Cox. AER 323. Regarding TSA employee

T.B., Cox told Anderson: "She's someone I know who goes to my church, a nice lady, but, you know, one day she may just follow orders and she may have to go." AER 325.

Anderson's notebooks reflecting some of the information for the database were admitted at trial. AER 1570-72; ER 620. On the same page of Anderson's notepad where the names of federal employees N.C., T.S., and T.B. appear, there was also a notation at the top of the page with phone numbers and the name "Vernons" with two lines indicating "I need names of Federal Marshals" and "Paperwork from Vernons?" AER 1571. After that meeting with Cox, Anderson looked on the internet for "'federal marshal' something or other." AER 328-31. On a page in his notebook, Anderson wrote "Federal Hit List" at the top, then wrote "[J.J.]; Federal Marshal; Anc."[2] ER 620. Anderson testified that for the database he collected home addresses, standard addresses, street addresses, plot numbers from the State of Alaska Department of Natural Resources, and public information using Google website searches. AER 271-72, 312.

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[2] J.J. is a Deputy United States Marshal based in Anchorage, Alaska. AER 411-12.

Cox also directed Anderson to compile information about several Alaska State Troopers. AER 318-20, 326-27, 331-35. For example, Cox called Anderson and gave him the names R.W. and L.P. AER 326-27, 1572. Also, in the fall of 2010, Cox called Anderson and asked him to find out where Alaska State Trooper M.J. was based. AER 331. Anderson told Cox that M.J. worked in Fairbanks. AER 333.

Later, in February 2011, Cox provided Trooper M.J.'s information to one of the government cooperating witnesses, Gerald "J.R." Olson, on a post-it note. AER 721-31, 1278-1294, 1498-99. Cox described Trooper M.J. as the "the guy we've been having problems with." AER 1288-89. The post-it note showed Trooper M.J.'s name, with property lot and block number information.[3] AER 332-35. In addition, the post-it note included personal information about Trooper M.J., that he was "former Army." AER 1288-89, 1498-99. Cox provided Olson with Alaska State Troopers' personal addresses "to add them to the list and to – to have available for [them] if [Cox] initiated 241." AER 729.

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[3] At trial, Trooper M.J. testified that the information on the post-it note accurately reflected the location of where he was living in 2007. AER 434-36.

2. Cox instigates confrontations with his targets[4]

Cox instigated confrontations with federal officials, including TSA employees T.B., D.B., and J.H., and DHS employee N.C., and with state officials, including Alaska State Trooper R.W. AER 418-25, 439-40, 446-47, 450-71, 903-09, 911-20.

TSA employee T.B. had hosted lunches at her house for college students from her church, which Cox attended (including wear body armor once). AER 911-14. At one point Cox called T.B. and asked whether he was on the "no-fly" list. AER 914-15. T.B. refused to provide Cox with that information and told T.S., the federal security director at the airport in Fairbanks, that Cox attempted to obtain that information from her. AER 915-16. T.B. was added to Cox's "hit list." AER 1571.

Cox approached DHS employee N.C. when she was off-duty but in uniform at Walmart with her daughter. AER 419-23. N.C. described

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[4] TSA employees T.B. and D.B., DHS employee N.C., Alaska State Troopers R.W. and M.J., and State of Alaska OCS employee W.W. each testified regarding their interactions with Cox. AER 371-77, 418-36, 439-40, 446-47, 450-71, 903-09, 911-920.

Cox as "confrontational, a little bit aggressive." AER 421. After learning that she worked for U.S. Customs, Cox said "something to the effect of [she] was okay if [she] worked for Customs, but he doesn't like to see a lot of feds, basically, in Fairbanks." AER 420. Cox told her that "he didn't believe [Department of Homeland Security] was a legally formed department within the government" and that he had a few thousand armed men in his militia. AER 422. Nevertheless, DHS employee N.C. was also added to Cox's "hit list." AER 1571.

In January 2010 Cox approached TSA employees D.B. and J.H. while they were working at the Fairbanks airport. AER 903-09. Cox asked if the dogs they had were TSA dogs, and then claimed that they "were violating his rights by having the canines." AER 903. Cox called D.B. and J.H. "Nazis" and started to get loud. AER 906-07. D.B. described the tenor and tone of Cox's voice as "a little aggressive and confrontational." AER 905. D.B. and J.H. then walked away from Cox. AER 905, 907. D.B. went outside on the curb, Cox followed her, and came up close behind her. AER 907-08. When she turned around, Cox took a picture of her with his cell phone. AER 907. When D.B. asked him what he was doing, Cox responded "I need to know who the Nazis

are." AER 907-8. Shortly after that encounter, D.B. saw the TSA Federal Security Director T.S. speaking with Cox, and "by their body language, it looked a little confrontational." AER 909. TSA employee T.S. was added to Cox's "hit list." AER 1571.

Cox's mother-in-law described statements about TSA agents Cox made during Thanksgiving 2010:

> The most specific remark that I heard him say was when they were talking in reference to two TSA agents, and the conversation was talking about what they would like to do if – if the federal government, and talking specifically about TSA agents, did something to his family, that they would go in and burn the homes of those agents and if the families were there and were running out during the fire, they would shoot them down.

AER 910. Cox's mother-in-law further testified that she knew that Cox had "a list of – of things that if the government crossed the line pertaining to those certain things, they were prepared to act." *Id.* Her testimony also highlighted an important shift in the threats Cox was making; no longer was his planning solely for a hypothetical "declaration of martial law." Cox had begun to assert that he would trigger his plans to kill federal agents if they "did something to his family," and later if Cox were killed. Finally, he issued instructions to

retaliate even if he were only arrested, making it clear that his violent plans no longer were limited to an unlikely hypothetical, but to a concrete, imminent event.

Cox also obtained personal information about Alaska State Trooper R.W. AER 450-53. Prior to May 2010, Cox had met with Trooper R.W. at the Alaska State Trooper office in Fairbanks. AER 437-38. Twice in one day over Mother's Day weekend 2010 Trooper R.W. observed Cox drive by his house, located in an isolated area. AER 450-71. On the night of June 9, 2010, Cox approached R.W.'s home unannounced. AER 453-54. R.W. "assumed there was going to be a problem" and felt exposed and vulnerable. AER 455-56. R.W. sent his wife and children upstairs, drew his weapon, and took a position behind a vehicle when he saw Cox driving up the driveway. AER 454-56. Cox's wife, Marti Cox, was with him. AER 457. R.W. could see that Cox was wearing body armor. AER 468. A conversation ensued wherein Cox talked to R.W. about his problems with OCS, the fact that he had relinquished his United States citizenship, and his militia, which Cox said had 3,500 members. AER 462. Cox claimed that he was concerned that members of his militia would harm troopers, judges or their

families, and troopers' families if something happened to him or his child. AER 462-64. Cox told R.W. that "he wouldn't do it, but he couldn't control members of his militia and he didn't know how they would react if something happened to him or his family, or they were – he was taken into custody." AER 463. R.W. understood Cox's words to be a veiled threat against him. AER 463, 468. Cox phrased his statements along the lines of "he would hate to see troopers or their families killed or injured." AER 464.

3. Cox enlists Anderson to move his weapons and participate in security detail

In 2010, Cox was charged with domestic violence. AER 273-75. Soon after, Cox asked Anderson to remove weapons from Cox's home and Anderson agreed. AER 296. Anderson observed a silencer, a Sten machine gun (which Cox previously told Anderson was fully automatic), and several grenade hulls at Cox's home. AER 296-301.

In spring/early summer 2010, Cox asked Anderson to be part of a "security detail" for Cox during his meeting with OCS as a result of Cox's domestic violence. AER 302-04. Anderson agreed, and the next day put his AK-47 firearm and tactical vest in his vehicle and drove to the meeting location. AER 305-09. Cox tasked Anderson to find out

where W.W., the OCS officer in charge of his case, lived. AER 303, 310-12, 1573-75. Cox explained "he needed to know where she was because if she hurts his family she might get a bullet through her windshield." AER 313. Following Cox's directive, Anderson obtained W.W.'s home address. AER 310-11, 377-79, 1573-75.

4. Cox holds militia commissioning ceremony

By summer 2010, Cox's public statements and aggressive encounters with federal and state officials had created concern, and the FBI asked Olson, a cooperating witness with active ties to the militia movement, to contact Cox to see if he could learn more about his plans. AER 934-41, 959-61. Olson had been charged with a felony in the State of Alaska and in hopes of some leniency in his sentencing had been providing assistance to law enforcement. AER 954-58. In part because Olson had previous ties to a militia in Montana, Olson's background suggested that he would be able to develop a relationship with Cox. AER 959. Olson made his initial contact with Cox in the summer of 2010. AER 961.

In August 2010, Cox held a militia "commissioning ceremony" at Barney's residence for new members to be commissioned in and sworn

into his militia. AER 558-59. Olson attended the militia commissioning ceremony. AER 566. Lonnie Vernon and his wife Karen also attended. *Id*. At that meeting, Cox told the attendees that there was a federal assassination team out for him and his family. AER 1169-71. Cox also described his version of his dispute with OCS. AER 1171-76. He accused the federal government of being behind the OCS investigation and boasted that he told a state court judge, "We don't mean any harm to anyone, but if you want a war, we've got one hell of a war with your name on it." AER 1177.

5. Cox instructs security details for court hearing and KJNP interview to kill federal agents if need be

In November 2010, Cox enlisted a "security detail" to protect him, his wife, and common law "judge" David Bartels from the supposed federal assassination team. AER 587-88, 1116-20, 1178-90, 1502, 1518. This armed and body-armor attired security detail was arranged by Cox specifically to "protect" Cox while he attended a court hearing in downtown Fairbanks related to a state misdemeanor weapons charge against him. ER 514; AER 589-90, 596, 1117-24, 1129-32, 1515-17. Another security detail was planned for later that evening while Cox

was interviewed at King Jesus North Pole (KJNP), a television station near Fairbanks. ER 515; AER 593-94, 1514-19. Cox instructed the security details to shoot to kill if a "plainclothes" "agent" "draws down" on Cox or one of the other protectees. ER 515; AER 1502, 1518, 1569.

Cox held several meetings to organize the "security" teams for his court hearing and KJNP appearance, anticipating the arrival of federal agents. AER 586, 1178-90, 1606. A whiteboard titled "Security Team" seized from Cox's house described the plans, together with options for responding to plainclothes agents, including "lead poisoning." AER 1502. In addition, handwritten notes seized from the residences of Cox, Barney, and Vernon reflected Cox's directions for the security detail such as "use grenades to stop." ER 515; AER 1518, 1569.

During one of the briefings, Cox instructed his men that they had to be prepared to kill federal agents and described a scenario where they would stomp the killed federal agents through the ice. AER 590-91. Cox called the federal agents "soulless assassins" and said: "If we kill one of them, they're not going to be missed, they're not going to come looking for you." AER 1183-84.

Cox told the security team members that they needed to be "guys who are – who've come to terms with the fact that if somebody shows up at the TV station, because it's an hour long and it's live – to try to kill Judge Bartel [sic] or Marti [Cox], you might have to kill him." AER 1184-85. Cox also said that he had bought a "whole bunch of hornet nest grenades" to be loaded into grenade launchers attached to their rifles, which he could provide to the security detail members. AER 1185.

Barney was in charge of Cox's security detail at KJNP to "protect" Cox from federal agents. ER 515; AER 1113-15, 1117-18, 1123-24, 1518-19. Barney was armed that night with a 37mm launcher loaded with "Hornet's Nest" anti-personnel rounds attached to his AR-15. AER 1121-22, 1138-43. Vernon and Gary Brockman, other members of the security detail at KJNP, were also armed that night as part of Cox's security detail. AER 402, 1122, 1611.

When they arrived, the security detail set up lights, established a vehicular funnel point, and stopped at least one incoming vehicle while visibly armed with weapons. AER 391-92, 413-17. Barney set up on

the perimeter, wearing body armor. AER 1142. Another member patrolled the property surrounding KJNP on a 4-wheeler. AER 1141.

6. Cox makes threats at state courthouse

During a December 10, 2010, hearing on Cox's misdemeanor weapons charge, Cox told the judge that:

> Soulless federal assassins have made threats on the lives of my wife and children. This, coupled with your long established and well documented – ah, practice of refusing to ascertain the truth, leaves me but one inescapable conclusion: You are rebellious impostors evincing a design to reduce us under absolute despotism. We want peace and friendship, not war. But should you thrust war upon us by your continued aggression, my men and I, along with all those who love liberty and law, will cry out to the just and moral God of the universe, and with a strong reliance on his providence, fulfill our moral duty to protect our families and repel the lawless aggressors who seek to do us harm. We know who you are and we know who you aren't. We wish no harm on anyone, and, reciprocally, we will not tolerate harm from anyone, especially not from you. Winston Churchill, when surrounded by danger said, quote, "We sleep soundly in our beds because rough men stand ready in the night to visit violence on those who would harm us." I sleep soundly. If you continue to harm or threaten us in any way, we have the right to defend ourselves. The sword of a righteous God is swift to destroy those who oppress the innocent.

AER 1489-90. Cox continued by indicating that he sees the judge on the marathon course and at Fred Meyer and sees the prosecutor around

town, and: "There's a lot of people out there that would just as soon come and kill you in your home at night, than come and argue with you in your court by day. And that is just as bad and wrong as, ah, pretended governments or governments that are acting outside of the law." AER 1491-92.

A few days later, after a subsequent court hearing, Cox wanted to serve some papers on another state court judge. AER 922. Alaska State Trooper Schoenberg told Cox that, to get the paperwork served, Cox needed to file the paperwork with the clerk's office on the lower level of the courthouse. AER 922-25. Trooper Schoenberg was surrounded in close proximity by Cox and about four other men with Cox (including Barney) and Cox told him "We've got you guys out-manned and outgunned, and we could probably have you guys all dead in one night." AER 921-31, 1623.

7. Cox sends Vernon and Olson to Anchorage to attend militia convention and buy grenades

The month before he was arrested, Cox directed Vernon and Olson to go to Anchorage to attend a convention on behalf of his militia. AER 639-41. Before their trip, Cox told Vernon and Olson to "get as many

pineapple grenades as you – as you can get, because we'll just, um, thread the bottoms and stick an ALS fuse in them." AER 643-45, 648-50, 1193. Cox also explained that if they could get pineapple grenades with the hole in the bottom, they could tap it, put a bolt in it, put gunpowder in, and put in a new fuse. AER 649-51, 1191-98. Cox added that he already had the new fuses. AER 650, 1191-98. Cox then brought up C-4 explosives, which "would be good to have," and said he knew someone who would make C-4 for them and that he had discussed the price with him, but it would depend on the shelf life of the C-4.[5] AER 1197-98.

Vernon and Olson traveled to Anchorage and followed Cox's directions. AER 655. Vernon and Olson drove directly to a military surplus store in Anchorage owned by Bill Fulton, whom Cox knew.[6] Vernon asked to buy grenades from Fulton. ER 657-60, 671-72, 1237-38. During subsequent conversations that weekend, Vernon said that

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[5] C-4 is a pliable explosive. AER 651.

[6] Fulton hosted the convention in Anchorage. Fulton owned a military surplus store and was a firearms dealer. AER 645-46, 659-60. Unbeknowst to the defendants and Olson, Fulton was also cooperating with the FBI. AER 673-74.

he wanted to purchase grenades, 50 grenade fuses, and a suppressor. AER 671-74, 675-78, 685-86, 1204-06, 1220-22, 1228-29, 1243-44, 1252-53. While in a hotel room with Olson and Fulton, Vernon described the plan:

> Mr. Fulton: Yeah, but check this out. We were on this whole thing with Schaeffer [Cox], and I want to talk to you about this, but you are not going to cause the fucking militias in the state of Alaska to rise up.
> Mr. Vernon: No, no, no, no, no.
> Mr. Fulton: Schaeffer [Cox], on the other hand, will.
> Mr. Vernon: Yeah, he will. That's what he wants. He wants the big show. But what I'm getting at – what he said to them –
> Mr. Fulton: Yeah.
> Mr. Vernon: - and I saw that – is they're running fucking scared. There's a whole bunch of them lil' dickweed judges out there. But you know what? We know all of them. We know where they live. We know the – the district – the assistant district attorney. He's a fucking Nazi, little fuckwad.
>
> . . .
>
> Mr. Vernon: We're going – we're peeking over the fence. They're looking at, you know, what – what will come – what will happen when – if we take him down? What if they do come to our house? Well, you know what? That was already pre-planned.
> Mr. Fulton: What was?
> Mr. Vernon: The family thing. We made it a long – pact a long time ago.

Mr. Fulton: What family thing? What the fuck are you talking about?
Mr. Vernon: Now, listen to me. Listen to me. If they fuck with one of us –
Mr. Fulton: Uh-huh.
Mr. Vernon: - when we go to their house, all of them with the titles –
Mr. Fulton: Yeah.
Mr. Vernon: We'll drag them out and they will never find them.
Mr. Fulton: Okay, but not for families. You're not talking about going after innocents.
Mr. Vernon: We're talking about everyone involved in this.
Mr. Fulton: You're not talking about going after innocents.
Mr. Vernon: First – no, the first round –
Mr. Fulton: No children.
Mr. Vernon: The first round will be all the ones involved in it.
Mr. Olson: Like the judges or –
Mr. Vernon: Yup. They're going to get gone. They can put up all the people around their house, all the snipers they want, whatever they want to do. But one way or the other, they won't know when it'll happen.

. . .

Mr. Vernon: Okay, okay. If they pull a gun when we go in there, too, I'm sorry, it's part – you – you – you made it happen, asshole.
Mr. Fulton: Yeah, but what you're talking about is premeditated, and you know that.
Mr. Vernon: Well –
Mr. Fulton: No, I'm not going to sit here and fucking play pansies and then (inaudible).

> Mr. Vernon: They make it pre-meditated the day they do wrong to us.

AER 1260-65. *See also* AER 688-90.

8. The "2-4-1" Plan; "I'm not against mailing heads to people"

On February 12, 2011, Cox held a meeting at Ken Thesing's residence in Fairbanks with Barney, Thesing, and Olson. AER 699. Thesing had the rank of "major" in Cox's militia. *See* AER 1587 (text from Cox to Barney on 12/7/10: "Just talked to Maj. Thesing about a battle plan"); AER 635-36. Cox said that he was not going to appear at his next scheduled court hearing, and instead raised the idea of "2-4-1," a plan whereby if Cox or any militia members were killed then Cox and the others would kill two other people (such as law enforcement and judges) in retribution. ER 377-98; AER 700, 702-03, 706. During this meeting, Cox said that two state court employees, M.G. and R.W., "need to dangle together like a windchime." ER 376; AER 701-02. When Barney asked whether "2-4-1" would be triggered by Cox being arrested, Cox responded:

> I believe that it is absolutely morally allowable [to activate 2-4-1] if they were to come and arrest Ken [Thesing] for the three of us to go kick in the judges' door and – the troopers and arrest two of them. And

> because it's war, it doesn't even really have to be the ones that did it. . . . . And it's not just a war in fact, it's a war declared by them, explicitly, without mincing any words, and so I think it's absolutely morally allowable that if they arrested Ken [Thesing] or arrested me, to go in and arrest two of them. . . . . If they kill one of us, we go kill two of them.

ER 390-91.

Cox continued that he "would be well within my rights to go drill McConahy in the forehead and any of these people that are propagating this because they're posing a huge threat to my life and my family." ER 392; AER 707-08. "McConahy" was the state court judge presiding over his pending criminal case. AER 708. After Olson sought clarification about "2-4-1," Cox instructed, "go for the ones that are either authorized or failed to prevent," ER 394, reasoning that "[b]ecause then they'll give people pause to authorize or fail to prevent." *Id.*; AER 708. Cox continued, "I'd say the trooper that did it and the trooper that authorized it and the judge that authorized it. You know, it would be – kind of the top people." ER 394-95. Cox expressed that it's a tough issue because "it's easier to get ready to die than it is to kill." ER 396. Nevertheless, Cox said that he was willing to kill. ER 397.

After hearing from Barney, Thesing, and Olson, Cox summarized:

> All right, well, let me give you guys my thoughts. I really appreciate your thoughts on that. My thoughts on 241 is that we're not in a strong enough position to execute more than once, we're not in a strong enough position to follow through, and so at this point what we should do is do everything we can to avoid it, but that what we should do is we should bluff it for all it's worth and pray for God's protection and shielding hand and, uh, work and train and get ready to where we can turn that 241 into a real ability instead of just (inaudible).

ER 409. Cox and Barney then discussed next steps:

> Barney: In the meantime training up guys and (inaudible) guys through and getting them ready.
> Cox: So, that we can – so that we can turn it from a bluff to a – to a –
> Barney: An action.
> Cox: Yeah, and we'll take the – we're ready – and the road I'll take is, we're ready and we could have you dead in minutes, but we are long suffering and we want to be your friends. You've got to stop pushing, we want to be at peace. We're going to continue long suffering, but not forever.

ER 413-14. Barney then volunteered that they should "get those little target, bull's-eye things, you put them on the . . . back windows of all the cop cars." ER 414; AER 714-15. Because Cox had decided not to appear for his next court hearing on the weapons charge and they anticipated that an arrest warrant would be issued, Barney offered that

Cox and his family could hide out at rental cabins owned by Barney. ER 415-16; AER 714-15.

At the meeting, Cox also discussed the grenades he possessed and expressed his desire to get grenades with longer delayed fuses. ER 417-19; AER 716-17. Cox told Barney, Thesing, and Olson: "I would like to have eight-second fuses and powder that burns fast enough to really send that shrapnel flying because we're using the two second fuses right now." ER 418.

9. Cox becomes a fugitive, continues to prepare for "2-4-1," and moves his weapons stash

As planned, Cox failed to appear for his February 14, 2011, court hearing. AER 732-33. Barney and Olson attended the hearing to find out if an arrest warrant was issued for Cox. *Id*. Judge McConahy indeed issued an arrest warrant. AER 738.

Cox, now a fugitive, moved into the Vernons' residence. AER 743-44. Cox, Lonnie and Karen Vernon, and Olson met at the Vernons' residence on February 14 and 15, 2011. AER 743-49, 1295-97. Cox and Vernon talked about ways to set up booby traps to block access to the

Vernons' house by law enforcement. AER 1299-1302. Cox described his vision of the plan:

> Cox: It gets bloody when they've got – when we've got our crap together enough to – to make a good effort at round two.
> Olson: Yeah.
> Cox: Round one is going to be easy. Round two is where the work starts.
> Olson: Yeah.
> Cox: And we can do round one right now. I think the blood starts is when we've got – when we feel like we've got the – it starts either – at either just the point of total desperation when there's nothing else and it's just a Hail Mary before you get swallowed up alive, or when you've got the – the power to possibly prevail.
> Olson: Yeah. When – when they recognize the power –
> Cox: It's not like we're waiting for them to get bad enough.

AER 1309-1310. Cox later summarized, "So, what do we do? We kill a whole butt load of them and then offer peace." AER 1318. The next day, Cox and Olson discussed a variety of firearms and scopes, and Cox explained that they were probably going to be doing their battling at houses instead of in the woods. AER 764-65, 1331.

A few days later, Cox and his family moved into Barney's home. AER 774-79. Cox took along his firearms, his body armor, and CS grenades.[7] AER 777-78, 784-85.

At a meeting later that day attended by Cox, Barney, and Olson, Cox spoke again about the "2-4-1" plan. AER 784-89. Cox said, "if we all shook hands and went out of here to go roll judges' heads, I mean, we're definitely morally justified." AER 1368. Barney agreed. *Id.* Regarding "2-4-1," Cox said: "But I can say that I think for right now, a 241 . . . would be running out ahead of the scale and sacrificing our self to no avail." AER 1375. Barney responded:

> [T]hat our troops – and that's the scale starting to tip, when they see more people that start to wake up and come to our aid, and even if they still have greater numbers, they'll be a point to where even with guerilla warfare and stuff like that, two for one [2-4-1] becomes a real possibility at that point. . . . Because you actually have enough people on your side that you can – you can pay 241 for a while.

AER 1376.

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[7] Cox and his family continued to live at Barney's residence until the day of his arrest, March 10, 2011.

Cox said that his "subconscious goal was to be able – was to get prepared to execute a 241 that needed to be – I think that it needs three – three more things here." AER 1377. Cox said one thing it needs is "more public pain." AER 1378. Second, Cox said, "we just need more numbers." AER 1379.

Later in the conversation, Cox and Barney agreed that if the government took one of their kids, "that's a 241." AER 1387-90. Cox also said: "Well, I'm not going to target women and children, but I'm not opposed to killing them either, you know. I mean, God had them kill men, women, and children." AER 1391.

Cox told Barney and Olson that "[t]he purpose of killing somebody is to prevent them from killing the innocent" and "I'm not against some like drastic, shocking things either, like, you know, mailing heads to people." AER 1394. Cox then said "I don't want to gloat. Just make people suffer." AER 1395. Cox also told Barney and Olson, "I think if you got the time and resources, you ought to give them proper burial, you know?" AER 1397.

Cox also told Barney and Olson that while the victims had value as human beings, "that doesn't mean that I won't kill you" or "that I wouldn't hang your body from a lamppost to deter others." AER 1398.

Two days later, Cox took Barney and Olson to a property he owned where he stored weapons in a shed. AER 787-801. At Cox's direction, Barney and Olson moved assault rifles, ammunition, and approximately eight grenades from Cox's shed into Barney's truck. *Id.*

10. Cox and others continue to build their arsenal of weapons

The next day, Cox, Barney, and Olson met again at Barney's residence. AER 803-04, 1399-1411. Barney relayed a conversation he had with an "arms dealer and explosive dealer" about a rumor that eight grenades had been stolen from Fort Wainwright and Cox had them. AER 1401. Barney continued, "Me and Schaeffer [Cox] were talking about it and thinking eight grenades doesn't sound like a lot unless you're one of the Judges or DAs we're looking at." AER 1401-02.

Later in February 2011, Cox, Barney, and Olson met at Barney's residence and discussed getting silencers. AER 806-07, 1412-19. Cox ordered a pistol and silencer matched set from Olson. AER 1420-21. Cox then discussed with Barney and Olson how a silencer would work

with a Glock firearm. AER 1421-23. Cox told Barney and Olson that he "would love to get a center fire silencer." AER 1425; *See also* AER 808-09. Cox also told Olson that "we just did a little tutorial yesterday on . . . homemade silencer for .22s." AER 1425. Cox, Barney, and Olson also talked about subsonic ammunition. AER 1434.

Cox described how to modify a firearm to make it fully automatic. AER 1435-45. Cox had previously told Olson that he had a fully automatic weapon and that it was a weapon that he made himself. AER 1409-10.

Cox, Barney, and Olson also discussed a missing grenade launcher. AER 832-33, 1448-49. Cox asked Olson if he had gotten a grenade launcher, but Olson said he did not see one when they moved the weapons from Cox's property. AER 1448. Barney added "And I know we haven't used it on any of the little missions that we've done. The only one we used is the one with the spider on it and I had it mounted to my AR with HOV . . . hornet's nest." AER 1449.

Cox, Barney, and Olson met again at Barney's rental cabins. AER 837-39. During the conversation, Cox told Olson that he'd like to have some pineapple grenades. AER 1456-59. When they were discussing

the price of grenades, Cox said: "But, yeah, if [Bill Fulton] could come down even to I'd say anything below $70, I would be feeling like I can buy as much as I want. And if he gets it at $50, I think I'd stock up." AER 1458.

In March, 2011, Olson informed Cox that only eight grenades would be available for purchase from Fulton. AER 1624-27, Ex. 30-06. Olson told Cox that he had told Fulton they wanted them, to which Cox responded: "Yeah and as many more as you can get." *Id.*, AER 1626.

The Vernons similarly had placed an order for weapons from Olson. AER 802-03, 840, 849. Lonnie Vernon said that "with the grenades he'd be able to take out two or three 5-0s, he called them, which is the term for law enforcement, at a time." AER 850.

11. Cox's other preparations for "2-4-1"

Cox, Barney and Olson implemented a communication plan, a way to avoid detection by law enforcement, of using "red" phones and "yellow" phones to speak with each other. AER 822-31, 1565. The "red" phones were to be used for the most secure means of communication in a situation such as when Cox got arrested or "2-4-1" was initiated. AER

828-29. Those with the "red" phones were to carry them at all times and "have them charged up and ready to go." AER 829.

In making final preparations, Cox handed some notes to Olson to deliver for him. AER 815-18, 820-24, 831. One of those notes was to one of his tenants, listing things for the tenant to take over, and also describing what Cox was leaving for him: "I want you to have my yellow coat and Ice Axe if I don't make it back" and "The AR with the grenade launcher is yours to if I don't make it back." AER 820-24, 1495.

12. Cox's efforts to obtain database containing victim information

Cox called Anderson to ask him for people's addresses. AER 314. Between August 2010 and March 2011, Cox referred to the existence of a list with information about government officials, and Anderson's connection with it several times. ER 376-421; AER 721-31, 745-47, 1278-97. For example, during a conversation at Cox's house, Cox told Olson:

> Mr. Cox: Those are the number two troopers.
> Mr. Olson: Oh, okay.
> Mr. Cox: And then, uh, do you know who Mike Anderson is?
> Mr. Olson: No, huh-uh.
> Mr. Cox: Okay. He has everybody's – I mean –
> Mr. Olson: Address?

> Mr. Cox: And he's got them all –
>
> . . . .
>
> Mr. Olson: Yeah. So – so – he's – he's got the – you know all the actual specific addresses and everything.
> Mr. Cox: Yeah.

AER 1280-82. During this same conversation, Cox showed Olson on a map where Troopers R.W. and B.B. lived. AER 721-24. Cox described Anderson's skills, saying "you call him in . . . in 20 seconds, he's got it." AER 1291. At the end of the meeting, Cox told Olson "I can give you a much better I think this is a much better plan than holing up in a bunker . . . we know where all your guys live, too, and you want – want to be friends? . . . We can be friends and we can be enemies. What - what do you want to be?" AER 1293-94.

At Cox's direction, Olson contacted Anderson about getting the database, AER 351-52, 731, 739-46, but Anderson refused to give the information to Olson. AER 740-41. While at the Vernons' house, Cox explained to Olson and the Vernons that "Mike [Anderson] got skittish of giving you information," and that Anderson would rather just give it directly to Cox. AER 1296-97. The Vernons also tried to get the database from Anderson. AER 352-53; *see also* AER 769-73, 1347-48.

Vernon told Olson "[w]e're gonna stir some shit. We're gonna get that list, and we're gonna stir some shit." AER 1338. Vernon also explained that his wife "can make a list and we – we could – we could make our own list, we don't need [Anderson] to do it." AER 776; *see also* Ex. 23-07.

Cox tried to contact Anderson in early March 2011 to get the database. AER 852-56. In one day, Cox and Olson spent hours driving to different locations so Cox could find Anderson and get the database from him. AER 852-54. While in the vehicle together, Cox directed Olson where to go so they could find Anderson. *Id*. When he was looking for Anderson, Cox told Olson that a friend of his owned the building that the FBI rented and "if Cox really wanted to, he could get a key and – get inside the building." AER 858.

When Cox met with Anderson a few days later and asked Anderson for the database, Anderson told him that he had already destroyed the database. EAR 355-57, 361-62, 364. Unbeknowst to Cox, Anderson had destroyed it within a day or so of Olson contacting him about it, because he was concerned about what Cox was going to do with the information. AER 363.

Later, Cox described Anderson as "pretty chickened out." AER 858-59, 1461. Cox, undeterred by Anderson's actions, said "it's not like he [Anderson] got a monopoly or anything that can't be achieved the same way." AER 1462.

B. Final Weapons Transactions and Arrests

Cox, Barney, and Vernon were all arrested on March 10, 2011. AER 985, 988-89.

1. Vernons purchased pistol, silencer, and hand grenades and were arrested

Vernon was arrested first. AER 872, 988. The morning of March 10, 2011, Lonnie Vernon and his wife, Karen, met Olson and, after examining the weapons, the Vernons purchased a .22 pistol and silencer matched set and two hand grenades from Olson.[8] Exs. 40, 102, 103; AER 872-880. Immediately after the transaction was completed, the Vernons were arrested. AER 988. At the time of arrest, Lonnie Vernon and Karen Vernon were carrying loaded firearms. Exs. 106, 108.

[8] Unbeknowst to the Vernons, and later Cox and Barney, the grenades provided by Olson were inert.

2. Cox and Barney examined pistols, silencers, and hand grenades and were arrested

Later that day, Cox and Barney also met Olson. Exs. 38-39; AER 881-83. Seconds after Cox and Barney got into Olson's vehicle, Olson told them that what Fulton got them was matched sets of .22s instead of the XDs they ordered. AER 1467. Cox responded, "Well, that's gay. I have a silenced .22." AER 1468. Olson told Cox and Barney that Fulton did have grenades and they cost $50 each. AER 1469. Cox, Barney, and Olson then had the following conversation about silenced .22s:

Olson:	Because of the, uh – because of the silencers. They, uh – I guess they go (inaudible) they'll go – these ones here will go 200 rounds, these .22s, before you have to touch anything to the oil.
Barney:	Well, we can go light.
Olson:	(Laughter) Yeah.
Barney:	Go light and quiet.
Olson:	Well, the thing with a silencer is you're – you're close range, anyway.
Barney:	Yeah.
Olson:	You know?
Cox:	But see, .22s, even at close range, they take a long time to die.

AER 1472-73.

Cox, Barney, and Olson then discussed subsonic ammunition, and Barney asked: "How are they for devastation? Pretty good?" AER 1474. Barney asked whether the silencer was compatible with a particular firearm he owned. AER 1475-76. Cox asked Olson whether he ordered the XD .9 mil pistol and silencer matched sets, and Olson said "they're 10 to 12 months out because the dealer has to lose them." AER 1476. Cox told Olson to "see if they're coming." *Id.*

Olson asked whether "homemade ones" work, and Cox asked Olson whether Olson was talking about grenades or silencers. AER 1478-79. When Olson responded that he was asking about a silencer, Cox said that they work, that they are reliable and dependable, and that he had one himself. AER 1478-80.

Once they arrived at the location where the pistol and silencer matched sets and grenades were stored, Olson retrieved the weapons and brought them into the vehicle. AER 885, 887. While Cox and Barney were examining the weapons, a concerned citizen approached Olson's vehicle and asked them what they were doing. AER 887, 1481-1487. Because the situation was compromised, authorities immediately arrested Cox and Barney. AER 888, 989. Both Cox and Barney were

wearing body armor, Exs. 76, 83, and were carrying loaded firearms. Exs. 77, 80, 81.

C. Search Warrants Executed at Multiple Locations

The same day that Cox, Barney, and Vernon were arrested, law enforcement executed numerous search warrants on the defendants' residences and vehicles.

1. Barney's utility trailer

Law enforcement searched Barney's trailer, where Cox had been storing some of his belongings. AER 883-84, 1538. In the trailer Cox had the following items: two 37mm launchers, four "Hornet's Nest" anti-personnel rounds, four live smoke grenade fuses with bodies, 17 grenade bodies, thousands of rounds of ammunition, tannerite, smokeless powder, JB weld, firearms (including semi-automatic assault rifles and a .30 caliber Browning with crank-operated firing mechanism and tripod), Sten machinegun, Sten manual, silencer attached to a .22 pistol, 28 OC gas canisters, CS gas canisters, gas mask, body armor, police duty belt, lock picking tools, handcuffs, thumbcuffs, and tactical scopes. Exs. 400-09; 411-13, 415-24; AER 105-58, 169-87, 190-93, 1539-62, 1576-77. In addition, Cox had a number of documents in the trailer, including an Acts of War list which he had checked off:

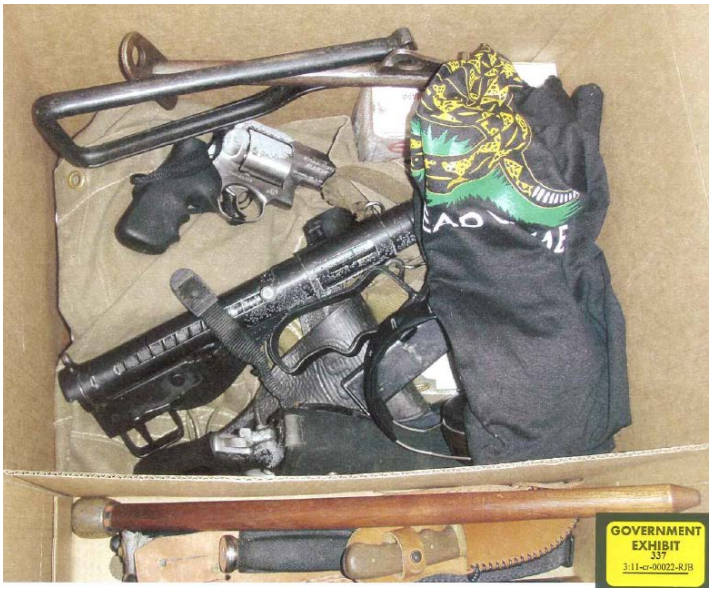
Acts of War

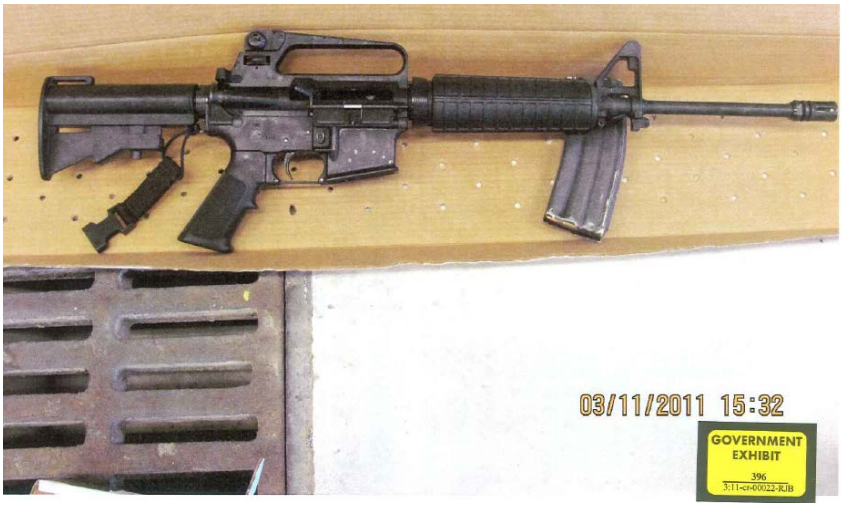
✓1. Firearm restrictions or other disarmament
✓2. Declaration of Martial Law
3. Mandatory Medical Anything
✓4. Involuntary Involvement in Anything
✓5. Circumvention of Juries
✓6. Confiscation of Any Property
7. Elimination of Gold, Cash, or Barter
✓8. Check Points of Any Kind
✓9. Federal Patrols
✓10. Blockades or Restrictions of Essential Goods
✓11. Political Arrests
✓12. Suspension of Courts
13. Chips or Marks
✓14. Child Control
✓15. Federalization of Law Enforcement
✓16. Restrictions on Freedom of Religion or Speech
✓17. Surrenders Powers to a Corporation or Foreign Government

Exs. 426-27; AER 1112, 1564.


GOVERNMENT
EXHIBIT


03/11/2011 14:13
GOVERNMENT
EXHIBIT


GOVERNMENT
EXHIBIT
337
3:11-cr-00022-RJB

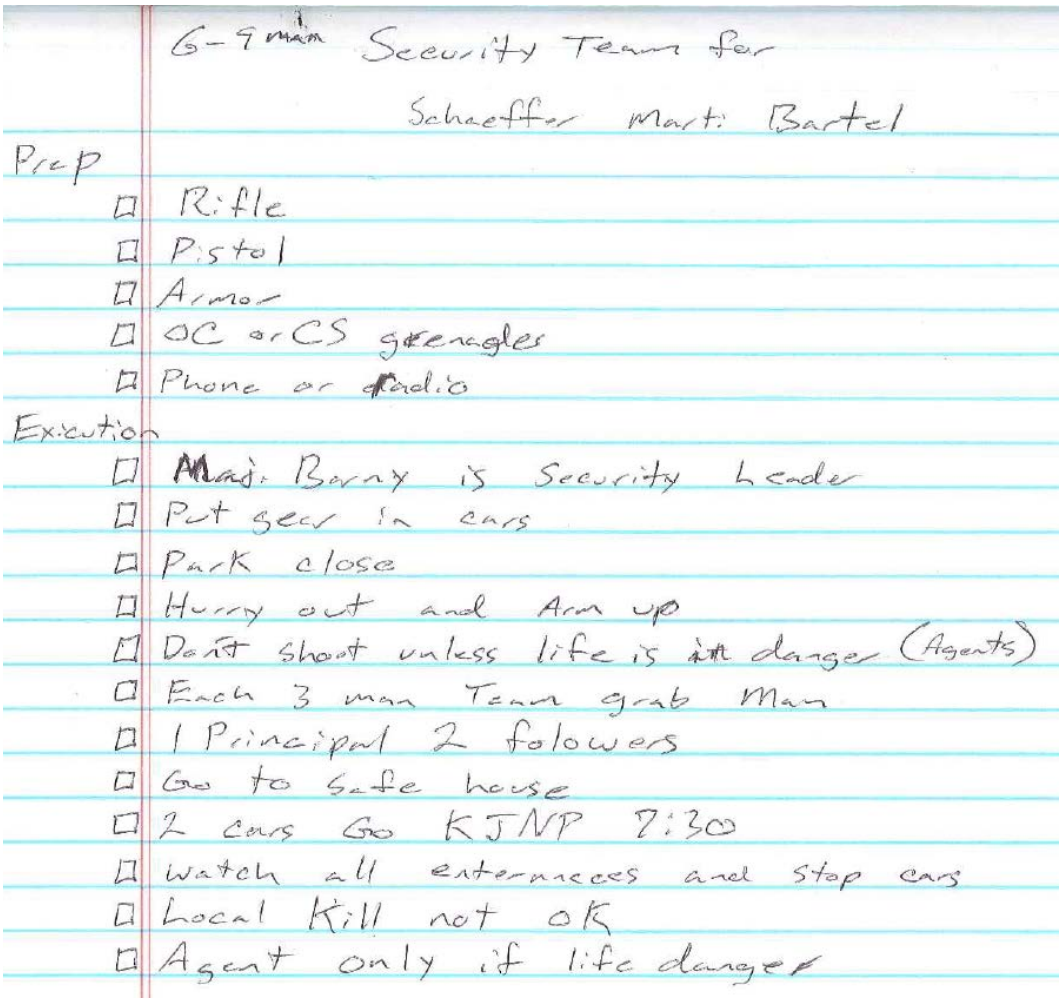


2. Cox's residence

Items found in Cox's residence included a white dry erase board marked up with operations plans for Cox's November 23, 2010 security team for the interview at the KJNP television station (Ex. 148; AER 1502), together with a handwritten notebook with plans for that day at the courthouse and that night at KJNP (ER 513-15), instructional CDs for converting firearms to fully automatic and constructing silencers (Exs. 152, 821-28), a DVD for how to build a silencer (Exs. 147, 466),

police equipment (Ex. 151; AER 1500, 1503), gas masks (Ex. 150), thumb cuffs (Ex. 154), and documents including the Acts of War lists (AER 1501).

Cox's handwritten notes listed the following for the KJNP security team:


6-9 man Security Team for
Schaeffer Mart: Bartel

Prep
- ☐ Rifle
- ☐ Pistol
- ☐ Armor
- ☐ OC or CS grenades
- ☐ Phone or Radio

Execution
- ☐ Maj. Barny is Security Leader
- ☐ Put gear in cars
- ☐ Park close
- ☐ Hurry out and Arm up
- ☐ Don't shoot unless life is in danger (Agents)
- ☐ Each 3 man Team grab Man
- ☐ 1 Principal 2 folowers
- ☐ Go to Safe house
- ☐ 2 cars Go KJNP 7:30
- ☐ watch all enterances and stop cars
- ☐ Local Kill not OK
- ☐ Agent only if life danger

ER 515, AER 1103-11.

3. Barney's residence

Items found in Barney's residence, where Cox had been staying at the time of his arrest, included cash, computers (Ex. 189), phones (Ex. 200), a box containing 37mm launcher and projectile components (Exs. 190, 191; AER 1506), firearms (Exs. 197, 198, 204, 205, 207, 208; AER 1505, 1508), approximately 20,000 rounds of ammunition (AER 1507), earpieces (Ex. 202), a tactical vest with CS gas canisters (Ex. 206; AER 1504), a ballistic vest (Ex. 210), a box containing two pulled pins and two unattached spoons/handles from practice grenades, and numerous documents. AER 228-29.

Documents prepared by Cox, Barney, and Ken Thesing challenging the jurisdiction of the State of Alaska superior court judges, assistant district attorney, and clerks who were associated with Cox's state court criminal cases were found. Exs. 192, 193, 194; *see also* AER 733-38. Other documents related to the "common law jury" that Cox was convening, Alaska Peacemakers Militia (APM) events and activities, potential team members for the courthouse and KJNP events, and claims being asserted against OCS employees, including W.W. Exs. 196, 199, 201. In addition, Barney had a notebook with security details and lists to prepare for the courthouse and KJNP events on November 23, 2010. AER 194-214, 1514-19. Barney also had a notebook with

handwritten notes asserting that the government was currently operating under the "rule of force" and one page with a bullet point for "Mission 241."[9] AER 215-27, 1520-24.

4. Barney's truck

In his truck, Barney had phones identified as "yellow" phones and a note pad with a list of "red," "yellow," and "green" phone numbers. AER 1525-27. Barney's and Cox's "red" phones were seized from their persons at the time of arrest. Exs. 75, 97. Cox and Barney were using different phones as part of their communication strategy to conceal what they were doing and Cox had said that he thought it was prudent if people were listening to his conversations to use a communication strategy. AER 1020, 1026-27; *see also* AER 1276 (During a phone call when Olson referenced "2-4-1," Cox scolded: "mind you, we're on the phone.").

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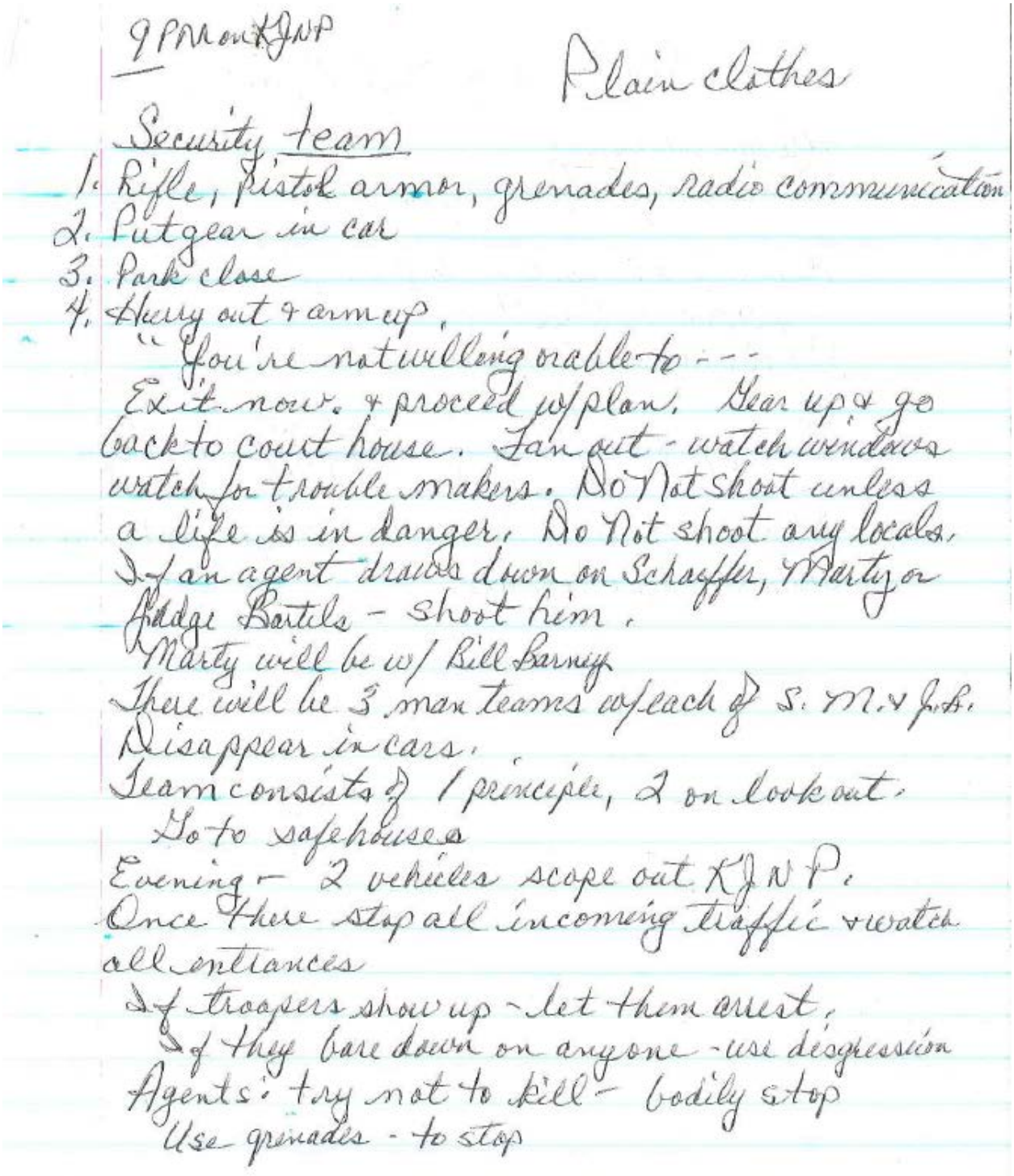
[9] Recall that, according to Anderson, once the government was operating under martial law, the plan was to "identify who was doing it and take them out before they could come for us, and – I mean, kill them before they could come for us." AER 267-68.

5. Vernon's vehicle

When the vehicle that the Vernons drove to the weapons transaction was searched, law enforcement found body armor, two assault rifles, additional handguns, and ammunition. AER 1534-37.

6. Vernon's residence

In their residence, the Vernons had numerous firearms, an improvised blasting cap with black powder and two lead wires, a booby trap device, Tannerite, a speed loader, thousands of rounds of ammunition, and a diagram of a courtroom with a handwritten operations plan. AER 246-48, 1528-33, 1566-69; Ex. 225-69, 276-83, 285-97, 299-302. The handwritten notes for the KJNP security detail reflect the following:



9 PM on KJNP

Plain clothes

Security team

1. Rifle, pistol armor, grenades, radio communication
2. Put gear in car
3. Park close
4. Hurry out + arm up,

" You're not willing or able to - - -

Exit now. + proceed w/ plan. Gear up & go back to court house. Fan out - watch windows watch for trouble makers. Do Not shoot unless a life is in danger. Do Not shoot any locals. If an agent draws down on Schaffer, Marty or Judge Bartels - shoot him.

Marty will be w/ Bill Barney

There will be 3 man teams w/ each of S. M. & J.S.

Disappear in cars.

Team consists of 1 principle, 2 on look out.

Go to safehouses

Evening - 2 vehicles scope out KJNP.

Once there stop all incoming traffic + watch all entrances

If troopers show up - let them arrest.

If they bare down on anyone - use desgression

Agents: try not to kill - bodily stop

Use grenades - to stop

AER 1569.

7. Cox's and Barney's electronic media

Forensic examinations of the computers used by Cox and Barney revealed internet searches for "ammonium nitrate bomb" and "tannerite" (AER 1578-79, 1580-81), a Google map search for "Alaska judge Michael P. McConahy" (AER 1584-85), and a document listing 17 Acts of War (hard copies of which were found in Cox's residence and the trailer) (AER 1582-83). AER 472-73, 486-89, 494-504.

Texts on Cox's iPhone included texts about security details, police duty belts, thumb cuffs, machine guns, and Hornet's Nests. AER 1030-58, 1586-1602. For example, on the night of November 23, 2010, following the security detail at KJNP, Cox received a text from an individual inquiring "Do we need a watch tonight?" Cox's outgoing text in response was "Well, yes. But we have 10 guys in the house. If we all keep a gun close, that is enough, I think. AR-15 at the top of the steps with a Hornet's Nest." AER 1045-46, 1596.

In addition, Cox's iPhone had notes saved on it. AER 249-59. One was for "Idears to do" with a list starting with "APM pens" and ending with "Crowd control." AER 1604. In the middle of the list following "weapons choices, badges, and official commissioning" was "Hit list."

Id. The last modified date for this note was November 17, 2010. AER 259. Another note was titled "Press Conference" and included the following:

> To the troble makers in government; Stop trying to prevoke an incedent with the militia. We've been watching you at least as close as you've been wathcing us and some of you are no deferent than the trigger happy cowboys we have to kick out of the militia. You just want a reason to go win a shoot out. You are trying to push me into giving the order to fight by threatening my sweet wife and inocent son. If you fellas with the FBI and the US martials want a big'Ole blow out I wish you would just call me and put it on the callender. Don't you think it seems a bit goofy to have FBI and US martials in on a "rooteen" make shur a baby is ok case? Nobody will think that you are in the right if you go after women and children and you wont be. And if you sucker the OCS girls in to the middel of this that will be on your conciance to. They may be confused about wehter or not children are property of the state but they aren't as cinister as some of you boys in the federal "beehive shak'n squad" up from the states. We don't want to attack you guys so don't attack us. If we did get cornerd into a fight wed probably lose but for each one of us you kill you'll make a thousand people willing to kill you and yours who wernt before.

AER 1605.

III. PROCEDURAL HISTORY OF THE CASE

a. Charges and Pretrial Motions

On January 20, 2012, Cox was indicted together with co-defendants Barney and Vernon in a Third Superseding Indictment. ER 9-32. Cox, specifically, was indicted for conspiracy to possess silencers and destructive devices in violation of 18 U.S.C. § 371 (Count 1); possession of unregistered destructive devices in violation of 26 U.S.C. § 5861(d) (Counts 2 and 10); possession of an unregistered silencer in violation of 26 U.S.C. § 5861(d) (Count 3); possession of an unregistered machine gun in violation of 26 U.S.C. § 5861(d) (Count 4); illegal possession of a machine gun in violation of 18 U.S.C. § 922(o) (Count 5); making a silencer in violation of 26 U.S.C. § 5861(f) (Count 6); carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) (Counts 7 and 15); conspiracy to murder federal officials in violation of 18 U.S.C. § 1117 (Count 12); and solicitation to commit a crime of violence, murder of a federal official, in violation of 18 U.S.C. § 373 (Count 16). *Id.*

Numerous pretrial motions were filed during the course of this case. The initial indictment against Cox charged only possession of

illegal or unregistered weapons, and Cox had filed a motion for a protective order against the submission of testimony regarding "an alleged '2-4-1 plan,' a plan to 'overthrow' the government, a 'common law court' and all other activity associated with Alaska Assembly Post and Alaska Peacemakers Militia," asserting that such testimony was irrelevant to the issue of whether he possessed illegal or unregistered weapons. ER 327-37; SER 82-83. After the court granted the parties' request for a continuance, the court denied the motion for a protective order without prejudice in light of the filing of the Third Superseding Indictment, which added the counts for conspiracy to murder federal officials and soliciting others to murder a federal official. ER 323-24; SER 80-81. None of the defendants renewed the motion for protective order after the filing of the Third Superseding Indictment.

Cox did file a motion in limine to exclude the use of the words "weapons cache" during trial. ER 773 (Doc. 292).

b. Jury Trial

The jury trial for all three defendants began on May 7, 2012. AER 38. At the close of the government's case, the court heard the defendants' arguments under Federal Rule of Criminal Procedure 29

(Rule 29) for judgment of acquittal. Defendant Cox argued, in part, that the condition precedent for the conspiracies had not been fulfilled and that there was no substantial risk of physical force. AER 63-96. The court ruled that the evidence was sufficient on all counts and denied the defendants' Rule 29 motions. AER 99-103. At the conclusion of the evidence, Barney and Vernon both renewed their Rule 29 motions, which the court denied. Cox did not renew his Rule 29 motion.

c. Jury Instructions

On April 20, 2012, the United States filed its proposed jury instructions and special verdict form. AER 1-30. On April 25, 2012, Cox filed his proposed jury instructions. ER 145-53. Barney and Vernon also filed proposed jury instructions. AER 31-37; ER 775, 784 (Docs. 321, 328, 421). On June 8, 2012, the United States submitted revised proposed jury instructions regarding the overt acts for the conspiracies in the case. ER 782 (Doc. 412). The United States also submitted revised proposed jury instructions regarding the destructive devices. ER 783 (Doc. 415).

After the conclusion of the evidence, the court inquired of defense counsel what evidence supported their proposed instructions on the

defenses of entrapment, self-defense, and contingency. ER 80. Cox's attorney responded that he was seeking an instruction on entrapment by estoppel related to the homemade devices in question. ER 80-81. Barney's attorney sought a general entrapment instruction, asserting that Olson brought up the issue of silencers. ER 81; *see also* ER 775 (Doc. 328 (Barney Instruction No. 5)). Vernon joined the argument that Olson entrapped Vernon related to the purchase of the silencer. ER 81-82. The United States argued that the instructions were not warranted because the evidence elicited at trial established that the defendants were predisposed to possess the illegal weapons prior to Olson contacting them and Olson did not induce them. ER 82-86.

The court also heard argument on the requested instruction related to self-defense. Cox asserted that he was concerned for his safety, and sought a self-defense instruction as to the conspiracy to commit murder.[10] ER 87-89. Barney joined the request, arguing that the defendants were concerned "that there could be some people coming at them that don't identify, don't announce themselves, and start

[10] Cox mistakenly cited it as Count 16 instead of Count 12.

firing." ER 89-90. Vernon argued that if the agreement was to act in justifiable self-defense, then there is no conspiracy. ER 90. The United States responded that the defendants' arguments would properly be made to the jury, but a self-defense instruction was not warranted given that the defendants were charged with an agreement to commit murder and pointed to evidence related to the targeting of federal officers and employees starting in August 2009, including testimony about the hit list. ER 91-92. The trial court also heard argument on Cox's request for jury instructions on the contingency issue. ER 94-101.

The court issued a preliminary set of jury instructions for the parties' review which included self-defense language in the murder jury instruction. As a result, the United States requested that the court add a sentence that the general principles of killing in self-defense must accommodate a citizen's duty to accede to lawful government power and the special protections due federal officials discharging official duties. ER 106-08. Cox requested a revision to the First Amendment jury instruction. ER 113-17. Regarding Cox's requested instruction on entrapment by estoppel, the court stated that the evidence did not support the instruction. ER 118.

At the time for formal exceptions to the court's jury instructions, the United States objected to the self-defense language in Instruction Number 48. ER 139-40. Cox objected to the language of the First Amendment instruction, the failure to give an entrapment by estoppel instruction regarding the silencer and machinegun, and the language of the instructions related to the "Hornet's Nest" anti-personnel rounds. ER 140-42. Cox did not object to the conspiracy to murder or the murder instructions. At no point did Cox request a specific unanimity instruction or raise any objection related to jury unanimity. On June 13, 2012, the court instructed the jury. SER 8-71.

On June 14, 2012, the jury submitted three notes seeking clarification on the instructions for Count 1, conspiracy to possess silencers and destructive devices, and Count 9 charging Barney with possession of an unregistered firearm. There were no questions from the jury related to the counts charging Cox with conspiring to murder federal officers and employees and soliciting others to murder a federal officer.

d. Verdict

On June 18, 2012, the jury returned a unanimous verdict convicting Cox of all counts except carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) (Counts 7 and 15). ER 2; SER 2-4.

e. Sentencing

Cox's total offense level was 49, resulting in a United States Sentencing Guidelines range of life imprisonment. PSR ¶ 200, filed separately and under seal. On January 8, 2013, Cox was sentenced to a total term of imprisonment of 310 months – specifically, 60 months on Count 1, 120 months on Counts 2-6 and 10, 310 months on Count 12, and 240 months on Count 16, to be served concurrently, and a five-year term of supervised release. ER 4-5.

SUMMARY OF ARGUMENT

The jury instructions given by the court, taken as a whole, properly instructed the jury as to the conspiracy to murder federal officials. Any alleged error did not affect Cox's substantial rights or affect the fairness, integrity, or public reputation of the judicial proceedings.

This Court should decline to consider Cox's ineffective assistance of counsel claim on direct appeal. The record does not include the facts necessary to evaluate either trial counsel's conduct, or the prejudice, if any, such conduct caused Cox. Nothing in the record suggests counsel was inadequate, much less so inadequate as to deny Cox his Sixth Amendment right to counsel.

The trial evidence was more than sufficient to prove that Cox committed the crimes of soliciting others to murder a federal official and conspiring to murder federal officers and employees.

The trial court properly admitted evidence of Cox's statements and other documents related to the groups Cox was involved with, as the evidence was inextricably intertwined with the charged crimes.

ARGUMENT

I. The trial court properly instructed the jury on the conspiracy to murder federal officials.

A. Standard of Review

Because Cox did not object to the conspiracy to murder federal officials jury instructions, the instructions are reviewed for plain error. *United States v. Alghazouli*, 517 F.3d 1179, 1188 (9th Cir. 2008) Accordingly, Cox must show "(1) that there was error, (2) that the error was plain, and (3) that the error affected his substantial rights." *Id.* Even if Cox makes all three of those showings, this Court should exercise its discretion to reverse his conviction "'only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Ching Tang Lo*, 447 F.3d 1212, 1228 (9th Cir. 2006)).

An error is plain only if it "'is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection.'" *Ching Tang Lo*, 447 F.3d at 1228 (quoting *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997)). "Reversal on the basis of plain error is an exceptional remedy and an improper jury instruction rarely justifies reversal of a conviction for plain error." *Id.*

Cox concedes that plain error review controls this Court's review of his challenges to the conspiracy to murder jury instructions as they relate to mens rea and specific unanimity. However, Cox mistakenly asserts that the abuse of discretion standard applies to this Court's review of the conspiracy to murder federal officials instruction regarding self-defense. While Cox submitted a proposed instruction regarding self-defense, the court proposed a slightly different instruction. Cox did not object to the proposed instruction. ER 139-42. Accordingly, plain error review applies to this part of Cox's argument as well. *United States v. Anderson*, 741 F.3d 938, 945-46 (9th Cir. 2013) (applying plain error review where defendant "did not specifically object to the court's formulation of the final willfulness instruction"); *United States v. Tirouda*, 394 F.3d 683, 688 (9th Cir. 2005) (applying plain error review where defendant "did not distinctly object to the district court's failure to define 'accomplice'").

B. Discussion

Cox attacks the trial court's jury instructions as to conspiracy to murder federal officials on three grounds. First, Cox asserts that the jury was not properly instructed regarding the mens rea requirement.

Second, he contends that the court should have added an instruction stating that the United States was required to prove that the agreement was not an agreement to act in self-defense. Third, he asserts that the court sua sponte should have added a specific unanimity instruction informing the jury that it had to unanimously agree on the person or persons who were the intended victims of the murder conspiracy.

There was no error. The jury instructions given by the court properly described the elements of the conspiracy to murder federal officials and the underlying substantive crime of murder of federal officials, including an explanation of self-defense. Regardless, any alleged error did not affect Cox's substantial rights or affect the fairness, integrity, or public reputation of the judicial proceedings, due to the strength of the evidence against Cox as to the conspiracy to murder charge.

1. The jury was properly instructed as to the required mens rea.

Cox asserts that the court erred in failing to instruct the jury that the government had to prove Cox conspired with malice aforethought

and premeditation. However, Cox's argument blurs the analysis of what is required.

It is well-established that a trial court must instruct the jury on the elements of a charged offense. *Alghazouli*, 517 F.3d at 1189. In the conspiracy context, "if a jury is asked to determine whether a defendant conspired to commit an offense, the jury needs to know the elements of that offense." *Id.* This includes the mens rea. "The intent necessary to commit the underlying substantive offense is an essential element of a conspiracy." *Ching Tang Lo*, 447 F.3d at 1232. The Ninth Circuit has found error where the court has either failed altogether to provide an instruction regarding the mens rea requirements for an object of the conspiracy, or has provided an erroneous instruction regarding the mens rea requirements for an object of the conspiracy. *Id.*; *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995) (error where the court's substantive offense instructions failed to state that the defendants were required to know that structuring a transaction was illegal). However, a failure to instruct on an element of an offense – let alone the substantive underlying offense of a conspiracy – does not always rise to the level of a plain error. *See United States v. Lindsey*,

634 F.3d 541, 555 (9th Cir. 2011) (harmless error where the court failed to instruct the jury on the overt act element because "no rational jury could have made its findings without also finding the omitted or presumed fact to be true") (internal quotations omitted); *Ching Tang Lo*, 447 F.3d at 1232 (concluding there was error where no instruction was given regarding the mens rea required for the object of the charged drug conspiracy, but that the error did not affect the defendant's substantial rights).

In *United States v. Croft*, the Ninth Circuit rejected the same claims that defendant raises here. The *Croft* defendants challenged the trial court's jury instructions as to the charged conspiracy to murder, specifically contending that they incorrectly instructed the jury as to the requisite mens rea. 124 F.3d 1109, 1122 (9th Cir. 1997). The trial court had instructed the jury that murder is the unlawful killing of a human being with malice aforethought, that the government had to prove that there was an agreement to kill a federal official with malice aforethought, and the defendant willfully became a member of the conspiracy, knowing of its objectives and specifically intending to help accomplish the murder of the official. *Id.* Under that combination of

instructions, and because the court had defined murder to include the mental state of malice aforethought, the Ninth Circuit held the jury had been properly instructed. *Id.* The Ninth Circuit reasoned:

> Taken as a whole, the instructions did not permit the jury to convict without finding that [the defendants] shared the specific intent to murder [the United States Attorney]. It is not reasonable to interpret a specific intent 'to help accomplish the murder of . . . [the United States Attorney]' as an intent to help someone murder [the United States Attorney] without sharing that someone's intent. Particularly is this so when the court has instructed the jury that the conspiracy was one 'to kill . . . [the United States Attorney]' and that a person joins a conspiracy if 'she willfully participates in the unlawful agreement with the intent to advance the objective of the conspiracy.'

Id.

As in *Croft*, here, the jury received accurate instructions for the elements for both conspiracy to murder federal officials and the underlying crime of murder of federal officials, including as to the requisite mens rea. The only object of the conspiracy charged in Count 12 was an agreement to murder federal officials. The jury was instructed that Cox was charged with conspiring to murder officers and employees of the United States, and that the government must prove that "there was an agreement between two or more persons to murder officers and employees of the United States," and that "the defendant

became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it." SER 57. The jury further was instructed that "[o]ne becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy." SER 40.

The court gave the jury several additional instructions relevant to Count 12, conspiracy to murder federal officials. In Instruction No. 29, the court instructed the jury that "A conspiracy is a kind of criminal partnership – an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed." SER 40. The instruction further provided, in pertinent part:

> You must find that there was a plan to commit at least one of the crimes alleged as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.
>
> One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy.

Id.

Instruction No. 46 provided:

> Defendants Cox, Barney, and Vernon are charged in Count 12 of the Indictment with conspiring to murder officers and employees of the United States in violation of Section 1117 of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, between on or about August 2009 and continuing up to on or about March 10, 2011, there was an agreement between two or more persons to murder officers and employees of the United States;
>
> Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
>
> Third, one of the members of the conspiracy performed at least one overt act after on or about August 1, 2009 for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

SER 57. The next instruction, Instruction No. 47, listed some of the overt acts alleged by the government in Count 12 of the indictment. SER 58-62. In addition, Instruction No. 48 provided:

> In order for you to properly consider the charge of conspiracy to murder officers and employees of the United States, you must understand the elements of the crime of murder of officers and employees of the United States. The government is not required to prove these elements in this case, but the government is required to prove that the defendants entered into an agreement to commit that crime.

> The crime of murder of officers and employees of the United States has four elements:
>
> First, the defendant unlawfully killed one or more officers and employees of the United States;
>
> Second, the defendant did so with malice aforethought;
>
> Third, the killing or killings were premeditated; and
>
> Fourth, the victim or victims were killed while engaged in his/her official duties, or on account of the performance of his/her official duties as an officer or employee of the United States.
>
> Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.
>
> Force likely to cause death or great bodily harm is justified in self defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.
>
> A killing in self defense is not unlawful.
>
> To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life.
>
> Premeditation means with planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough, after forming the intent to kill, for the killer to have been fully conscious of the intent and to have considered the killing.

SER 63.

Thus, the court accurately instructed the jury on the elements of the underlying offense of murder of federal officials. SER 63. Because, of course, the government did not need to prove an actual murder, i.e., that a killing occurred, the court correctly added that "the government is not required to prove these elements in this case, but the government is required to prove that the defendants entered into an agreement to commit that crime." SER 63. Cox attempts to take this statement out of context, twisting the import of the court's instruction, that being that the government need not prove the object of the conspiracy was completed. In any event, the court's instruction remains an accurate statement of the law. Nevertheless, Cox contends – for the first time on appeal – that the court's instructions were fatally flawed because the language in the other instructions failed to instruct the jury on the mens rea required and the additional language affirmatively told the jury the government did not need to prove the elements of the underlying offense. He is wrong.

The Ninth Circuit has rejected a similar defense claim. In *United States v. Pemberton*, the defendant challenged a phrase that the court added to a conspiracy instruction. 853 F.2d 730, 733-35 (9th Cir.

1988). The court instructed the jury to consider "'were they in agreement that, *if the circumstances properly presented themselves*, they would commit a criminal offense.'" *Id*. at 734. The defendant asserted that the italicized portion of the instruction constituted error, but the Ninth Circuit disagreed. *Id*. at 734-35. The Ninth Circuit concluded that the trial court added the italicized language to "make clear that the ultimate objective of the conspiracy need not be accomplished for the crime of conspiracy to be complete" and that the phrase was "at worst, ambiguous." *Id*. at 734-35. The Ninth Circuit held that the instruction, viewed as a whole, was substantively correct and that "the one challenged phrase did not render the instruction misleading or inadequate to guide the jury." *Id*. at 735.

Applying *Pemberton*, here, the jury instructions, taken as a whole, clearly informed the jury regarding the elements of the conspiracy charge. The court correctly instructed the jury that the government was required to prove that Cox: (1) entered into an agreement to murder federal officials, and (2) became a member of the conspiracy with the intent to help accomplish and further the object of the conspiracy, that is, to murder federal officers and employees. SER 40,

50. The trial court further instructed the jury that murder is an unlawful killing with malice aforethought and premeditation. SER 63. Just as in *Croft*, the object of the conspiracy here was to murder a federal official, and it is not reasonable to interpret a specific intent "to help accomplish" and "to advance or further" the murder of a federal official as an intent to help accomplish the murder without having the specific intent to murder. Thus, in order to find the defendant guilty under the court's instructions, the jury had to find that Cox entered into an agreement to unlawfully kill federal officials with malice aforethought and premeditation. That is precisely what the law required and the jury was properly instructed here.

2. The self-defense instruction was not erroneous.

Cox next argues that the jury instruction was deficient because it did not tell the jury that the government had to prove that the agreement was not one for self-defense. Cox cites no case law in support of his argument that such an instruction is appropriate in the context of a conspiracy charge. In any event, as noted above, the trial court's instruction did in fact explain that a killing in self defense is not

unlawful and that, to be guilty, Cox must be found to have conspired to commit an unlawful killing. SER 57, 63.

In addition to instructing the jury on the elements of the underlying offense of murder, at Cox's request, the court added specific language regarding self-defense. The instruction included language from the Ninth Circuit model criminal jury instruction 6.8 on self-defense with an additional sentence: "A killing in self defense is not unlawful." SER 63. The law on self-defense as it relates to use of force on federal officers specifically differs from standard self-defense. *See United States v. Feola*, 420 U.S. 671, 684 (1975); *United States v. Span*, 970 F.2d 573 (9th Cir. 1992); 9th Cir. Crim. Jury Instr. 8.5 (2010) (recognizing that self-defense applies in this context only if (1) the defendant did not know that the person was a federal officer or employee, (2) the defendant reasonably believed that use of force was necessary to defend oneself against an immediate use of unlawful force, and (3) the defendant used no more force than appeared reasonably necessary in the circumstances).

In a case where an actual murder is committed and charged, and there is sufficient evidence of self-defense warranting the instruction,

there is an additional requirement that the United States prove that the defendant did not act in reasonable self-defense. The rationale behind adding that element for the affirmative defense is that otherwise a jury could not acquit the defendant on grounds of self-defense. *See Span*, 907 F.2d at 577. But that is not required in the conspiracy context, particularly given the instructions at issue here. The jury was specifically instructed that "[a] killing in self defense is not unlawful." SER 63. The jury was instructed that the United States had to prove that there was an agreement to commit *murder*, murder is an unlawful killing, and a killing in self-defense is not unlawful. SER 57, 63. Put another way, if the jury found that the defendants agreed to kill in self-defense, the instructions made clear that the jury had to acquit the defendants of conspiracy to murder because the first element would not have been satisfied. The given instructions, taken as a whole, correctly stated the law.

3. A specific unanimity instruction was not required.

a. The jury did not need to be unanimous as to a particular victim.

Lastly, and for the first time on appeal, Cox argues that the trial court erred in failing to add – sua sponte – a specific unanimity instruction that directed the jury that they had to be unanimous that the conspiracy concerned one particular targeted person or particular group of persons. Neither the facts nor the law support Cox's claim.

While the jury's verdict must, of course, be unanimous to convict, "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad v. Arizona*, 501 U.S. 624, 632 (1991) (internal quotations omitted). For example, jurors "must still unanimously agree that the defendant is guilty of participating in a particular conspiracy," but they "need not unanimously agree on the particular facts satisfying the *overt act* element of a conspiracy charge." *United States v. Lapier*, 796 F.3d 1090, 1096 (9th Cir. 2015) (internal citations omitted). *See also United States v. Hofus*, 598 F.3d 1171 (9th Cir. 2010) (jurors need not unanimously agree as to which particular act by the defendant

constitutes a substantial step); *United States v. Lyons*, 472 F.3d 1055, 1069 (9th Cir. 2006) (amended Jan. 11, 2007) (unanimity as to a particular theory of liability is not required as long as jurors are "unanimous that the defendant has committed the underlying substantive offense").

Similarly, jurors are free to convict on whatever evidence they believe supports a guilty verdict, even if they fail "to reach agreement on which pieces of evidence were ultimately persuasive." *United States v. Ruiz*, 710 F.3d 1077, 1081 (9th Cir. 2013) (finding no error in district court's failure to give a specific unanimity instruction). The Ninth Circuit has long held that unanimity is not required as to the particular facts underlying the verdict. *See Lyons*, 472 F.3d at 1068 (rejecting argument that jury had to agree unanimously as to a specific false promise or statement made by the defendants to convict on mail fraud); *United States v. Woods*, 335 F.3d 993, 998-99 (9th Cir. 2003) (same); *United States v. Kim*, 196 F.3d 1079, 1083 (9th Cir. 1999) (no abuse of discretion where trial court declined to give a specific unanimity instruction because the jury did not have to agree on which conduct led them to conclude that the defendant was an accessory to possession of

stolen goods); *United States v. Miguel*, 111 F.3d 666, 673-74 (9th Cir. 1997) (no plain error where trial court did not give specific unanimity instruction where defendant was "not entitled to a specific unanimity instruction regarding the parts of the body he touched" in sexual abuse case); *United States v. McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995) (holding that jury unanimity was not required as to a particular false statement for conviction for making a false statement in a passport application).

In *United States v. Gonzalez*, the Ninth Circuit assumed without deciding that a specific unanimity instruction was required for committing a violent crime in aid of a racketeering enterprise ("VICAR"), specifically conspiracy to murder rival gang members. 786 F.3d 714, 717 (9th Cir. 2015). The trial court in that case did not instruct the jury that they needed to unanimously agree on the overt act that was committed, but did grant the defendant's request for a specific unanimity instruction. The trial court instructed the jury that they "must unanimously agree as to the person or persons who were the intended victim(s) of the murder conspiracy." *Id.* at 716.

On appeal, the defendant argued that the trial court erred in "failing to instruct the jury that it must unanimously agree on the acts that constituted the conspiracy to murder underlying the VICAR offense." *Id.* The Ninth Circuit rejected the defendant's argument and held that "so long as jurors in a federal criminal trial unanimously agree that the Government has proven each element of a conspiracy, they need not unanimously agree on the particular overt act that was committed in furtherance of the agreed-upon conspiracy." *Id.* at 718-19.

The Ninth Circuit assumed, expressly without deciding, that a specific unanimity instruction was required for the VICAR conspiracy to murder rival gang members "to prevent different jurors from finding Gonzalez guilty based on different conspiracies to murder different gang members." *Id.* at 717. The Ninth Circuit concluded that "to the extent a specific unanimity instruction was required, the district court's additional unanimity instruction adequately ensured that the jurors reached the requisite level of unanimity." *Id.* at 719.

The facts of this case are distinguishable from those in *Gonzalez*. As an initial matter, Cox did not request a specific unanimity instruction or otherwise object to the court's jury instructions as to

unanimity or conspiracy to murder federal officials. Second, there is no concern here of different conspiracies to murder. The evidence at trial established *one* conspiracy to murder federal officials. Third, the statute that Cox was convicted of, 18 U.S.C. § 1117, included a specific element that the intended targets be officers and employees of the United States and that they be killed while engaged in his/her official duties, or on account of the performance of his/her official duties as an officer or employee of the United States. SER 57, 63. It was clear that the intended targets of the conspiracy to murder were federal officials. Nothing more was required.

The caselaw on conspiracy to murder federal officials establishes that the government does not have to prove that the defendant knew the identity of the victim, or even that the defendant knew that the victim was an officer or employee of the United States. *United States v. Feola*, 420 U.S. 671, 695 (1975) ("knowledge of the official identity of the victim is irrelevant to the essential nature of the agreement, entrance into which is made criminal by the law of conspiracy"); *United States v. Romero*, 897 F.2d 47, 51 (2d Cir. 1990), *cert. denied*, 497 U.S. 1010 ("It was not necessary that the defendant knew their ultimate victim was a

federal officer. . . . [A] conspiracy to murder a federal officer requires only the conspiracy to murder, not the specific knowledge of the identity of the victim."); *United States v. Benitez*, 741 F.2d 1312, 1318 (11th Cir. 1984) (holding that defendant "could be convicted of conspiring to murder government agents even if he did not know they were government agents").

In *United States v. Siddiqui*, the Second Circuit examined the statutory language of "*any* officer or employee" in 18 U.S.C. § 1114 and interpreted that "Congress did not intend that the government had to prove that the defendant had a particular individual in mind as an element of the crime." 501 Fed. Appx. 56, 59-60 (2d Cir. 2012). The court concluded that the identity of the intended victim is a "brute fact" not an element of an offense. *Id.* (*citing Richardson v. United States*, 526 U.S. 813, 817 (1999)). Finally, the court pointed to the absurd result of a contrary interpretation – that "a defendant who fired one shot at a group of United States employees or nationals with the intent to indiscriminately kill one of them, but not an intent to kill a particular individual, could not be convicted under the statutes." *Id.* at 60. Accordingly, the court rejected the defendant's argument that the jury

had to be unanimous as to which United States employee or national the defendant intended to kill. *Id.*

Similarly, caselaw examining whether jury unanimity is required as to intended victims of other crimes have come to the same conclusion: juries are not required to be unanimous as to the particular intended victim. In *United States v. Bryan*, the defendant was charged with 20 counts of mail fraud in addition to other crimes. 868 F.2d 1032 (9th Cir. 1989). The trial court instructed the jury that "'the government [must] prove . . . [t]hat defendant Bryan devised a scheme which was reasonably calculated to defraud a group of taxpayers and/or the United States by inducing the . . . taxpayers to claim false deductions on their tax returns; and . . . [t]hat . . . Bryan . . . acted with the specific intent to defraud the group of taxpayers and/or the United States.'" *Id.* at 1038. On appeal the defendant asserted that the trial court instructed the jury "that it could convict him if it found that he committed either of two frauds: the first directed at taxpayers, the second directed at the United States Treasury." *Id.*

For the first time on appeal Bryan argued that the trial court should have supplemented the jury instructions "with a specific

unanimity instruction reminding the jury that all twelve must agree about the identity of the intended victims." *Id.* The Ninth Circuit disagreed. The Court distinguished the facts of the case from those in *United States v. Mastelotto*, 717 F.2d 1238 (9th Cir. 1983), where there were two schemes involving two distinct sorts of transactions that occurred at different times, and pointed out that "[i]n this case, helping the investors set up fraudulent tax shelters was an action that arguably defrauded both the taxpayers and the government simultaneously." *Id.* at 1039. The Ninth Circuit held that the district court did not commit plain error by failing to give a specific unanimity instruction as to the intended victims. *Id.* at 1040. *See also United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996) (holding that no specific unanimity instruction was necessary as to intended victims of wire fraud) (*citing United States v. St. Gelais*, 952 F.2d 90, 97 n.2 (5th Cir. 1992)).

The identity of the particular intended victim of the conspiracy to murder federal officials was not an element of the offense requiring jury unanimity. That is a factual issue underlying the verdict, which does not require unanimity.

b. No specific unanimity instruction was necessary.

Even if the jury was required to be unanimous as to a particular victim of the conspiracy to murder federal officials, no specific unanimity instruction was necessary here. "'Normally, a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict.'" *Lapier*, 796 F.3d at 1096 (internal quotations omitted). *See also Bryan*, 868 F.2d at 1039 ("Absent special factors indicating that there is a genuine possibility of jury confusion – such as the complex nature of the evidence or a discrepancy between the evidence and the indictment – a defendant is not entitled to a specific instruction that the jury must agree on a particular set of facts.").

"However, a specific unanimity instruction is required if there is a genuine possibility of jury confusion or a possibility that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *Lapier*, 796 F.3d at 1096 (internal quotations omitted). Whether there is a genuine possibility of jury confusion turns on, among other things, the text of the indictment, the clarity and presentation of the government's argument, the complexity of the

evidence, the clarity or ambiguity of the jury instructions, as well as whether the jury sought clarification. *Lapier*, 796 F.3d at 1096-97 (internal citations omitted); *United States v. Musacchio,* 968 F.2d 782, 790 (9th Cir. 1991) (holding that no specific unanimity instruction was required because the indictment "was drafted with sufficient clarity, and the issues concerning the underlying false statements were clearly drawn" over the course of the three-week trial); *United States v. Gilley*, 836 F.2d 1206, 1211-13 (9th Cir. 1988) (holding that trial court was required to give a specific unanimity instruction sua sponte as to the 30-day period required by the illegal gambling statute when the jury submitted a question on the necessity of unanimity); *United States v. Echeverry*, 698 F.2d 375 (9th Cir. 1983), *modified*, 719 F.2d 974 (9th Cir. 1983) (holding that specific unanimity instruction was required in response to the jury's written questions indicating their confusion concerning multiple conspiracies).

In *Bryan*, the defendant failed to request a specific unanimity instruction at trial, but argued on appeal that the trial court should have given one sua sponte as to the intended victims of the fraud. 868 F.2d at 1039. The Ninth Circuit considered the following factors in its

analysis: (1) the evidence "was no more complex than that involved in [*United States v. Feldman*, 853 F.2d 648, 652 (9th Cir. 1988) (amended Oct. 19, 1988)]"; (2) there was no discrepancy between the indictment and the evidence, where "[t]he indictment alleged one unified scheme to defraud and the evidence did not create any ambiguity as to the possible existence of multiple schemes"; (3) the jury was instructed "that the government must prove beyond a reasonable doubt the existence of a scheme to defraud, was instructed on the meaning of reasonable doubt, and was advised that the jury verdict must be unanimous"; and (4) the jury did not indicate confusion during its deliberations. *Id*. The Ninth Circuit determined that it was not highly probable that the "inartful wording" of the court's instruction "materially affected the verdict." *Id*. The Ninth Circuit concluded that there was no plain error in the trial court's failure to submit a specific unanimity instruction sua sponte and the defendant was not entitled to the "exceptional remedy" of reversal. *Id*. at 1040 (internal quotation and citation omitted).

In *Lapier*, the Ninth Circuit concluded that the trial court should have given a specific unanimity instruction because there was evidence

of two separate and different conspiracies but only one was charged in the indictment. *Id*. at 1097-98; *see also United States v. Payseno*, 782 F.2d 832, 834-37 (9th Cir. 1986) (holding that specific unanimity instruction was required where the government introduced evidence of three separate offenses supporting the one count of extortion in violation of the Consumer Credit Protection Act). However, in *United States v. Anguiano*, the Ninth Circuit held that there was no plain error where the trial court failed to give a specific unanimity instruction despite the evidence at trial of the existence of two separate conspiracies. 873 F.2d 1314, 1318-21 (9th Cir. 1989). The Ninth Circuit determined that (1) the jury did not suggest it was confused, (2) the wording of the indictment indicated "there was little potential for juror confusion," and (3) the evidence was not so factually complex "to suggest that juror confusion was likely." *Id*. at 1319-20.

In *United States v. Castro*, the Ninth Circuit faced the question of whether a specific unanimity instruction was required where the defendants were convicted of one conspiracy count alleging multiple offenses. 887 F.2d 988 (9th Cir. 1989). The three objects of the conspiracy included misapplication of bank funds, submitting false loan

applications, and causing false entries to be made in bank records. *Id.* at 993. Defendants argued that the jury should have been instructed that they had to agree unanimously on the object of the conspiracy. The Ninth Circuit considered the following factors: (1) the evidence at trial was not complex and revealed only one conspiracy to defraud the bank, (2) the jury did not request any additional instructions on the objects of the conspiracy, (3) there was no discrepancy between the indictment and the evidence, and (4) the jury convicted the defendants of some of the substantive offenses that were the objects of the conspiracy. *Id.* at 993-94. Indeed, even where a single conspiracy has been alleged with multiple objects, the Ninth Circuit has held that the court's failure to give a specific unanimity instruction on the objects of the conspiracy was not plain error. *Id.* at 994. *See also United States v. Feldman*, 853 F.2d 648, 652-54 (9th Cir. 1988) (holding no plain error for failure to give specific unanimity instruction where defendant argued proof at trial regarding mail fraud scheme could be interpreted as a single scheme to defraud or multiple schemes but there was no action by jury requesting clarification, no discrepancy between the evidence and the indictment, the five-year span of time was "not so long as to make a

single scheme unlikely," the evidence was not unduly complex or confusing, and the jury was instructed that the verdict must be unanimous).

As set forth above, throughout the entire Ninth Circuit precedent on the issue of specific unanimity instructions, in only four cases has the Ninth Circuit held that plain error occurred. *Lapier*, 796 F.3d at 1097-98; *Gilley*, 836 F.2d at 1212-13; *Payseno*, 782 F.2d at 837; *Echeverry*, 698 F.2d at 377, *modified*, 719 F.2d at 975. Two of those cases involved jury questions indicating confusion and two of them involved evidence of multiple offenses where only one crime was charged. The facts of those cases are readily distinguishable from the facts of this case.

Here, Count 12 charged Cox, Barney, and Vernon with conspiring to murder officers and employees of the United States in violation of 18 U.S.C. § 1117. The sole object of the charged conspiracy was murdering federal officials. This was one conspiracy between on or about August 2009 and continuing up to on or about March 10, 2011. SER 57. The one and only goal of the conspiracy was to murder federal officials.

The jury was instructed on numerous occasions that its verdict must be unanimous. AER 40; SER 69-71. Regarding criminal conspiracy generally, the jury was specifically instructed that they must be unanimous "as to the particular crime which the conspirators agreed to commit." SER 40. As to the conspiracy to murder instructions, the jury was also instructed that they had to be unanimous "on a particular overt act that you find was committed." SER 57.

Put simply, there was no genuine possibility of jury confusion here. *See Bryan*, 868 F.2d at 1039. First, the evidence in this case was no more complex than that involved in *Bryan*, which involved a 51-count indictment charging Bryan and three other defendants with mail fraud, conspiracy to defraud the United States, aiding the preparation of false tax returns, and willful failure to file corporate tax returns, 868 F.2d at 1033. Second, there was no discrepancy between the indictment and the evidence. Count 12 charged one conspiracy with one object, and the evidence did not create any ambiguity as to the possible existence of multiple schemes. The evidence at trial was consistent with the overt acts listed in Instruction 47. There is no dispute that this was a lengthy trial with many witnesses and exhibits. However, the evidence clearly

established that Cox was guilty of participating in the conspiracy to murder federal officials. There was no risk that the jurors voted to convict on the basis of different facts establishing different offenses. Third, the jury was instructed that the government must prove each of the elements of the conspiracy to murder federal officers and employees beyond a reasonable doubt, SER 57-63, was instructed on the meaning of reasonable doubt, SER 26, and was advised that the jury verdict must be unanimous. SER 40, 69-71. Fourth, during deliberations, the jury submitted three notes with questions. None of those questions related to the conspiracy to murder instructions. The jury did not indicate any confusion as to Count 12.

This was not a case warranting a specific unanimity instruction. The trial court did not commit plain error by not adding sua sponte a specific unanimity instruction that Cox now seeks.

4. Even if there was plain error, it did not affect substantial rights or seriously affect the fairness, integrity, or public reputation of judicial proceedings.

As noted above, even if there is plain error, the appellant must also show that the error affected substantial rights and was prejudicial in order to upset a jury's guilty verdict. *See United States v. Jenkins*,

633 F.3d 788, 807 (9th Cir. 2011). To show prejudice, the appellant must show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Alghazouli*, 517 F.3d at 1190 (internal quotations omitted). For this determination, the Court considers not only the jury instructions, but also the evidence presented at trial. *See Jenkins*, 633 F.3d at 807 (considering the other crimes charged and the evidence introduced at trial in holding that there was not a reasonable probability the jury's verdict would have been different had proper jury instructions been given); *United States v. Nguyen*, 565 F.3d 668, 677-78 (9th Cir. 2009) (plain error of omitting materiality element in jury instructions did not affect substantial rights because of the strong evidence on materiality and because defendant did not contest materiality in presentation to jury); *Alghazouli*, 517 F.3d at 1190-92, 1195 (holding that the court erred in failing to instruct the jury on the elements of the underlying substantive money laundering offenses that were the object of the charged conspiracy, but that the error was not plain and that it did not affect substantial rights in part based on other crimes charged).

In any event, even if the appellant shows that the error is plain and affected substantial rights, the Court must consider whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotations omitted); *see also United States v. Alferahin*, 433 F.3d 1148, 1159-60 (9th Cir. 2006) (concluding that omission of materiality element in jury instruction where the evidence at trial fell short of proving materiality warranted new trial); *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (concluding that error did not warrant correction where the jury was not instructed on the "in relation to" element of the 18 U.S.C. § 924(c) charge where there was strong and convincing evidence that defendants carried and/or used guns "in relation to" charged drug transactions). Indeed, the Court should exercise its discretion to reverse the conviction only if permitting the conviction to stand "would result in a miscarriage of justice." *United States v. Fuchs*, 218 F.3d 957, 965 (9th Cir. 2000) (citing *Olano*, 507 U.S. at 736).

Here, Cox has not demonstrated that any alleged error affected his substantial rights or had a reasonable probability of affecting the

jury verdict. Besides Count 12, Cox was also separately convicted of Count 16: soliciting Barney and Vernon and others to engage in the murder of an officer of the United States in violation of 18 U.S.C. § 373. ER 28. As to Count 16, the jury was instructed that the government must prove the following:

> First, beginning at a time unknown, but starting at least on or about November 15, 2010, and continuing up to on or about March 10, 2011, the defendant had the intent that another person engage in conduct constituting the murder of an officer of the United States;
>
> Second, the circumstances must be strongly corroborative of the intent; and
>
> Third, the defendant solicited, commanded, induced, or otherwise endeavored to persuade the other person to commit the murder of an officer of the United States.

SER 67. The evidence was strong and convincing that Cox intended to murder federal officials. Accordingly, the jury convicted Cox of both conspiracy to murder federal officials and solicitation of others to murder federal officials.

It remains unclear how Cox now believes the jury should have been instructed on the conspiracy to murder. Regardless, assuming Cox now contends the trial court should have revised Instruction 46 so that the words "malice aforethought" and "premeditation" followed murder,

the outcome of the proceedings would not have been different. Similarly, even if the court had revised Instruction 46 to add that the United States was required to prove that Cox and his co-conspirators did not have an agreement to act in self-defense, the outcome of the proceedings would not have been different. And even if the court had added a specific unanimity instruction as to the intended targets of the conspiracy, the outcome of the proceedings would not have been different. The jury instructions, even if erroneous, clearly required the jury to render a unanimous verdict that Cox did not act in self-defense, but rather had the intent to murder, that is, to commit an unlawful killing with malice aforethought and premeditation. After listening to approximately five weeks of evidence, the jury convicted both Cox and Vernon of the conspiracy to murder federal officials and convicted Cox of solicitation of others to murder federal officials. There is no reasonable probability that but for the alleged errors, the jury's verdict would have been different. There was ample evidence introduced through the witnesses at trial that Cox intended to murder federal officials. No miscarriage of justice will result here if the Court declines to exercise its discretion.

II. This Court should decline to consider Cox's claim of ineffective assistance of counsel because neither is the record sufficiently developed, nor is trial counsel's alleged ineffectiveness so apparent from the record that Cox was obviously denied his Sixth Amendment right to counsel.

A. Standard of Review

Claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1060 (9th Cir. 2000). Only where the district court record is "sufficiently developed to permit review," or where trial counsel's "legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel," will this Court consider ineffective assistance of counsel claims raised on direct appeal. *Id.* (internal quotations omitted). A claim of ineffective assistance of counsel is reviewed de novo. *Id.*

B. Discussion

Cox asserts that trial counsel was ineffective in failing to seek an entrapment jury instruction specifically as to Count 12, conspiracy to murder federal officials. To prevail on a claim of ineffective assistance of counsel, appellant must show that his counsel's conduct fell below an

objective standard of reasonableness, and that his counsel's incompetence prejudiced him. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *Strickland* sets a "highly demanding" standard, requiring the appellant to prove that his attorney's performance amounted to "gross incompetence." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). There is a "wide range of reasonable professional assistance," and a "strong presumption" that counsel's conduct fell within that range. *Strickland*, 466 U.S. at 689. Consequently, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id*.

"[I]n most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." *Massaro v. United States*, 538 U.S. 500, 504 (2003); *see also United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("[C]ollateral review provided by the writ of habeas corpus offers the appropriate forum to fully develop the record of counsel's performance."). This is because the trial record was "not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Massaro*, 538 U.S. at

505. For example, "[t]he appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse." *Id.*

Cox has not established that his case falls within one of the exceptions to the general rule that ineffective assistance of counsel claims should be addressed in a collateral proceeding. The record is devoid of the necessary facts to determine if trial counsel was ineffective. There is nothing in the record from which this Court could conclude that Cox's attorney's representation was so inadequate that it obviously denied Cox his Sixth Amendment right to counsel. Barney and Vernon both sought an entrapment jury instruction which was rejected by the trial court. There was no evidence that Cox was induced. Moreover, there was overwhelming evidence that Cox was predisposed to commit the crimes. Cox cannot show that the jury's verdict would have been different had trial counsel sought the entrapment instruction.

This is not a case where trial counsel's ineffectiveness is so apparent from the record that it is advisable to consider the issue on

direct appeal. Nor is the record sufficiently developed to allow for adequate review. Cox is free to develop the record and pursue this issue in a § 2255 motion. This Court should decline to consider Cox's direct appeal on these grounds.

III. Sufficient evidence supported the guilty verdicts on Count 12, conspiring to murder federal officers and employees, and Count 16, soliciting others to murder a federal official.

A. Standard of Review

Because Cox made a motion for judgment of acquittal at the end of the government's case, but did not renew that motion at the end of trial, this Court may review the denial of the motion for judgment of acquittal "only to prevent a manifest miscarriage of justice, or for plain error." *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201 (9th Cir. 2000).

Cox concedes that the standard of review is plain error for his challenge to the sufficiency of the evidence as to Count 16, solicitation of others to commit murder of a federal official. AOB 70. But as to Count 12, conspiracy to murder federal officers and employees, Cox mistakenly asserts that this Court's review should be de novo. AOB 61-62. Cox cites *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224-25 (9th Cir.

2007). In *Esquivel-Ortega*, the defendant moved for acquittal under Rule 29 at the conclusion of the government's case. *Id.* at 1224. After the trial court denied the motion, defense counsel rested subject to offering an audio tape of a call whose transcript already had been admitted into evidence, and a voice exemplar in the possession of the government. *Id.* at 1224-25. The Ninth Circuit concluded that "[g]iven the nature of the evidence, and the fact that the court had denied Esquivel's motion for acquittal only a few moments earlier, requiring Esquivel to renew his motion at that point would have been 'an empty ritual.'" *Id.* at 1225 (internal quotations and citations omitted). The Ninth Circuit held that de novo review was appropriate because the record showed that "it would have been futile for Esquivel to renew his motion following the offering of those two pieces of evidence." *Id.* The facts of this case are clearly distinguishable from the facts in *Esquivel-Ortega*. Here, after the trial court denied the Rule 29 motions, the defendants' case lasted seven trial days, including testimony from 19 witnesses. ER 785 (Doc. 428.) The United States then called three witnesses on rebuttal. Under those facts, based on Cox's failure to

renew the Rule 29 motion at the conclusion of the case, the sufficiency of the evidence is reviewed only for plain error.

B. Discussion

Cox challenges the sufficiency of the evidence as to Count 12, conspiracy to murder federal officers and employees, and Count 16, solicitation of others to commit murder of a federal official.[11] In reviewing a challenge to the sufficiency of evidence, this Court considers whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356 (1972)). When considering the evidence presented at trial in the light most favorable to the prosecution, the reviewing court "may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).

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[11] The timeframe for Count 12 was between August 2009 and March 10, 2011, while the timeframe for Count 16 began at a time unknown, but no later than November 15, 2010, through March 10, 2011. SER 57, 67.

The jury was properly instructed on the essential elements of the crimes of conspiracy to murder federal officers and employees and soliciting others to murder a federal officer. The evidence against Cox was overwhelming. After a lengthy trial with a large quantity of evidence, the jury deliberated for a little over two days. The only notes submitted by the jury pertained to the weapons counts, and ultimately it became clear that the jury was deadlocked as to Barney for the charge of conspiracy to murder federal officers and employees.

The record is replete with evidence of a conspiracy to murder federal officials and Cox's membership in that conspiracy, together with evidence of Cox's solicitation of others to murder a federal official. The evidence against Cox came in many forms, from witness testimony to physical documents to electronic evidence to recordings of Cox's own words. The evidence revealed a progression of Cox's plans to murder federal officials, his efforts to recruit others to join him, and the escalation of weapons acquisitions to further those plans. Throughout the conspiracy to murder federal officials, Cox remained in control of what the triggering event was to implement his plans to murder federal officials.

1. Creation of the database of victims and their home addresses

In the fall of 2009, Cox and Anderson agreed to create a database gathering personal information of government officials so that they would be in a position to kill those government officials if the government declared martial law. AER 266-69. Consistent with Anderson's testimony, the evidence established that in August 2009 Cox drafted the Acts of War list on his computer. AER 488-89, 1582-83.

Cox also believed there were federal agents after him and Cox "wanted to know who they might be and where they might be." AER 315-16. Anderson's notes from his conversations with Cox reflect that Anderson was directed to obtain the "names of federal marshals." AER 1571. Anderson did the research requested by Cox and wrote the name of a United States deputy marshal under the title "Federal Hit List." ER 620; AER 328-31. Moreover, Anderson's sketch of the federal building in Fairbanks corroborates his testimony that Cox and Anderson discussed conducting surveillance of the federal building in Fairbanks. AER 321-23, 1571.

Cox gave Anderson the names of federal and state officers and employees, including law enforcement, to add to the database. AER

317-20, 323-27, 1571-72. Some of those federal and state officers and employees were individuals with whom Cox had instigated confrontations. For example, federal TSA employee D.B. described a confrontation that Cox instigated with her at the Fairbanks airport. AER 903-09. D.B. testified that Cox called D.B. and her co-worker "Nazis" and accused them of violating his rights by having TSA canines (both of them had bomb-sniffing dogs). AER 903. D.B. walked away from Cox and went outside, but Cox followed her and got up close and took a picture of her with his cell phone. AER 907-08. When she asked Cox what he was doing, Cox responded "I need to know who the Nazis are." *Id*. Another federal employee, DHS employee N.C., described a similar confrontation instigated by Cox. AER 418-425. She described that she was in uniform at Walmart with her daughter, and Cox approached her and told her that he "doesn't like to see a lot of feds" in Fairbanks and that he did not believe DHS was a legally formed department within the government. ER 420.

Cox was proud of the database and had bragged about it, about how Anderson had "everybody's" addresses, referring to home addresses of government officials. AER 1280-82. Cox's intent behind the purpose

of the database was clear: "One day she may just follow orders and she may have to go." AER 325. Cox was referring to pre-meditated murder of a federal employee, specifically TSA employee T.B.

When Cox, Vernon, and Olson were unsuccessful in obtaining the database information from Anderson, Cox was not deterred and said "it's not like he got a monopoly or anything that can't be achieved the same way." AER 1462. Similarly, when Vernon was unable to obtain the database from Anderson, Vernon said "we could make our own list, we don't need [Anderson] to do it." AER 776. A reasonable jury could infer that the database contained information about specific targets of the conspiracy to murder, including those federal officials about whom Cox had already gathered information. Cox's and Vernon's statements reflect that they intended to continue gathering personal information about federal officials.

2. **Cox's Security Details**

Cox enlisted numerous individuals to participate in armed security details to "protect" him from federal agents. Anderson testified that Cox asked him to be part of a security detail for Cox's meeting with

OCS, Anderson agreed, and Anderson arrived at the meeting location with his AK-47 firearm and tactical vest. AER 302-12.

Cox's statements in numerous public speeches and recorded conversations reflected that he believed that he and his family had been targeted by the federal government, and that they might be killed. AER 1169-71; Exs. 486-487. He accused the federal government of being behind the OCS investigation, which he viewed as a threat to his family. *Id*. In November 2010, Cox arranged an armed security detail to "protect" Cox while Cox attended a hearing at the state courthouse. AER 590-91, 596. Cox planned another armed security detail for later the same evening while Cox was at an interview at KJNP television station. AER 593-94. Cox enlisted Barney to be the commanding officer of the armed security detail. Cox's whiteboard outlined the instructions he gave to the members of the security details, and corroborates the testimony at trial that Cox anticipated that federal agents would be at the KJNP television station. AER 587-91, 1502. Number five on the whiteboard states "Look out for plain clothes agents drawing weapon." ER 500, AER 1502. Number seven states "Drawing down on Schaeffer [Cox], Marti [Cox], Judge Bartels. Shoot for

defense." ER 500, AER 1502. Number 13 states "plain clothes . . . first option Hornet's Nest, OCS gas" and "lethal force second option, lead poisoning." ER 501-02. At the pre-security detail briefings, Cox instructed his men that they had to be prepared to kill federal agents. AER 590-91. Cox told the security team members that they needed to be guys "who've come to terms with the fact that if somebody shows up at the TV station . . . to try to kill Judge Bartell or Marti, you might have to kill him." AER 1184-85. Cox's handwritten notes state "local kill not ok . . . agent only if life danger." ER 515. The Vernons' handwritten notes reflected that the instructions regarding how to handle federal agents was "try not to kill – bodily stop – use grenades – to stop." AER 1569. Cox could have directed his men "Do not shoot unless they shoot first," but those were not Cox's orders. Similarly, Cox could have instructed his men that federal agents should be treated the same as local law enforcement. Instead of "local kill not ok," Cox's notes could have reflected "law enforcement kill not ok." A reasonable jury could infer that Cox's intent was that his men would kill federal agents if they arrived at the KJNP television station.

Between Cox's recorded statements and the physical documents corroborating those recorded statements, it was clear that Cox intended his security detail to murder a federal official, that the circumstances of that night at KJNP were strongly corroborative of his intent, and that Cox solicited his men to murder a federal official. There is no dispute that Cox intended his security detail to be fully armed, not only with firearms (including both rifles and pistols), but also with grenade launchers and "Hornet's Nest" anti-personnel rounds, and with OC gas and CS gas.

Barney was in charge of the security detail to "protect" Cox from federal agents. Barney's notes list the materials needed for the night: "pistol, rifle, gas masks, body armor, ammo, mags, mag holders, grenades, and grenade launchers, radios or phones." AER 1517. Barney was wearing body armor and was armed with a 37mm launcher loaded with "Hornet's Nest" anti-personnel rounds attached to his AR-15. AER 1121-22, 1138-43. Vernon was also armed that night as part of the security detail. AER 402, 1611. The security detail set up lights and established a vehicular funnel point. AER 391-92. One member of the security detail was patrolling the property on a 4-wheeler. AER

1141. Barney, Vernon, and other members of the security detail did what Cox asked them to do regarding the armed security detail at KJNP. There is no doubt that the circumstances were strongly corroborative of Cox's intent that they murder a federal official. Moreover, the conduct of Cox, Vernon, and Barney on that night more than suffices to demonstrate the existence of a conspiracy to murder federal officials and their membership in it. Vernon and Barney participated in the security detail ready and willing to kill federal agents at Cox's direction.

3. **The "2-4-1" Plan**

The evidence established that Cox's public statements and confrontations with federal and state officials were more than veiled threats. They reflected his intent to murder federal officials, particularly when viewed in context with his recorded conversations with Olson. For example, Cox threatened Alaska State Trooper Schoenberg "we've got you guys out-manned and outgunned, and we could probably have you guys all dead in one night." AER 1622-23.

Cox's statements reflected a specific intent to murder. Cox held a meeting with Barney, Thesing, and Olson where he explained a "2-4-1"

plan that if Cox or any militia members were killed then Cox and the others would kill two other people (such as law enforcement and judges) in return. Prior to this meeting, Vernon and Cox had already agreed to this plan. Vernon confided in Olson and Fulton that Vernon and Cox already knew where their targets lived and they made a pact "[i]f they fuck with one of us . . . when we go to their house, all of them with the titles – . . . [w]e'll drag them out and they will never find them." AER 1262. When Fulton confronted Vernon that what he was talking about was "premeditated," Vernon responded "They make it pre-meditated the day they do wrong to us." AER 1265. Vernon's statements confirm that he and Cox agreed to murder federal officials well prior to Vernon's trip to Anchorage to purchase more grenades at Cox's direction.

During the meeting discussing the "2-4-1" plan at Thesing's residence, Cox gave an example that if law enforcement were to come and arrest one of them, then it would be "absolutely morally allowable" to arrest judges and troopers. ER 390-91. Cox indicated that "2-4-1" meant "if they kill one of us, we go kill two of them." *Id.* The targets of the "2-4-1" would be "the ones that either authorized or failed to prevent." ER 394. Cox explained that "it's not just a war in fact, it's a

war declared by them." ER 391. Cox's attempts to justify the initiation of the "2-4-1" plan based on the government's declaration of war was consistent with the Acts of War list that he had checked off and was storing with his arsenal of weapons in Barney's utility trailer.

Over the course of a series of meetings when "2-4-1" was discussed, Cox and others discussed that they were not quite ready to implement it. At one point, Cox concluded that "we're not in a strong enough position to execute more than once." ER 409. But Cox told Barney and Olson that his goal was to get prepared to execute the "2-4-1" plan. AER 1377.

Throughout many conversations, Cox was the one who would constantly return to the topic of "2-4-1" and killing. The conversations also reflected that Cox felt morally justified to initiate "2-4-1," but he believed they needed to "train and get ready to where we can turn that 241 into a real ability." ER 409. Barney agreed and indicated that in the meantime they would train up guys and get them ready. ER 413-14.

There were also many conversations during which Cox and Barney discussed what would trigger the "2-4-1" plan. For example,

Cox and Barney agreed that if the government took one of their kids, "that's a 241." AER 1387-90. The evidence established that "2-4-1" was going to be initiated when Cox gave the order, and that is what Cox, Barney, and Vernon agreed to. For example, Cox gave Olson Alaska State Troopers' personal addresses "to have available for [them] if [Cox] initiated 241." AER 729.

4. **Stockpiling Weapons**

Cox, Barney, and Vernon had numerous weapons, legal and illegal. They had firearms such as AR-15s, other assault rifles, a .30 caliber Browning with crank-operated firing mechanism, and pistols. AER 1505, 1508, 1534, 1536-37, 1540, 1556, 1558-59, 1562. They had a .22 pistol with an attached silencer. AER 1552. They had a fully automatic machinegun. AER 1541. They had body armor and ballistic vests. AER 1504, 1532-33. They had OC gas and CS gas canisters. AER 1544, 1576-77. They had grenades. AER 1543, 1545, 1553-55. They had 37mm launchers and "Hornet's Nest" anti-personnel rounds. AER 1506, 1542, 1544, 1551. They had thousands of rounds of ammunition. AER 1507, 1531, 1535, 1546-49, 1557, 1560-61. They had tannerite. AER 1528, 1550. They had tactical scopes, gas masks, police

belts, and thumb cuffs. AER 1500, 1503, 1539. They already had an arsenal of weapons and yet they were trying to get more. They were preparing to implement the "2-4-1" plan.

Cox had been storing some of his weapons in a shed on one of his properties but he enlisted Barney and Olson to move those weapons to Barney's property. AER 787-801. Cox directed Vernon and Olson to get more grenades when they were in Anchorage in early February 2011 – to get as many pineapple grenades as they could. AER 1193. Later in February 2011, Cox wanted to get more grenades and placed an order for a pistol and silencer matched set. AER 1420-21, 1456-59. Vernon also placed an order for grenades and a pistol and silencer matched set. AER 802-03, 840, 849-50. Barney also placed an order for a pistol and silencer matched set. AER 1445. They were amassing weapons in order to be "strong enough" to execute the "2-4-1" plan.

The evidence presented throughout the trial proved beyond a reasonable doubt that Cox agreed with others to murder federal officers and employees and solicited others to murder a federal official. In his appeal brief, Cox argues that the plan was to take effect only if "various highly unlikely conditions precedent first occurred." AOB 67. However,

the evidence was overwhelming that Cox, Vernon, and Barney agreed to murder federal officials. The issue of when, what specific day or moment they would execute "2-4-1," had not yet been determined. Cox admitted that they were "not in a strong enough position to follow through" yet. ER 409. But that does not diminish the import of the agreement. *See Craig v. United States*, 81 F.2d 816, 822 (9th Cir. 1936) ("Conspiracy is essentially a crime of intent. The crime here charged was completed when the appellants agreed on the scheme.") (internal quotation and citation omitted); *United States v. Prince*, 883 F.2d 953, 958-59 (11th Cir. 1989) (condition precedent "does not make the agreement any less of an agreement for conspiracy purposes"); *United States v. Podolsky*, 798 F.2d 177, 179 (7th Cir. 1986) ("Since, however, section 371 requires the commission of an overt act, as well as an agreement, we doubt whether it is necessary to complicate the trial of conspiracy cases by making likelihood of fulfilling all conditions another element of the crime. As all agreements, including all conspiracies, have some conditions, implied or expressed, 'subjective or objective likelihood' could become an issue in every conspiracy trial."). This was not a case of "conditional conspiratorial liability" as referenced in

United States v. Palmer, 203 F.3d 55, 64 (1st Cir. 2000). This was a case where the defendants agreed to murder federal officials, took overt acts in furtherance of that agreement, but had not yet finalized the details of the execution of the goal of the conspiracy. Moreover, one of Cox's starting points for the "2-4-1" discussion was the scenario if one of them were to be arrested. Cox was in control of that triggering event and he purposefully chose not to appear at his court hearing knowing that the judge would issue an arrest warrant. Cox was in control of the timing of not only the initiation of the execution of the "2-4-1" plan, but also of the triggering events they discussed. While some portions of society may view the items on Cox's Acts of War list as unlikely to occur, Cox's checkmarks reflected that Cox believed that they already did occur. In part, that is why, as reflected in the conversations between Cox and Barney, the defendants believed they were already morally justified to implement the "2-4-1" plan.

Cox, Vernon, and Barney were prepared to kill federal agents. This includes the federal officials whom Cox had threatened and provided their names to Anderson to add to the database. It also includes the federal agents they expected to arrive at KJNP. Cox

argues that the team of federal agents did not exist, and thus lacked a federal identity. AOB 65-66. Cox misstates the theory of the government's case. During the jury instructions conference, the trial court clarified that for the KJNP incident, the defendants' intended targets were federal agents who may arrive at KJNP. As summarized by the trial court, "[w]e're talking about agents appearing without identification and . . . either drawing down on somebody or . . . starting to shoot somebody." ER 97. The likelihood of whether federal agents would respond to KJNP when they learned that armed men had set up a vehicle checkpoint and were verifying public citizens' identification does not bear on whether the defendants agreed to murder federal officials that night and took overt acts in furtherance of that agreement. As discussed at the jury instructions conference, in addition to the list of specific individuals they were targeting, "Mr. Cox had an Acts of War list that he had checked off, he had declared war. He was anticipating federal agents showing up." ER 100. These were all issues that were raised during the course of the trial and argued to the jury.

After considering all of the evidence, the jury concluded that Cox was a member of the conspiracy to murder federal officials and solicited

others to murder a federal official. There was more than sufficient evidence supporting the jury's verdict.

IV. The trial court properly admitted evidence of Cox's statements and information about groups with which he was involved.

A. Standard of Review

Because Cox failed to object to the admission of the evidence, the standard of review is plain error. *United States v. Khan*, 993 F.2d 1368 (9th Cir. 1993). "'[I]t is the rare exception when a district court's decision to admit evidence under Rule 403 constitutes plain error.'" *United States v. Chistensen*, 2015 WL 5011989 (9th Cir. Aug. 25, 2015) (quoting *United States v. Plunk*, 153 F.3d 1011, 1019 n. 7 (9th Cir. 1998) (overruled on other grounds)).

Cox mistakenly asserts that the standard of review is abuse of discretion. AOB 76. Cox is mistaken for two reasons. First, Cox's motion to exclude the evidence was filed and decided when the only charges against him were weapons charges; the amendment of the indictment to include the conspiracy to murder federal officials and soliciting others to murder a federal official made the relevance of the evidence showing Cox's extreme views clear. Second, the trial court's ruling denying his motion in limine was without prejudice; when a

party fails to renew the objection when the evidence is offered after such a ruling, the objection is waived, and review is for plain error only. Cox relies on *United States v. McElmurry*, 776 F.3d 1061, 1068 (9th Cir. 2015), *United States v. Waters*, 627 F.3d 345, 354-57 (9th Cir. 2010), and *United States v. Curtin*, 489 F.3d 935, 952 (9th Cir. 2007). Those cases all involved fact patterns where the defense objected to the admission of the evidence and the court made a definitive ruling. *McElmurry*, 776 F.3d at 1067 (court's definitive in limine ruling preserved the matter without the need for further objection); *Waters*, 627 F.3d at 351-52, 356 n.4 (applying abuse of discretion standard of review where the defendant had filed a motion to exclude the evidence and renewed her objection to the materials at trial); *Curtin*, 489 F.3d at 942-43, 956 (applying abuse of discretion standard of review where defendant objected to the evidence before the trial court). Unlike *McElmurry*, *Waters*, and *Curtin*, here, there was no definitive ruling from the court and no contemporaneous objection raised by Cox.

Prior to the filing of the Third Superseding Indictment, Cox had filed a general motion in limine on the sole ground that evidence about "an alleged '2-4-1' plan, a plan to 'overthrow' the government, a

'common law court' and all other activity associated with Alaska Assembly Post and Alaska Peacemakers Militia" was "irrelevant to the issue of possession" of illegal weapons. SER 82-83. The Third Superseding Indictment added Counts 11 through 16, which included the charges for conspiracy to murder federal officials, carrying firearms during and in relation to a crime of violence, and soliciting others to commit murder of a federal officer. ER 26-28. On February 7, 2012, more than three months before trial started, the court denied Cox's earlier motion without prejudice in light of the filing of the Third Superseding Indictment. SER 80-81. The only subsequent motion in limine filed by Cox related to the use of the term "weapons cache." ER 773 (Doc. 292). Moreover, at trial, Cox did not object to any of the evidence that he now claims the trial court should not have admitted. Thus, the proper standard of review is plain error.

B. Discussion

Cox contends that some of the evidence relating to Cox's statements about gun rights, sovereign citizen rights, and his militia

was prejudicially inflammatory.[12] The crux of Cox's argument is that the prejudicial effect of the evidence outweighs its probative value under Rule 403. However, Cox did not object to the admission of any of the exhibits he now seeks to challenge. Moreover, Cox himself offered the same and related exhibits during the defense case, including during Cox's own testimony. Cox cannot claim that evidence he himself highlighted was so inflammatory as to be unfairly prejudicial.

One of the preliminary instructions read to the jury before the presentation of the evidence dealt with the public speeches or statements given by Cox:

> You may hear evidence in this case of defendants' political or other beliefs. Whether you agree or disagree with such beliefs should not be considered by you.

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[12] It is not entirely clear which pieces of evidence he seeks to challenge. It appears that Cox is now challenging the admission of the following Exhibits: 194, 196, 201, 444, 506, 807, 919, 920, and 926. AOB 78-79. He also refers to the Acts of War list, but with no record citation. AOB 79. The Acts of War list appeared in Exhibits 136 (search of Cox's residence), 427 (search of trailer), and 763 (search of Cox's computer seized from Barney's residence). There is also a reference to the Alaska Peacemakers Militia (APM) uniform shirts with no record citation. AOB 79. The APM uniform shirts were Exhibits 71 (Olson's shirt), 301 (Vernon's shirt seized from his residence), and 420 (Cox's shirt seized from the trailer).

> All people have a right to hold whatever beliefs they think are appropriate, and have a constitutional right to express such beliefs, provided however, that you may consider such expressions of beliefs only insofar as such expressions are evidence relating to one or more of the crimes charged.

AER 51. Again, at the conclusion of the trial, the jury was instructed as to their consideration of such evidence:

> All people have a right to hold such beliefs they think are appropriate. All people have a constitutional right to express such beliefs, even in a provocative, challenging or offensive manner, and even if the speech advocates the use of force. Whether you agree or disagree with such expressions should not be considered by you. You should consider such expressions of such beliefs only insofar as such expressions are evidence relating to one or more of the crimes charged.

SER 23. Further, the court instructed the jury that "You are here only to determine whether the defendants are guilty or not guilty of the charges in the indictment. The defendants are not on trial for any conduct or offense not charged in the indictment." SER 29.[13]

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[13] Cox challenges the trial court's denial of a request for a First Amendment instruction in the middle of the presentation of the evidence. AOB 87-90, SER 73-75. Cox mistakenly cites to Ninth Circuit Model Instruction 2.10 related to Rule 404(b) evidence. There was no Rule 404(b) evidence admitted in this trial. Cox requested this instruction while Olson was testifying about texts he exchanged with Cox. The court considered Cox's argument and concluded that it was "not appropriate to instruct at this time." SER 74. The court

During the case-in-chief, the United States played short clips from speeches made by Cox, including Cox's speech at a meeting sponsored by the Sanders County Patriots in November 2009 at the VFW in Plains, Montana ("Montana Speech"). AER 236-38, 1613-20. The statements played at trial were made by Cox during the conspiracies. Cox did not object to any of these exhibits, including the Montana Speech. ER 693. The total time of the exhibit playing statements made by Cox in the Montana Speech was approximately six 1/2 minutes.

During the defense case, Cox testified for about three days. On direct, Cox discussed at length his political views, his participation in a

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specifically pointed out that "I gave them a general instruction at the beginning that in part covers this sort of thing and will instruct them at the end. But I – I just don't think under these circumstances that it makes sense to call attention to particular things and tell the jury what to do or not do about those things as we go along. It's – with the amount of words of defendants that are going to be before the jury, it – it calls for a general instruction at the end of the trial rather than individual instructions as we go along, in my – in my opinion." *Id.* "And certainly insofar as it's an exercise of free speech, that's one thing. On the other hand, so far as it provides a motive for alleged crimes, then it's something else, and it can be both." *Id.* The trial court did not abuse its discretion in refusing to give the instruction at the time the evidence was offered, particularly in light of the instructions given at the beginning and end of trial. *See United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987).

number of groups or movements, and speeches he had given around the country. AER 1064-1102. Cox played the entirety of one speech (the "Solution Speech") which was about 1 ½ hours long. Cox Ex. FSC-6; AER 1091-1101, 1144-67. In Cox's direct testimony and in the Solution Speech that Cox played, he spoke at length about his militia and the common law court. *Id*. In addition, Cox offered a declaration related to the Second Amendment signed by a number of individuals. Cox Ex. FSC-5.

On cross-examination of defense witness Steven Gibson, the United States played a one-minute clip from the Solution Speech, the same speech that Cox went on to play in its entirety. ER 704-06; Ex. 920; Cox Ex. FSC-6; AER 1144-67. While Cox did request a First Amendment instruction, Cox did not object to the admission of the exhibit. ER 705-06. Now, on appeal, Cox challenges the admission of that exhibit, the same exhibit he offered in its entirety in the defense case. The United States also cross-examined Cox with portions of statements he made in early 2011. Ex. 926; ER 656-92. Cox did not object to that exhibit. ER 657. In fact, the United States offered to play the exhibit first outside the presence of the jury and Cox's attorney

stated that he did not have an objection to the United States playing the clips. ER 656-57. This tactical decision by the defense amounts to a waiver of any objection, and should not be subject to challenge on review.

The district court properly admitted the evidence of Cox's statements and other material about gun rights, sovereign citizen rights, and the Alaska Peacemakers Militia (APM) because they were part of the crimes with which he is charged. To the extent that this Court determines the evidence was not inextricably intertwined, they were properly admitted under Federal Rule of Evidence 404(b).

1. The trial court was not required to read or listen to the exhibits prior to admitting the evidence.

Cox asserts that the trial court was required to review the evidence and to require the government to articulate the basis for admission before trial. AOB 76. Cox relies on *McElmurry*, *Waters*, and *Curtin*. However, those cases hold that *when a Rule 403 objection is made*, the trial court is required to review the evidence prior to ruling on the objection. *See McElmurry*, 776 F.3d at 1066-70 (where defendant "strenuously objected" to the evidence, no deference was given to the

trial court's Rule 403 ruling because the trial court had not read the evidence before admitting it over the Rule 403 objection); *Waters*, 627 F.3d at 356 n.4, 357 (where the defendant objected to the admission of defendant's reading materials, the trial court was required to review them before ruling on their admissibility under Rule 403); *Curtin*, 489 F.3d at 942-43, 956-58 (where defendant objected to the evidence, the trial court was required to review the evidence "when exercising its discretion pursuant to Rule 403"). Here, Cox did not object to the evidence. Accordingly, the trial court was not required to review the evidence prior to its admission. The trial court did not make a Rule 403 determination because Cox failed to make a Rule 403 objection (or any objection for that matter). These cases do not stand for the absurd proposition that a trial court is required to review all evidence in the absence of an objection prior to its admission at trial. *See McElmurry*, 776 F.3d at 1072-73 (Christen, J., dissenting in part) ("I understand *Curtin* and *Waters* to apply when a Rule 403 objection is raised regarding a specific piece of evidence, and the court definitively rules on the objection without reviewing that piece of evidence. . . . . [T]he court's opinion arguably requires district courts to review all materials the

government *might* introduce at trial – before the government has even specifically identified them – in order to give even a tentative ruling on a pretrial motion in limine. Such a time-consuming burden will almost certainly delay pretrial rulings and deprive trial counsel of helpful guidance needed for trial preparation and settlement negotiations.").

2. The evidence was inextricably intertwined with the evidence of the charged crimes.

Evidence should not be considered "other crimes" evidence when the evidence concerning the "other" act is inextricably intertwined with the evidence of the charged crimes. *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987). Inextricably intertwined evidence may be "used to flesh out the circumstances surrounding the crime with which the defendant has been charged, thereby allowing the jury to make sense of the testimony in its proper context." *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1327 (9th Cir. 1992). Additionally, evidence is admissible "in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-13 (9th Cir. 1995). Evidence may also be properly admitted to refute a defense. *United States v. Williams*, 291 F.3d 1180, 1189 (9th Cir. 2002)

(overruled on other grounds); *United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995).

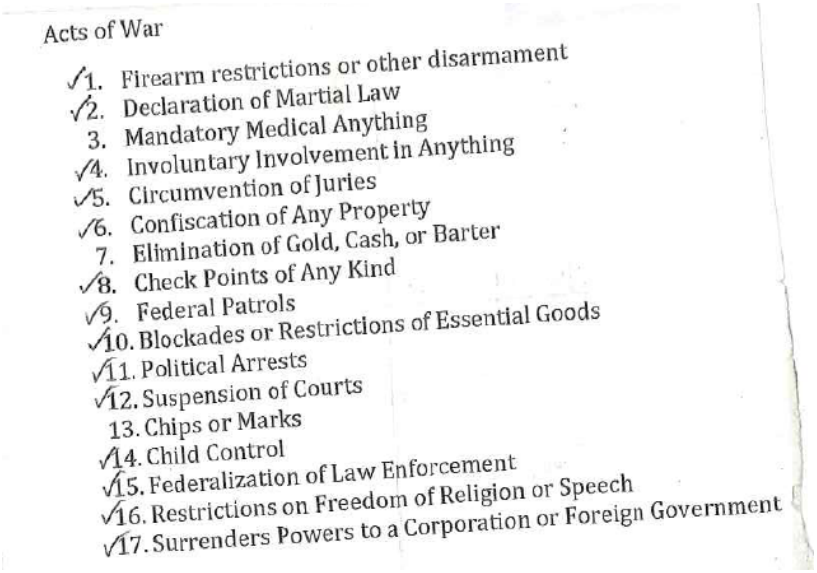
Here, the evidence Cox now argues should not have been admitted at trial was inextricably intertwined with the evidence of the charged crimes. All of the evidence now objected to occurred during the timeframe of the conspiracies. The relationships among Cox, Barney, and Vernon were central to showing the jury that they entered into agreements to commit crimes together. For one, they were all members of Cox's militia, the Alaska Peacemakers Militia. Cox was the "commander," Barney was a "major," and Vernon was a "sergeant." AER 641. The militia is how the defendants were connected to each other and how they had opportunities to meet together. Cox was the leader, and his militia was a place to recruit individuals into his inner circle. It was those individuals whom he solicited to murder a federal official. The testimony at trial established that Cox used the ranks of his militia members to do his bidding. For example, Cox promoted Olson to the rank of "sergeant" before sending Olson and Vernon to Anchorage to attend the militia convention and to buy grenades. AER 640-41. Indeed, one of the witnesses at trial testified that he still

considered Cox his commander and would follow Cox's orders today. AER 382.

Several of the items now objected to, such as the copies of the APM manual, were found in different locations, including Barney's and Vernon's residences, linking the men together. Exs. 72 (Olson's), 201 (Barney's), 300 (Vernon's), 531 (Clark's). In his opening statement, Cox described the APM as the "family militia," an "organization that tried to get government to listen, whether it be the judiciary, legislature or executive branch." ER 308-09. Similarly Barney began his opening statement by saying that the "men who formed the Alaska Peacemakers Militia were, I believe, almost all Christians, devout Christians, and of the type that believe the end of the world is near" and "[t]hey have various rules about storing food for a year." AER 104. The APM manual included sections regarding tactical movements, hand signals, speed reloading, and marksmanship. ER 561-81. There was nothing in the manual about storing and preserving food.

Similarly, the Acts of War list created by Cox was relevant to show Cox's motive and intent to murder federal officers and employees. Cox created the list, and it was located on his computer, in his house,

and in the trailer with an arsenal of weapons. AER 488-89, 1501, 1564, 1582-83. The list from the trailer had Cox's hand-written checkmarks next to 14 of the 17 items on the list:



Acts of War

✓1. Firearm restrictions or other disarmament
✓2. Declaration of Martial Law
3. Mandatory Medical Anything
✓4. Involuntary Involvement in Anything
✓5. Circumvention of Juries
✓6. Confiscation of Any Property
7. Elimination of Gold, Cash, or Barter
✓8. Check Points of Any Kind
✓9. Federal Patrols
✓10. Blockades or Restrictions of Essential Goods
✓11. Political Arrests
✓12. Suspension of Courts
13. Chips or Marks
✓14. Child Control
✓15. Federalization of Law Enforcement
✓16. Restrictions on Freedom of Religion or Speech
✓17. Surrenders Powers to a Corporation or Foreign Government

AER 1112, 1564. Regarding item #2 in the list, Anderson testified that Cox and Anderson agreed that if the government declared martial law, those in the position of governmental leadership would have to be killed. AER 266-75. Anderson also testified at trial regarding his yellow notebook with a page titled "Federal Hit List" with the name of a deputy U.S. marshal. ER 620. Part of the same exhibit was a separate pamphlet called the "Six Million Swindle." ER 622-25. Both of the items were seized from Anderson's residence and packaged together. ER 617.

The "common law court" organized by Cox and Barney was described in Overt Acts F and G of the Third Superseding Indictment. ER 16-17. Cox now for the first time objects to some of the documents related to the common law court, including documents found in Barney's residence admitted as Exhibits 194 and 196, and a flyer created by Cox that was published in the newspaper and distributed around Fairbanks with Cox's phone number on it, Exhibit 444. Specifically, regarding Exhibit 194, the record is clear that the United States conferred with the defense regarding the pages of this exhibit.[14] AER 230-35. The court heard argument on Cox's objection to pages 41 and 43 of Exhibit 194 and reviewed those pages that were in dispute. The United States did not offer those pages at that point in the case, and there were no objections to pages 1, 15, or 16 of the exhibit. ER 516-44. Similarly, with respect to Exhibit 196, Cox did not object to that exhibit. ER 545. While the entire exhibit was admitted, the government only asked the witness about pages 7, 17, 18, and 19 of the exhibit. ER 545-50; AER 1510-1513. Page 7 was a pamphlet about a

[14] Defense counsel and the court had trial exhibit binders with copies of the government's proposed trial exhibits.

common law court, referencing an upcoming meeting on January 15, and listed Thesing's phone number as the contact. ER 546, 549. Pages 17-19 were handwritten notes listing names of individuals: page 17 was titled "Possible Jurors" and included names such as Lonnie and Karen Vernon, Ken Thesing, and Gary Brockman. ER 547-48; AER 1511. Page 18 was titled "Exit Team" and listed names and phone numbers of individuals such as Lonnie Vernon, JR Olson, Coleman Barney, Mike Anderson, and Ken Thesing. AER 1512. Page 19 listed names and phone numbers of individuals. AER 1513. Similarly, Cox did not object to the admission of Ex. 444, the informational flyer about the common law court, asserting that the Alaska Court System and Alaska Bar Association are "under criminal investigation." ER 586-88, 591. The second page of the document had Cox's handwriting on it and also listed both Cox's phone number and Thesing's phone number. ER 589-90. Cox prepared the informational flyer about a meeting he was hosting on December 1 and wanted Olson and others to distribute the flyers around Fairbanks. *Id.*

These documents helped show the relationship between Cox, Barney, and Vernon, and also their connections with others such as

Olson, Anderson, and Thesing. They also related to their motive and intent to commit the crimes charged, and were necessary to tell the comprehensive story to the jury. Cox, Barney, Vernon, Thesing, and others participated in a "common law jury" in January 2011 during which Cox was "acquitted" of prior State of Alaska charges that he had pled guilty to and that were pending. AER 619-32. Cox used the "common law jury" proceeding to challenge the jurisdiction of the State of Alaska court system, including the judges, clerks, and troopers that were being targeted by Cox. Cox also used the "common law jury" as a platform behind his intent to murder. For the jury, it provided background and context for why Cox was motivated to kill state and federal officials.

The United States also introduced at trial documents located on Thesing's computer, including a news article quoting Cox. AER 1607-10. There was no objection to the admission of the news article (Ex. 807). AER 365-70. The article indicates that it was published on March 17, 2010 and quotes Cox that "Power comes from the barrel of a gun"; "The federal government is all power and no authority. The Constitutional Congress is all authority and no power. So we're faced

with this question: Do we condone a rebellious government and become an accessory to that with our compliance, or do we come together and try to find a way to put force, put power with that authority?"; and "I am not opposed to violent, bloody force." ER 647-49, AER 1607-08. This document was admissible because it corroborated the testimony of Olson and other witnesses regarding the conversations that occurred between Cox, Barney, Vernon, and Thesing. Thesing, the same individual who hosted the location of the first recorded meeting about the "2-4-1" plan, saved this document on his computer. Furthermore, Cox's statements regarding force, violence, guns, and the federal government were inextricably intertwined with the evidence of the charged crimes.

Finally, the clips of Cox's Montana Speech admitted during the government's case-in-chief are inextricably intertwined with the crimes charged. The public statements that Cox made reflected in the Montana Speech include admissions regarding possession of illegal weapons, such as machine guns. Moreover, the clips of Cox's statements provided a description in his own words of his prior interactions with law enforcement and federal TSA employees. Those

statements helped to establish Cox's motive and intent to murder federal officials and to solicit others to murder federal officials. In addition, Cox's statements reflected in the Montana Speech occurred prior to Cox meeting Olson. The United States anticipated that Cox might raise an entrapment defense. Cox's statements reflected in the Montana Speech demonstrate that Cox was predisposed to commit the crimes charged.

The United States also used Cox's prior statements in the cross-examination of witnesses. The United States properly cross-examined defense witness Gibson with a video of Cox's Solution Speech, in which Cox stated that he was "not against spilling blood for freedom," and that the question is not whether you would "*die* for liberty" but rather whether you would "*kill* for liberty." Ex. 920; AER 1151. Gibson testified that prior to contacting Cox he had Googled Cox and watched some of Cox's videos, including the clip of the Solution Speech. AER 1059-63. The use of the exhibit was proper cross-examination regarding Gibson's motivation for contacting Cox and bias during the course of his testimony.

In addition, the United States properly cross-examined Cox with his own prior statements reflected in Exhibit 926. In his direct testimony, Cox testified at length about speeches he had given and his views on violence. Cox's statements included in Exhibit 926 were made during an interview with the American Underground Network Radio. ER 656-58. The clips included Cox's statements regarding possession of weapons, Cox's belief that a federal assassination team had been sent to Fairbanks to assassinate him, his control of the militia, and threats made by Cox. ER 668-92. It was a valid line of cross-examination of Cox given the charges against him. Moreover, some of the statements were similar to statements made in other recordings previously admitted at trial. For example, Cox's statements regarding his belief about the federal assassination team were similar to those he made during the interview at KJNP television station. The fact that Cox repeatedly expressed the same views countered any defense that his more extreme threats were not serious but just isolated hyperbole. To the contrary, the evidence established that his threats were serious, considered, and developed.

3. Even if not inextricably intertwined, it was properly allowed as 404(b) evidence.

If this Court finds that the challenged evidence was not inextricably intertwined, it was properly allowed as 404(b) evidence. This Court has construed Rule 404(b) as being a "rule of inclusion." *McElmurry*, 776 F.3d at 1067; *United States v. Avers*, 924 F.2d 1468, 1472 (9th Cir. 1991). *See also Curtin*, 489 F.3d at 952 ("We routinely have held that circumstances surrounding an alleged crime become *more* relevant when the defendant makes his intent a disputed issue."). For the reasons stated above, the challenged evidence goes to "motive, opportunity, intent, preparation, plan, knowledge, and identity."

4. The probative value was not substantially outweighed by the danger of unfair prejudice.

The evidence now objected to by Cox was not so "inflammatory" or "reprehensible" to raise a concern of unfair prejudice. In terms of quantity or volume, these were only a small portion of evidence put before the jury during a lengthy trial. Cox himself raised many of these topics throughout cross-examination and during the defense case.

In particular, Cox complains about the "Six Million Swindle" pamphlet that was found in Anderson's residence together with the

yellow notebook. The items were separated for questioning Anderson at trial. Anderson was only asked questions about the yellow notebook; no questions were asked about the pamphlet. ER 611-14; 617-25. All counsel reviewed the exhibits before they were submitted to the jury at the conclusion of the evidence. For the sake of this appeal, the government assumes that the pamphlet went back to the jury during deliberations and acknowledges that no evidence linked it to Cox. However it is sheer speculation that the jury even reviewed this pamphlet, and they heard no questions or argument related to it. If anything, it is most prejudicial against Anderson. While on the stand, Cox consistently distanced himself from Anderson and denied that he provided any names to Anderson. There is no reasonable probability that but for this one pamphlet being submitted to the jury, compared to the mounds of evidence against Cox, the result of the proceedings would have been different.

CONCLUSION

For all the above reasons, the government respectfully requests this Court affirm the convictions of Francis Schaeffer Cox.

RESPECTFULLY SUBMITTED on February 27, 2017, at Anchorage, Alaska.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	CA No. 13-30000
	)	
Plaintiff/Appellee,	)	DC No. 3:11-cr-00022-RJB
	)	U.S. District Court for Alaska,
vs.	)	Anchorage
	)	
FRANCIS SCHAEFFER COX,	)	
	)	
Defendant/Appellant.	)	

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee hereby states that there are no related cases pending before this Court.

DATED on February 27, 2017, at Anchorage, Alaska.

s/ YVONNE LAMOUREUX
YVONNE LAMOUREUX
Assistant United States Attorney

BRIEF FORMAT CERTIFICATE

I hereby certify that I prepared this brief in accordance with the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit insofar as said Rules are available and known to me.

DATED on February 27, 2017, at Anchorage, Alaska.

s/ YVONNE LAMOUREUX
YVONNE LAMOUREUX
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for the Appellee hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing program used to prepare this brief, there are 27339 words in this brief.

DATED on February 27, 2017, at Anchorage, Alaska.

s/ YVONNE LAMOUREUX
YVONNE LAMOUREUX
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CERTIFICATE OF SERVICE

I hereby certify that on Click here to enter a date., I electronically filed Appellee's Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, all participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

RESPECTFULLY SUBMITTED on February 27, 2017, at Anchorage, Alaska.

s/ YVONNE LAMOUREUX
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