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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. ERIC J. PARKER, O. SCOTT DREXLER, RICHARD R. LOVELIEN, and STEVEN A. STEWART, Defendants.	2:16-CR-00046-GMN-PAL **GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE IRRELEVANT AND PREJUDICIAL ARGUMENT AND INFORMATION SUPPORTING JURY NULLIFICATION**

CERTIFICATION: Pursuant to Local Rule 12-1, this Motion is timely filed.

The United States, by and through the undersigned, respectfully moves *in limine* to preclude the defendants from 1) addressing in voir dire, opening statement,

or closing argument, and/or 2) adducing or eliciting during direct or cross-examination, any information or argument that the defendants broadly characterize as "state of mind" evidence which, as shown below, amounts to nothing more than irrelevant personal opinions and beliefs about the BLM, BLM agents, and agent conduct. More specifically, the government seeks to preclude evidence, information, commentary, beliefs or opinions about the following:

- April 6, 2014, officer encounters with civilians during the arrest of Dave Bundy, including any testimony concerning, or video/audio depicting, that event;
- April 9, 2014, officer encounters with civilians during the convoy block, including any testimony concerning, or video/audio recordings depicting officer encounters with Ammon Bundy or Margaret Houston;
- Third-party/lay person testimony or opinion about the level of force displayed or used by law enforcement officers during impoundment operations, including operations on April 12, 2014;
- References to the opinion/public statement of Governor Brian Sandoval of April 8, 2014, and/or opinions registered by other political office holders or opinion leaders about BLM impoundment operations;
- References to First Amendment zones;
- References to Cliven Bundy's grazing, water, or legacy rights on the public lands;
- References to infringements on First and Second Amendment rights; and
- References to punishment the defendants may face if convicted of the offenses.

As shown in the supporting Memorandum, comment and argument about such matters is nothing more, at bottom, than an improper attempt at jury nullification—that is, seeking to persuade jurors to acquit (or, hang) based upon political beliefs or values rather than upon the evidence. During Trial 1, defendants repeatedly made such nullification arguments and presented nullification opinions and beliefs; they did so primarily through defendant Parker's testimony, but also through cross-examination of government witnesses and closing arguments, by improperly characterizing BLM conduct during impoundment operations as abusive or overreaching. While such characterizations are untrue to begin with, what is more important is that the imagined issue of federal "overreaching," or violations of treasured rights, is flatly irrelevant to any element of the offenses charged or any possible defenses.

This Motion thus seeks to preclude irrelevant beliefs, opinions and comments about officer conduct during impoundment operations on April 6 and 9. There is no evidence that any of the officers either exceeded their authority or used excessive force. To adduce evidence of these events, whether on direct or cross-examination or in closing argument, unfairly prejudices the government by placing it in a position of having to prove a negative; that is, to explain or prove that the officers did not act unlawfully or otherwise supposedly overreach their authority.

In support of this Motion, the government submits the supporting Memorandum of Points and Authorities and reiterates all arguments from its previous motions *in limine*. *See* ECF Nos. 1390 and 1799.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural Posture.

On March 2, 2016, a federal grand jury in the District of Nevada returned a sixteen-count superseding indictment against 19 defendants, charging them with:

Conspiracy to Commit an Offense Against the United States, 18 U.S.C. § 371;

Conspiracy to Impede or Injure a Federal Officer, 18 U.S.C. § 372;

Use and Carry of a Firearm in Relation to a Crime of Violence, 18 U.S.C. § 924(c);

Assault on a Federal Officer, 18 U.S.C. § 111(a)(1), (b);

Threatening a Federal Law Enforcement Officer, 18 U.S.C. § 115(a)(1)(B);

Obstruction of the Due Administration of Justice, 18 U.S.C. § 1503;

Interference with Interstate Commerce by Extortion, 18 U.S.C. § 1951; and

Interstate Travel in Aid of Extortion, 18 U.S.C. § 1952.

These charges all stem from a massive assault on law enforcement officers in April 2014, while those officers were duly executing the orders of the United States District Court for the District of Nevada.

Six defendants—Burleson, Drexler, Parker, Stewart, Lovelien, and Engel—were severed and tried in the first trial, beginning in February 2017. In April 2017, the jury returned guilty verdicts on some of the counts as against Burleson and Engel, but were deadlocked on the remaining counts. The jury further remained deadlocked on all counts as to defendants Parker, Drexler, Stewart, and Lovelien.

The Court declared a mistrial on all deadlocked counts and ordered their retrial on June 26, 2017. The government has since dismissed the remaining

deadlocked counts against defendants Burleson and Engel, and the retrial of Parker, Drexler, Stewart, and Lovelien will commence on July 10, 2017.

B. Trial 1 – Jury Nullification Arguments – Beliefs and Opinions About Officer Conduct.

In Trial 1, the government filed motions *in limine* to preclude defense references to irrelevant information and argument about officer conduct during impoundment operations as well as to preclude evidence of statements by political and opinion leaders about BLM conduct and government policies concerning the public lands related to the impoundment. *See* ECF Nos. 1390 and 1799. The Court sustained many of the government's objections; nevertheless, the defendants referred to, or attempted to adduce, information of this nature during trial, for the pretextual reason of "supporting a claim of self-defense," or some other undefined excuse or justification based on "state of mind."

For example, the defendants' attorneys (and, during his direct examination, Parker himself) frequently regaled the jury with their views about 1) how important the First Amendment was, 2) why "zones" set aside for First Amendment speech were (in their minds) unduly restrictive and unconstitutional, and 3) how "standing up to government abuse" was the *real* reason why the armed militants came to Bunkerville. Thus—setting to one side that government agencies may properly establish First Amendment zones for safety reasons on public lands and that First Amendment zones, although designated, were not used during impoundment operations—Parker, under the "state of mind" guise, offered a slew of irrelevant, jury-nullifying comments touching **not** on material issues of this case (primarily, assault, extortion, and

conspiracy), but on free speech, religious worship, the views of the Governor, and his own aunt:

- "After I saw that video, I definitely became more interested. I -- it was -- it was frustrating to see – I don't like seeing people get hurt like that. I understand that they may not have agreed with what they were doing or whatever, but ***to see them throw the lady down and sic the dogs and the Tasers and stuff***, I grew up in Nevada and . . . I ***remember thinking that could be my aunt getting thrown***." (Tr. (Apr. 6, 2017) at 14);

- [Responding to a question about Facebook post falsely alleging that "martial law [has been] declared in Nevada county"] "[W]hen I found this post . . . there was a lot of conversation going on underneath it. **And *they were talking about martial law*** and what was going on in and around Bunkerville at the time. ***A lot of people were upset by the militarized presence that was in their town and around their town*** . . . . [Explaining his belief that "martial law" is] when the Constitution is put aside for a certain amount of time and basically the military law becomes military – ***the Constitution's void and they're – the rules change***." (*Id.* at 17-18);

- "That one . . . that says, 'First Amendment area,' it . . . made me mad . . . . My first thought was . . . so . . . if the media shows up, they have to stand in that box, too? The ***First Amendment's much more than just the right to stand somewhere with a sign***; . . . I was frustrated. I ***wondered if people were to want to pray, if they would have to go into that box to do so***. And if the media showed up and wanted to cover things, if they would have to only do so from that box. ***The . . . First Amendment is . . . important to me and I know it's important to other people*** . . . and I was . . . insulted[.]" (*Id.* at 24);

- [Asked about events from April 9 (when he was not there), Parker offers that an exhibit shows:] "a woman laying on the ground ***at the feet of an agent. She was just picked up and thrown to the ground***." (*Id.*);

- [Cajoled into explaining what was "going through [his] mind" based on an event he never personally saw, *viz.*, the arrest of Dave Bundy, Parker opines:] "***He was arrested on the side of the road for taking pictures and . . . for not being in a First Amendment***

> ***zone for taking pictures. . . but when I was that he was arrested for basically exercising his First Amendment . . . .***" (*Id.* at 27);
>
> • [Opining that BLM "snipers" suppress free speech]: "A sniper, two snipers up -- ***a sniper and a spotter most likely up a hill***, which was allegedly, in the article, above the arrest of Dave Bundy. . . . I just saw that they had – ***they had deployed snipers for violating not being in the First Amendment Zone*** . . . . [This] affected my state[]of mind a lot. I – I had decided I was -- I was going. . . . ***I couldn't believe that the BLM, the Bureau of Land Management had snipers and all this militarized stuff*** . . . ." (*Id.* at 31);
>
> • [After reading the Governor's statement of April 8, Parker recites how that "affect[ed] [his] state of mind"]: "Well, again, it was reaffirming some of the things I was feeling already and . . . ***I thought it was interesting because it was the governor . . . It seemed to me that the governor disagreed with what was going on as well, and that's just my opinion, but . . . I agreed with what he was saying***." (*Id.* at 37);
>
> • " . . . . I wasn't going to be bullied into not exercising my First Amendment." (*Id.* at 43);
>
> • "[I] was frustrated with the militarization and the heavy-handed nature of what was going on. [T]he First Amendment zone really." (*Id.* at 44);
>
> • "Dicks. I called them dicks . . . . Because they were pointing guns at women and children and myself and they threatened to shoot people that day, ***who I felt were just exercising their First Amendment right*** . . . ." (*Id.* at 87).

Excerpts from Apr. 6, 2017 Trial Transcript (all emphases added).

But despite Parker's alternative reality views about what he thinks the officers should have done, *they did nothing unlawful*. The same is true about the arrest of Dave Bundy of April 6 and the officer encounter with civilians on April 9. Nothing was shown to be improper or excessive about either of these events, yet the defendants frequently referenced them on cross-examination of witnesses, during the

direct testimony of defendant Parker, and during their closing arguments, as if the officer conduct was unlawful, frequently adducing, or otherwise referring to, general opinions, beliefs, and statements about their supposed outrage over officer conduct.

Drexler's counsel followed suit, reading Governor Sandoval's statement in its entirety and, as if it had been admitted for its truth, juxtaposed it with his theme that BLM was "overreaching" and lawlessly repressing meek "protesters":

> Most disturbing to me is the BLM's establishment of a First Amendment area that tramples upon Nevadan's fundamental rights under the U.S. Constitution. To that end, I have advised BLM that such conduct is offensive to me and countless others and that the First Amendment area should be dismantled immediately. No cow justifies the atmosphere of intimidation which currently exists or the limitation of constitutional rights sacred to all Nevadans. [continuing with argument] . . . I want you [the jury] to think about it. Prior to the 12th , the BLM had over 80 law enforcement officers and you've seen the video. You saw videos of an arrest. You saw an elderly woman taken down to the ground like a rag doll. You saw protestors getting tased. You saw lethal weapons out there . . . think about all that while Mr. Myhre, or whoever from the government, is talking to you.

Tr. (Apr. 13, 2017) at 63.

> Does a court order to gather cows give the BLM the right to indiscriminately use assault rifles? German Shepherds? Does a court order to gather cows allow them to do that? To attack unarmed and -- intimidate people? Does a court order to gather cows, does that give the right to the BLM to suppress our First Amendment right to speech, protest, be heard?

Id. at 64.

These are just a few examples of the defendants' trial-long efforts to try this case based on the non-issue of supposed "government abuse," absolutely incorrect allegations of officer misconduct, and references to the need for citizens to protect

treasured Constitutional rights by using force. But not only is such argument and evidence irrelevant and unfairly prejudicial, it is, in fact, an improper attempt at nullification. The defendants should thus be precluded from meandering through these nullification issues at trial.

C. Legal Standard.

1. Federal Rule of Evidence 402

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Evidence is relevant only if it has "any tendency to make the existence of an element slightly more [or less] probable than it would be without the evidence." *Jackson v. Virginia,* 443 U.S. 307, 320 (1979). In other words, only evidence that is relevant to the elements of the charge against defendant, or to a legal defense, is admissible at trial. *See* Fed. R. Evid. 402. Although a defendant is entitled to confront witnesses and to present a defense, he has no right to present irrelevant evidence. *See Wood v. Alaska,* 957 F.2d 1544, 1549 (9th Cir. 1992). The Court has discretion to determine which issues are relevant to the proceedings. *See id.*

Defenses that are not legally cognizable are properly excluded as irrelevant. *See United States v. Southers,* 583 F.2d 1302, 1305 (5th Cir. 1978) (evidence of eventual repayment of misapplied funds does not negate the requisite intent); *United States v. Harris*, 313 Fed. Appx. 969, at *1 (9th Cir. 2009) *vacated on other grounds*, *Harris v. United States*, 130 S. Ct. 3542 (2010) (in public corruption case, evidence of city council's motivation for rescinding public contracts irrelevant to issue of whether defendant engaged in self-dealing); *United States v. Urfer,* 287 F.3d 663, 665 (7th Cir.

2002) (in prosecution for willful damage to federal government property, district court properly refused to allow defendants to turn the trial into a referendum on national defense strategy).

2. Federal Rule of Evidence 403

Even if evidence offered by a defendant has probative value, it is properly excluded under Rule 403 of the Federal Rules of Evidence. That rule provides, in its pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time . . . .

Fed. R. Evid. 403; *see also United States v. Sarno,* 73 F.3d 1470, 1488-89 (9th Cir. 1995) (exclusion of evidence relating to proof of fact that was not element of charge not abuse of discretion where such evidence "might well have (as the district court here concluded) induced confusion in the minds of the jury and distracted them from the true issue [of the charge]").

3. Jury Nullification Generally

Nullification is "a violation of a juror's oath to apply the law as instructed by the court." *Merced v. McGrath*, No. C-03-1904 CRB, 2004 WL 302347, at *6 (N.D. Cal. Feb. 10, 2004), *aff'd*, 426 F.3d 1076 (quoting *United States v. Thomas,* 116 F.3d 606, 614 (2d Cir. 1997)). When a defendant introduces, or attempts to introduce, irrelevant information, arguments, or questions designed to encourage jury nullification, the court has a duty to forestall or prevent juror nullification "by firm instruction or admonition." *Thomas*, 116 F.3d at 616 (2d Cir. 1997). *See also United*

States v. Young, 470 U.S. 1, 7–10 (1985) (holding that the district court has a duty to prevent improper arguments to the jury, including those designed to "divert the jury from its duty to decide the case on the evidence"); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) ("A trial judge . . . may block defense attorneys' attempts to serenade a jury with the siren song of nullification."); *Zal v. Steppe*, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, concurring) ("[N]either a defendant nor his attorney has a right to present to a jury evidence that is *irrelevant* to a *legal* defense to, or an element of, the crime charged. Verdicts must be based on the law and the evidence, *not* on jury nullification as urged by either litigant.") (emphasis added); *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) ("[D]efense counsel may not argue jury nullification during closing argument.").

D. Argument.

1. "State of Mind" Does Not Justify Admitting Otherwise Inadmissible Opinions and Beliefs; Neither Parker, Nor Any Other Defendant (or Witness) Has The Right To Testify To Inadmissible Evidence Because He Seeks To Explain or Provide Reasons For His Conduct.

In a prosecution for threatening and assaulting federal law enforcement officers, officer conduct is not at issue unless it gives rise to a claim of self-defense. Here, it does not. The government showed in Trial 1 (*see* Trial Brief and Motions in Limine ECF No. 1799) that self-defense is not a cognizable defense here, because: (1) the defendants cannot offer more than a mere scintilla of evidence that they did not know that the officers in the Wash were law enforcement officers; or (2) the

defendants cannot show that the officers' used excessive force, and certainly not that the defendants' response to the officers' use of force was necessary and proportionate.[1]

Having failed to establish self-defense in Trial 1, ungrounded self-defense-type arguments – or evidence offered in support of a theory of self-defense/justification that will never materialize – should be excluded in the re-trail. In this regard, the court should preclude not only the information adduced in Trial 1 (as set forth above) but it should require the defendants to make offers of proof outside the presence of the jury in the event they intend to offer "new" information in an attempt to establish a defense. In other words, the defendant should not be permitted to adduce information before the jury that, at the end of the day, does not advance proof of a defense or negate intent – such tactics only serve to advance nullification arguments.

No evidence of improper or excessive officer use of force – let alone lethal force – was ever adduced during Trial 1 and cannot be adduced during the re-trial. Nor was there ever any evidence that BLM officers "attacked" or "intimidated" people, or that officers were not acting within their authority during impoundment operations.

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[1] "A defendant is entitled to a jury instruction regarding his theory of defense if it is legally sound and founded in the evidence." *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984). While the factual foundation for a requested instruction need not be great, *see, e.g., United States v. Sanchez-Lima*, 161 F.3d 545, 549 (9th Cir. 1998) (should receive self-defense instruction when "there is any foundation in the evidence"), it must amount to more than a mere "scintilla" (*see, e.g., United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993) and cannot rest on facts that simply do not support the instruction. *See, e.g., United States v. Rodriguez*, 502 F. App'x 637, 638 (9th Cir. 2012) ("Rodriguez's action of charging [the victim] after [the victim] backed away negates any claim of self-defense or defense of others.").

Yet, using the guise of "state of mind," defendants adduced testimony and information that implied that they were – and, ultimately, they argued outright that they were.

Under the rules of evidence, lay opinions, statements, and beliefs about officer conduct and use of force – like those presented by Parker – are not admissible even if officer conduct was at all relevant at this trial. *See* Fed. R. Evid. 701 (limiting lay witness opinion to circumstances not present here); 404(b) (precluding evidence of other acts to show that a person acted in conformity thereto). But here, they do not meet even the minimum threshold of relevancy because evidence of officer conduct in this case does not advance proof of a defense or negate an element of the offense, including intent.

Further, the fact that Parker testifies about his opinions and beliefs about the conduct of the BLM does not cloak them with the mantle of admissibility even if they are offered to supposedly describe his thinking ("state of mind") at the time. Neither Parker, nor his co-defendants, has the right to abrogate the rules of evidence in order "to explain himself" – or to otherwise present reasons that do not amount to a defense or negate an element of the offense. To allow otherwise, merely provides the defendants with a vehicle to expound upon their beliefs about the First Amendment, the BLM, their alternative reality view of the world, and a host of other irrelevant matters – all in an attempt to nullify the verdict. *United States v. Rosenthal,* 266 F. Supp. 2d 1068, 1075 (N.D. Cal. 2003), *rev'd on other grounds*, 454 F.3d 943 (9th Cir. 2006) ("To permit nullification in cases where a defendant has a 'good' reason for his conduct when motive is not an element of the crime allows jurors to use their

individualized set of beliefs as to 'good' reasons to be determinative of guilt or innocence").

On this point, *Zal* (in particular, Judge Trott's concurrence) is illustrative. There, the defendants were charged with criminal trespass during their protests of abortion clinics. At trial, the district court excluded any defenses of (1) necessity; (2) defense of others; (3) compliance with international law, treaties, or declarations; and (4) mistake of fact. Moreover, the court precluded the use of about 50 words that were *linked to the excluded defenses*, such as: unborn, feticide, murder, killing centers, fetus, slaughter, destroy, homicide, butchery, carnage, and thug. When Zal — portraying himself a zealous advocate for seven of the defendants — blatantly ignored the order and used the proscribed words in front of the jury, the court cited him with contempt.

On appeal, Zal argued, among other things, that the court's exclusions violated his client's Sixth Amendment right to "explain himself" and his actions to a jury. In affirming the contempt citation, however, the Ninth Circuit—recognizing that the proscribed words and stricken defenses were simply irrelevant to the elements of the offense—ruled:

> Zal essentially is arguing that the [court's] orders prevented the jury from fully appreciating why his clients acted unlawfully; there can be no constitutional violation if Zal had no right to present the excluded defenses. Zal had *no* constitutional right to present evidence *merely to bring out the reason for his clients' actions*.

Zal, 968 F.2d at 929.

Judge Trott's concurrence expanded on the fact that Zal — like the defendants here — was trying, through irrelevant evidence, inflammatory terms, and "need-to-explain-myself" palaver, to pursue the equally-impermissible goal of nullification:

> [T]he [right to explain/right to present reasons] argument simply fails to come to grips with Zal's admitted central purpose*: to brush aside the court's rulings on the precluded defenses and to prevail wrongfully on the jurors to exercise their illegitimate power of nullification.* Such a fundamentally lawless act in a court of law is not protected by the Constitution. To deny an attorney this type of "explanation" is certainly not to deny a defense right to effective representation.

Zal, 968 F.2d at 930 (emphasis added); *accord United States v. Sapse*, 628 F. App'x 516, 516-517 (9th Cir. 2016) (unpublished) (in prosecution for fraud and violation of federal regulations, Ninth Circuit emphatically affirms Judge Dawson's refusal to allow defendants to discuss irrelevant issue of the Food and Drug Administration's supposedly chilling effect on innovative medical procedures, such as those being hawked by the defendants: "The district court prohibited the defense from introducing evidence related to the FDA's politics to rebut the evidence of the regulations violations. Appellant argues that this decision was in error and violated his right to present a defense . . . . Appellant failed to establish the connection between the FDA's politics and the issues in the case. Therefore, the district court properly excluded this evidence as being irrelevant.") (*citing United States v. Vallejo*, 237 F.3d 1008, 1015–17 (9th Cir. 2001)).

A defendant's subjective beliefs and opinions were similarly excluded in *United States v. Komisaruk,* 885 F.2d 490 (9th Cir. 1980). There, the defendant was charged with willfully damaging government property by vandalizing an Air Force computer.

Id. at 491. At trial, the district court precluded the defendant from presenting her "political, religious, or moral beliefs" about whether a particular computer navigation system was legal under international law.

After conviction and upon appeal, the defendant urged that she had been precluded from presenting evidence of her good motive (*i.e.*, her desire to prevent nuclear war) to negate the government's evidence of criminal intent. *Id.* at 493; *see also id.* at 492-493 (describing irrelevant beliefs, including view that the Air Force computer was illegal under international law, and that she was otherwise morally and legally justified in her actions). The Ninth Circuit affirmed that the defendant's "personal disagreement with national defense policies could not be used to establish a legal justification for violating federal law nor as a negative defense to the government's proof of the elements of the charged crime." *Id.* at 492.

The same is true here. None of the events of April 6 and 9, nor any of the commentary surrounding those (or other jury-nullifying events), is relevant to any defense or justification. Nor do those events negate the defendants' *relevant intent* since none of these defendants was present for those events or charged in connection with them.

The defendants could not establish a self-defense claim in Trial 1 and they cannot do so in the re-trial. They should not be allowed, therefor, to parade a host of arguments about BLM conduct before the jury or expound about their "thoughts" about what BLM was doing or should have been doing during impoundment operations. This case is no different from other emotionally-charged cases – like the

abortion clinic cases – where defendants are precluded from presenting their oftentimes one-sided moral and philosophical view of the world around them, all in the hope of finding someone on the jury who agrees with them and will, accordingly, vote to nullify the verdict.

While Parker and his co-defendants may have disagreed with BLM's operations and/or methods, their thoughts and opinions about these matters at the time – however genuine or contrived – do not (and cannot) give them a legal pass to assault, threaten, and extort a federal officer under any cognizable legal theory. Thus, they should be precluded from introducing those thoughts and opinions at trial as if they did. To allow this would, as Judge Trott stated, reduce the trial to a "free-for-all, in which the laws **enacted by the people through their democratically elected representatives** effectively would [be] ignored and repealed." *Zal,* 968 F.2d at 930 (emphasis added).

2. The Court Should Preclude General Statements That the Jury Should "Send a Message" to the Government or That The Jury Should Consider The Potential Punishment of the Defendants.

"It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict." *United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1992). Inappropriate references could be as overt as "you understand the defendant is facing up to five or ten years in prison if convicted," or as subtle as "the defendant is facing a lot of time," "this case has serious consequences for the defendant," or "the defendant's liberty is at stake in this trial." However phrased, such comments are inappropriate in light of this Court's clear command that the jury

not consider punishment in determining whether the defendant is guilty of the charged offense. *See, e.g., Frank,* 956 F.2d at 879.

Similarly, "[s]tatements clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact are irrelevant and improper." *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009) (internal quotations omitted).

> The point of the "send a memo" statement was that if the jury acquitted Sanchez based on his duress defense, the verdict would in effect send a message to other drug couriers to use that defense themselves. This message would extend "to all drug traffickers, to all persons south of the border and in Imperial County and in California—why not our nation while we're at it." The obvious implied consequence of such a message would be increased lawbreaking, because couriers would be less afraid of conviction. Thus, by his "send a memo" statement, the prosecutor was encouraging the jury to come to a verdict based not on Sanchez's guilt or innocence, but on the "potential social ramifications" of the verdict.

United States v. Sanchez, 659 F.3d 1252, 1257 (9th Cir. 2011) (finding the statement improper); *United States v. Leon-Reyes,* 177 F.3d 816, 823 (9th Cir.1999) (prosecutors may not "point to a particular crisis in our society and ask the jury to make a statement" with their verdict); *United States v. Williams,* 989 F.2d 1061, 1072 (9th Cir. 1993) (improper to exhort jury to "[t]ell these defendants that we do not want [methamphetamine] in Montana").

> The prosecutor's comment was made in response to defense counsel's blatant plea for jury nullification, in which he told the jury to send a message that the government "should be spending their thousands of dollars on other things like gangs and dope and not this kind of case such as innocent elderly people.

United States v. Parker, 991 F.2d 1493, 1498 (9th Cir. 1993) (finding improper argument by defense counsel allowed the government to make a similar argument out of fairness).

In Trial 1, counsel for Stewart questioned a witness in front of the jury about punishment, inquiring whether he faced 83 years if he had been charged with offenses like those brought against the defendants. He further urged that the jury should "send a message" by their verdict. *See, e.g.*, Tr. 4/12/17, p. 190 ("show the government that the Constitution is alive and well"); *id. (*"show the government that [a crime] hasn't happened here"). These, and similar arguments are blatantly improper and should not be permitted.

3. Evidence Intended to "Dirty Up" the Victims of this Assault is Irrelevant and Unfairly Prejudicial Jury Nullification.

Evidence which is intended to portray victims in a negative light and suggest that an acquittal should be entered because the victims deserve to be victims is not relevant to any charge or defense. Submitting such evidence to a jury asks them to engage in improper jury nullification. Therefore evidence intended to suggest, however inaccurately, that BLM officers were "militarized" (e.g., wearing their uniforms and carrying their firearms), that they "brutalized" protestors on April 6 or 9, 2014 (e.g., with regard to April 9, 2014, were attacked by the defendants own co-conspirators and had to evacuate civilian personnel), that they "occupied" Bunkerville (e.g., brought sufficient personnel to conduct a far-ranging cattle operation and stayed in the local hotels), that they established rights-crushing First Amendment zones (safe places with parking off widely used roads that would always be open to the public), and so on constitute nothing more than unfairly prejudicial and inadmissible attacks on the victims of these crimes.

Evidence of the kind described above was offered in Trial 1, purportedly to advance a self-defense argument. But it was clearly not intended for that purpose. Otherwise it would not be so liberally referred to (and shown) in their closing arguments when no self-defense instruction was given. The true purpose of this evidence was to "dirty up" the victims—nothing more.

> Rule 403 does not limit "unfair prejudice" to one side. "Unfair prejudice" means, at its most serious, "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." McCormick on Evidence § 185 at n. 31 (2d ed.1972); see Fed. R. Evid. 403, 1972 Advisory Committee Note. While a defendant is fully entitled to prove self defense, a defendant is not entitled to persuade a jury by evidence "justifying the deliberate destruction by private hands of a detested malefactor." II Wigmore on Evidence § 246, at 57.

United States v. James, 169 F.3d 1210, 1216 (9th Cir. 1999) (Kleinfeld, J., dissenting); *United States v. Comerford*, 857 F.2d 1323 1324 (9th Cir. 1988) (affirming the trial judge's decision to keep the domestic violence evidence out in an assault trial involving unrelated males); *Cohn v. Papke*, 655 F.2d 191, 192-95 (9th Cir. 1981) (holding trial judge had abused his discretion by admitting the defendants' evidence that the plaintiff was homosexual, because the man's sexuality was of limited relevance, and the relevance was outweighed by the risk of unfair prejudice); *United States v. Driver*, 945 F.2d 1410, 1416 (8th Cir. 1991) (holding "evidence of the child abuse investigation involving the victim would have served merely to portray him as a bad person, deserving to be shot, but did not relate to Driver's claim of self defense.").

Evidence that the victims deserve to be assaulted, threatened, and extorted by the defendants is inadmissible, prejudicial, and just plain wrong. It should be excluded.

E. Conclusion.

Like the defendant who criminally trespasses at an abortion clinic because he or she is morally opposed to constitutionally-protected abortion procedures, or like the defendant who sabotages military equipment because she is morally opposed to war, the defendants' views and beliefs about the BLM (divorced from reality as they are) are flatly irrelevant because they cannot justify conduct that is squarely proscribed by the federal statutes. Nevertheless, these defendants seek to air their views to the jury for the same impermissible reason as the defendants in the abortion clinic case: jury nullification; that is, the hope that the jurors (or, at least one of them) will ignore the relevant questions framed by the jury instructions (*viz.*, "Did this defendant intentionally assault a law enforcement officer?" "Did this defendant intentionally threaten a law enforcement officer?"), and decide the case based on personal sympathy with the defendants' supposed beliefs.

WHEREFORE, for all the foregoing reasons, the United States respectfully requests that the Court enter an Order granting its Motion and precluding jury nullification as delineated herein.

Dated this 15th day of June, 2017.

Respectfully submitted,

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//s//

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CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **GOVERNMENT'S MOTION IN LIMINE** was served upon counsel of record, via Electronic Case Filing (ECF).

DATED this 15th day of June, 2017.

/s/ Steven W. Myhre

STEVEN W. MYHRE
Assistant United State Attorney