CA No. 18-10287

D. Ct. No. 2:16-CR-46-GMN

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GOVERNMENT'S REPLY BRIEF

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I. INTRODUCTION

In its opening brief, the government described the extraordinary efforts prosecutors took to review and produce thousands of items of discovery while seeking to protect victims and witnesses from threats and violence. We argued that any missteps with respect to disclosure of *Brady* materials were at worst negligent and did not warrant the extreme sanction of dismissal with prejudice. We discussed the documents on which the court based the dismissal, and showed that each was either duplicative of previously disclosed material, unknown to the prosecutors, or—based on the district court's prior rulings—reasonably understood by the government to be irrelevant.

Defendants do not rebut, and largely fail to even address, these arguments. Instead, they seek to inject numerous other issues unrelated to the decision on appeal. They re-raise baseless allegations of misconduct that the district court rejected (including one allegation the court generously found "[not] necessarily in bad faith" but rather premised on defendants' ignorance); they ask this Court to consider sensational, untested accusations that they urged the district court *not* to investigate; they highlight misconduct findings against a BLM agent that played no role in the court's decision; and they re-raise a double jeopardy argument the district court explicitly, and correctly, rejected.

This Court should reject defendants' attempts to obfuscate the issue in this appeal. As the Court has made clear, a district court's discretion to dismiss an indictment with prejudice is exceedingly limited. A court does not have discretion to dismiss an indictment with prejudice unless the government's misconduct was so grossly shocking and outrageous as to violate the universal sense of justice; or where the government's misconduct was flagrant, *and* caused substantial prejudice, *and* no lesser remedy is possible to cure that prejudice.

The district court here abused its limited discretion. Its findings of "flagrant" misconduct rested on mistaken assumptions about how the produced documents related to previously produced discovery; a legally erroneous equating of nondisclosure with flagrant misconduct; and a failure to appreciate how some of the government's discovery decisions, even if erroneous, were reasonable in light of the court's prior rulings.

Thus, even assuming the district court correctly found a *Brady* violation with respect to one or more documents, the extraordinary sanction of dismissal with prejudice was unwarranted and exceeded the court's limited discretion. The court's condemnation of the prosecution team was undeserved, and less drastic remedies were available. This Court should reverse.

II.

REPLY ARGUMENT

A. The Timing of the Government's Disclosures Did Not Constitute "Flagrant Misconduct," and Defendants' Attempts to Defend Parts of the District Court's Analysis Fail.

The district court based its dismissal on the government's disclosure of about 80 pages of documents including maps, FBI 302s, a BLM report about the Mojave Desert Tortoise, an administrative log from the FBI's Tactical Operations Center (TOC), two documents mentioning a surveillance camera, and threat assessments prepared for an unexecuted 2012 impoundment.[1]

In its opening brief, the government explained that the maps and 302s were duplicative of previously disclosed information, and thus our "late" disclosure of those additional documents was neither flagrant nor substantially prejudicial; that our inability to locate the Desert Tortoise report or learn about the TOC log earlier was not unreasonable and did not demonstrate "outrageous" government misconduct; and that our failure to appreciate the possible relevance of two documents mentioning the camera and the threat

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[1] Payne and Ammon Bundy claim that "the government disclosed approximately 3,300 pages of discovery" after the deadline for disclosing *Brady* evidence, and that the district court found a "substantial portion" of these documents favorable to defendants. Payne Br. 33 (citing 1ER:28). *But see* 1ER:28 (district court listing "favorable" documents, which comprise no more than 81 pages).

assessments was reasonable in light of previous court rulings. The defendants' limited attempts to defend parts of the district court's analysis fail.

1. Payne and Ammon Bundy Concede the Maps Were Duplicative.

As the government explained, OB 31–33, the maps we disclosed in December 2017 duplicated maps we produced in June 2016. Payne and Ammon Bundy explicitly concede this point. Payne Br. 72 ("The government is correct …"). They assert, however, that "the *meaning* of the drop points on the maps did not become clear until after Defendants received all of the late discovery." *Ibid*. But even if later disclosures were necessary to understand the "meaning" of the drop points—an assertion the government disputes, *see*, *e.g.*, 3ER:161, 167–168 (explanation of drop points and description of nighttime LP/OPs)—maps showing those drop points were disclosed in June 2016, and thus disclosure of duplicative maps 18 months later could not prejudice the defense.[2] In light of defendants' concession, the district court clearly erred in relying on the disclosure of the duplicative maps as flagrant misconduct supporting dismissal with prejudice of the indictment.

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[2] Payne and Ammon Bundy assert that the government only addressed prejudice with respect to the surveillance camera and related reports. Payne Br. 79. This is incorrect. *See* OB 2, 3, 30–31, 32–33, 35, 37–38, 40, 44, 54–55, 59–60, 62–63.

2. Payne and Ammon Bundy's Contention That the Felix Supplemental 302 Contained New Relevant Information Is Meritless.

As we explained, OB 33–35, BLM Rangers Brunk and Russell's tactical overwatch position during Dave Bundy's arrest was uncontested, and well documented through timely discovery and earlier testimony. *See*, *e.g.*, 3ER:174–175 (emails); 3ER:177 (Def. Exh. 5008-F) (video); 3ER:193–194 (Brunk's testimony). Our later disclosure of a supplemental 302 documenting Officer Felix's observation of Brunk or Russell in that position provided no new information on that point. *See* 2ER:84–85.

Payne and Ammon Bundy acknowledge that the government timely disclosed the earlier information. Payne Br. 71. But they argue that these earlier disclosures did not "relieve" the government "from its responsibility to disclose" the Felix supplemental 302, *id*. 71–72; and imply the supplemental 302 is important because information in it conflicts with a 302 documenting Felix's initial interview. Both points are red herrings.

First, defendants do not explain *why* the government was required to disclose the Felix supplemental 302. *Cf. Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work"). Although the district court repeatedly stated the 302 showed Felix

"observing the listening post/observation posts ("LPOPs")," *see* 1ER:5, 28, 49, that finding—which Payne and Ammon Bundy inexplicably repeat, *see* Payne Br. 35—is clearly erroneous. *See* 2ER:84–85. In fact, the document summarized Felix's observations during Dave Bundy's arrest, which was nowhere near the Bundy household and had nothing to do with LP/OPs.

Second, although the paragraph in the Felix supplemental 302 describing where he was during Dave Bundy's arrest conflicts with the incorrect, one-sentence description in his initial 302, *compare* 3ER:195 *with* 2ER:84, that irrelevant discrepancy (or correction[3]) was not the basis on which Payne claimed relevance of the supplemental 302.

Payne's sole contention was that the supplemental 302 regarding "Felix observing a BLM officer in a 'tactical over watch position' on April 6, 2014 (*referring to BLM Rangers Brunk or Russell* during Dave Bundy arrest)" (emphasis added) was relevant because it "bolster[ed] the notion that snipers were in the area and that the Bundy household was surrounded." CR:3027 at 19 n.8. But as we explained, OB 33–35, Payne's own description of the 302 makes clear he was already aware of Brunk and Russell's tactical overwatch position during

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[3] As the government elsewhere demonstrated, when officers are re-interviewed, they are sometimes asked to review reports of earlier interviews and correct any errors. *See* 12SER:2789 & n.6.

Dave Bundy's arrest, and this duplicative account was unnecessary to "bolster" that uncontested point.

Finally, defendants do not attempt to defend the district court's clearly erroneous finding that the December 2017 disclosure of the Felix supplemental 302 was prejudicial based on "[d]efense represent[ations] that they would have proposed different questions for the jury voir dire, exercised their challenges differently, and provided a stronger opening statement," *see* 1ER:50, as defendants made no such representations with respect to this document.[4] Because Brunk and Russell's tactical overwatch position was well known, disclosed, and uncontested, the district court clearly erred in relying on the Felix supplemental 302 as flagrant misconduct supporting dismissing the indictment with prejudice.

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[4] Although defendants made such representations with respect to other documents, their claim—that, if *only* they had received the documents earlier, *then* they would have sought jurors who were "open to allegations of government over-reaching, infiltration and wrong doing," 6SER:1069—strains credulity, given that this was defendants' strategy from the beginning. In any event, defendants cite no authority finding a mid-trial *Brady* violation prejudicial based on lost opportunities in jury selection, and the government is aware of none. *See United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008) (noting that the "appropriate remedy" for *Brady/Giglio* violations "will usually be a new trial").

3. Defendants Do Not Rebut the Government's Argument That Its Failure to Disclose the Delmolino Supplemental 302 and Racker 302 Earlier Was Reasonable, or That the District Court Erred in Finding Flagrant Misconduct with Respect to Those Disclosures.

The district court said the Delmolino supplemental 302 was "potentially exculpatory" because it "provides information regarding BLM individuals wearing tactical gear, not plain clothes, [and] carrying AR-15s." 1ER:49–50.[5] And it found the "suppression" of that 302 and the Racker 302 was "a willful failure to disclose *because the FBI created these documents*." 1ER:50 (emphasis added).[6] Defendants do not rebut the government's argument that those findings were erroneous.

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[5] As we explained, OB 37–38, we had already produced significant discovery about these matters.

[6] Payne and Ammon Bundy accuse the government of "erroneously" suggesting the district court did not have these documents "before ruling," because the government provided them as exhibits to its December 29, 2017, pleading. *See* Payne Br. 82 n.13 (citing OB 63). But with one incorrectly drafted exception, *see* OB 29, the government's complaint was that the court did not have those documents (or the maps or Desert Tortoise report) when it granted the mistrial *on December 20*. *See* OB 23, 32, 34, 40, 62–63.

a. In light of the district court's prior rulings, the government's failure to appreciate the potential relevance of evidence regarding armed law enforcement officers near the Bundy residence was not unreasonable, and in any event these documents were duplicative.

Before trial, the district court repeatedly ruled that what law enforcement officers wore and what weapons they carried was not relevant to any available defense. *See*, *e.g.*, 5ER:844–45; 5ER:813–14. It was not until a week after jury selection began that defendants claimed this evidence could rebut allegations that they *falsely* said Bundy's property was surrounded by BLM snipers. *See* 4ER:650–54; 680–82. The court acknowledged, on November 8, 2017, that this new theory changed the calculus of its materiality analysis. 4ER:709–710. The government disclosed the Delmolino supplemental 302 on November 7—the day *before* the court reversed course and found that information about the officers' uniforms and weapons might be material to the case.

To be sure, the superseding indictment alleged that the defendants made false claims about snipers and being surrounded. But these were only three of the more than 70 overt acts alleged. Moreover, the government's opening statement, which covers 94 pages of trial transcript, *see* 8SER:1560–1654, includes only a *single sentence* alleging that the defendants' claims of being surrounded by the BLM were false, *see* 8SER:1582. Payne and Ammon Bundy quote those three overt acts repeatedly, Payne Br. 6–7, 45–46, and make that

single sentence of the government's 94-page opening statement a separate brief subheading, *see id*. at 18. But their attempt to turn this minor aspect of the government's case into its centerpiece fails.

Payne and Ammon Bundy argue that the government should have appreciated the importance of these allegations because, they assert, "the government itself argued" that the indictment's allegations that defendants made false representations about BLM conduct "were integral to the government's case from day one." Payne Br. 87. In support of that assertion, they cite the government's opposition to Payne's motion to strike, as surplusage, 23 paragraphs and seven headings and subheadings from the superseding indictment. CR:718. But *none* of the text Payne sought to strike involved allegations that the defendants falsely claimed being surrounded by snipers. The government's opposition to the motion to strike says nothing about the import of those three overt acts to the government's case. And in any event, regardless how important or unimportant those allegations were to our case, striking them—and precluding the government from introducing any evidence to support them—would cure any prejudice from the timing of the disclosures.

Moreover, the documents regarding the officers' uniforms and weapons, mostly focusing on the LP/OPs near the Bundy residence, were duplicative of earlier discovery, and defendants' complaints demonstrate again how they

simulatenously complained about too much and too little discovery, and used the government's extraordinary discovery production against it.

In March 2017, the government disclosed a 302 stating that BLM Ranger Terrell Bradford was assigned to an LP/OP, and that his duties included "observations in the area of the Bundy residence (front and rear positions)." 11SER:2487–2488. When we pointed this out, Payne complained in a November 20, 2017, pleading that the defendants could not be held responsible for knowing what was in the discovery, given the "close to 24,000 pages of discovery and hundreds and hundreds of hours of video-taped material" the government had produced. *See* 5SER:780.

The government also produced discovery in March 2017 identifying the six officers assigned to LP/OP nightwatch during the impoundment. But in a November 2017 pleading, Payne claimed the defense did not have that information, CR:2906 at 7 n.5, so we provided additional discovery about those officers, including the Racker 302, which states "Racker conducted LP/OP duties in the area of the Bundy Ranch" for a time. 2ER:88. Payne cited the Racker 302 in his December 18, 2017, pleading, 6SER:1056, and without giving the government an opportunity to respond, the district court declared a mistrial in part based on it. 1ER:49. This was error.

b. Defendants make no attempt to defend the district court's equating FBI authorship with flagrant misconduct.

As the government argued, *see* OB 36–37, the district court erred when it found "a willful failure to disclose," and thus flagrant misconduct, based solely on the fact that the FBI created these documents, because "[d]rawing this authorship-willfulness nexus effectively imposes strict liability for discovery errors, virtually eliminating the possibility of inadvertent nondisclosure." Payne and Ammon Bundy's response to this argument proves our point.

They argue that the prosecution team "has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police." *See* Payne Br. 73 (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). True enough. But that proposition means only that prosecutors' failure to learn of such evidence can constitute a *Brady* violation: the court here went much further, concluding—solely because the FBI created the 302s—that the government's failure to disclose them earlier was a *willful* failure to disclose amounting to *flagrant* misconduct. The district court cited no authority supporting that authorship-willfulness nexus, and defendants likewise fail to offer any. The court erred.

4. Defendants Do Not Rebut the Government's Argument That Its "Failure" to Find the Desert Tortoise Report Earlier Did Not Constitute "Flagrant Misconduct."

Payne and Ammon Bundy assert that the Desert Tortoise report contained "favorable evidence suggesting there was no documented injury to tortoises by grazing." Payne Br. 39. But they do not explain *how* such evidence is favorable. They cite "12SER:2572 n.4" as a prior explanation, but that footnote simply acknowledges that the district court was *incorrect* in stating the report "documented the fact" that a BLM agent asked the FBI to place a surveillance camera,[7] and states the "defense believes the other bases cited for the finding of a *Brady* violation are sufficient…." 12SER:2572 n.4.

The only other basis the court articulated, however, was that the report "would have been useful to potentially impeach Ms. Rugwell who testified that there had been a detrimental impact on the desert tortoise habitat." 1ER:57. This basis lacks factual and legal support.

In fact, at trial, Rugwell testified by way of background that the BLM reduced the number of cattle-grazing permits after the the Desert Tortoise was listed as threatened. 8SER:1769–1770. On cross-examination, she testified

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[7] Without explanation, Cliven Bundy repeats the district court's clearly erroneous finding, *see* CBundy Br. 19, even though the district court itself later recognized and corrected its clear error. *See* 1ER:28–29.

about a discussion at a meeting that "centered around whether a cow had eaten a desert tortoise, and [she] said that [she] was not aware of that," 9SER:1909, but added that cows "can adversely affect the habitat, yes, and we did have specialists that found a lot of degradation of habitat in that area." 9SER:1910; *see also* 9SER:2043. Rugwell denied knowing about a purported 1990-1991 evaluation that "held that the desert tortoise was not threatened by cattle." 9SER:1920.

It is unclear how a report "suggesting there was no documented injury to tortoises by grazing" could constitute impeachment information, given that Rugwell's testimony narrowly addressed degradation of habitat.[8] More important, it is unclear how any such evidence would be relevant. Injury to the Desert Tortoise, or its habitat, is not an element of any crime charged. Whether Bundy's illegal grazing harmed tortoises, or their habitat, is irrelevant to any fact of consequence in this case, so the government's failure to locate and provide the report earlier could not have prejudiced the defense.

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[8] The report explicitly made no findings regarding the impact of trespass grazing on habitat. Because the court did not have the report, it was presumably relying on Payne's December 18, 2017, assertion that, "[o]n November 16, 2017, Ms. Rugwell stated that grazing in the area had a detrimental impact on the desert tortoise habitat…. Among these 500 pages received December 8, 2017, suggest [sic] there was no documented injury to tortoises by grazing." *See* 6SER:1067.

Moreover, defendants do not even attempt to defend the district court's conclusions that the government "willfully suppressed" the report and that this constituted flagrant misconduct. As we explained, *see* OB 38–39, the two references that began the search for the report both mis-identified it as an OIG report. Defendants requested the "OIG report," and the government documented its diligent, but unsuccessful, search for that non-existent "OIG report." Once we discovered the Desert Tortoise complaint, found the BLM Internal Affairs report about it, and learned that the BLM report was the so-called "OIG report," we immediately produced it, along with a letter from BLM explaining why it had been so difficult to locate. 3ER:218–19. Defendants offer nothing to counter these documents confirming the government's diligent efforts. The district court's findings of willful suppression and flagrant misconduct with respect to this report are clearly erroneous.

5. Defendants Do Not Dispute That Prosecutors Produced the TOC Log as Soon as They Learned About It, and Do Not Rebut the Government's Argument That Their Failure to Learn of It Earlier Was Not Unreasonable.

The opening brief described how prosecutors learned about the FBI's administrative log. *See* OB 42–43. Payne and Ammon Bundy try to defend the district court's findings that the government "willfully" suppressed the log, resulting in substantial prejudice to the defense, but their attempt fails.

They assert, without explanation, that the TOC log "revealed, for the first time, the government employed actual snipers close to the Bundy home." Payne Br. 47.[9] This is incorrect. The forward operating base was more than a mile away from the Bundy home (a fact the government disclosed more than a year before trial, *see* 3ER:169), and no FBI snipers were deployed during the impoundment operation. 3ER:226–228.[10]

These defendants claim the TOC log provided evidence that "what Defendants said since April 2014 was true: actual FBI snipers were 'standing by,' close to the Bundy home, ready to respond at a moment's notice." Payne Br. 48. But the defendants did not allege that snipers were "standing by," "ready to respond." Rather, they maintained that BLM "employed snipers against Bundy family members," 6ER: 1196; and that the Bundy residence was "surrounded by snipers," 6ER:1197. Neither claim is true, and the TOC log

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[9] These defendants purport to describe the district court's findings, combining quoted phrases from the court's ruling with their own assertions. As presented, their description implies the district court found the TOC log "directly rebutted" overt acts in the indictment. *See* Payne Br. 33–34. It did not, and the district court made no such finding. *See* 1ER:51 (finding that the TOC log "would have been potentially useful to the Defense to rebut the indictment's overt acts").

[10] As we noted, OB 43, 44, officers from other agencies did assume "sniper" roles at various times, which we disclosed in discovery.

does not prove, or suggest, otherwise. But even assuming defendants could have used the log to persuade the jury that they were not lying when they made those statements, and that they suffered prejudice from the timing of the disclosure, any prejudice could be remedied by striking the allegations regarding the misrepresentations and prohibiting the government from introducing any evidence to support those allegations.

Payne and Ammon Bundy reject that obvious solution on the ground that they were also prejudiced because they were "prevented … from using the sniper information in openings," Payne Br. 77, but the record belies their claim. *See* CR:2887 at 6 (Payne asserted in his opening that he came to Nevada because he had seen pictures that looked like government snipers); CR:2888 at 22 (Ryan Bundy: "[T]he evidence will show that snipers pointed directly at me"); *id*. at 44 (Ryan Bundy: "I had the sniper pointing at me. 200 or so armed men surrounding my home"); CR:2884 at 109 (Cliven Bundy: "[W]hen he tells you that he was feeling surrounded and concerned for his life … It's because there was a SWAT team. Because there was snipers. Because there was the FBI.").[11] Defendants' claim that the government's late disclosure of the TOC

[11] Ammon Bundy did not make an opening statement.

log kept them from talking about snipers in their opening statements is simply not true.

But even if the TOC log's potential usefulness to the defense means that the government's failure to disclose it earlier constituted a *Brady* violation, that violation alone does not justify the extreme remedy of dismissal with prejudice of the indictment. *See United States v. Toilolo*, 666 F. App'x 618, 620 (9th Cir. 2016) (unpublished) (the "'extremely high' due process dismissal standard" was not met even where the prosecution was "sloppy, inexcusably tardy, and almost grossly negligent"). That high standard was not met here.

To the contrary, the court noted that "the Government has been diligent, has tried to provide all of the information that it has, [and] has tried to seek out any information out there that is required to be provided" and acknowledged that the log "doesn't seem like it's something … the attorneys from the U.S. Attorney's Office[] would necessarily have been able to locate by any diligent means." 4ER:510. Although prosecutors have a duty to learn of favorable evidence known to law enforcement agencies acting on its behalf, *see Kyles*, 514 U.S. at 438, the question here is whether an inadvertent, or even negligent, violation of that duty warrants dismissal with prejudice. This Court clearly holds that it does not. *See Chapman*, 524 F.3d at 1085 ("[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant

misbehavior."); *United States v. Kearns,* 5 F.3d 1251, 1255 (9th Cir. 1993) (even "negligent" or "grossly negligent" conduct did not rise to the level of "flagrant misconduct").

The prosecutors in this case spent hundreds of hours reviewing, cataloging, and producing discovery; they kept meticulous records of thousands of items produced; and as the defendants continued to press their ever broader discovery demands, even as trial began, prosecutors checked and doublechecked FBI files for information responsive to the defendants' late requests and the district court's evolving conclusions regarding materiality. *See* 4ER:643–44. In light of these efforts—and in light of the court's earlier acknowledgment that the TOC log wasn't something the prosecutors "would necessarily have been able to locate by any diligent means"—the court's later conclusion that the prosecution team's failure to find the TOC log earlier amounted to "an intentional abdication of its responsibility," 1ER:30–31, was particularly unwarranted, and unfair. The court abused its discretion.

6. Defendants Show No Prejudice from the Government's "Failure" to Disclose Earlier Additional Information About the Camera.

"When the Bundys looked out their window in April 2014, they saw a surveillance camera." Payne Br. 50. Payne and Ammon Bundy assert that the camera "contributed to feelings within the Bundy home of fear and isolation."

Ibid. (citing 1SER:2–3). Cliven Bundy and Ryan Bundy discussed the camera during their opening statements to the jury. *See* 3ER:250 (Cliven Bundy: "You are going learn that they had a camera…. You will hear about they were looking right into his house at times seeing Cliven on the phone."); *id*. at 283, 284 (Ryan Bundy, talking about seeing "surveillance cameras on the hills"). Defendants acknowledge they were well aware of the surveillance camera, and they do not rebut the government's argument that they suffered no prejudice from the government's "failure" to disclose earlier additional information about the camera.

The district court's dismissal was based in part on two documents referencing the camera: 1) a 302 describing an FBI agent's investigation of a lost live-feed after Ryan Bundy knocked the camera over, *see* 2ER:98, and 2) one page in the FBI's operation work order that noted a "surveillance camera wth view of Bundy residence," *see* 2ER:105. Neither document contained any relevant information beyond simply noting the *existence* of a surveillance camera with view of Bundy residence. The court found that "evidence of a surveillance camera, its location, the proximity to the home, and that its intended purpose was to surveil the Bundy home … potentially rebuts the [indictments'] allegations of the defendants' deceit." 1ER:46–47.

The record belies the district court's apparent assumption that the government hid the existence of the camera, its location, and its purpose. In May 2016, the government disclosed to all defendants a videotaped interview in which Ryan Bundy discussed the surveillance camera and admitted knocking it over with an ATV. *See* 9ER:1775 (1D68). And as noted above, the defendants themselves acknowledge they were aware of the camera, and that it was monitoring the Bundy residence.[12]

The government argued, *see* OB 48–49, that the two documents referencing the camera contained no non-duplicative information in light of the uncontested fact that the defendants were aware of the camera. Defendants do not attempt to rebut that argument.[13]

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[12] Payne and Ammon Bundy's assertion that the government "questioned the existence of the camera" (*see* Payne Br. 64) is incorrect. The government opposed Ryan Bundy's motion seeking, among other things, "the make, model, characteristics, and capabilities of every piece of equipment being used on the hills above the Bundy home," in part because it was a fishing expedition that "fail[ed] to establish any materiality of the information he [sought]." 1SER:1, 8. The magistrate judge agreed Bundy had not demonstrated the information was material, 1SER:11, a conclusion the district judge later affirmed, *see* 4ER:709–10. The government never suggested the camera did not exist.

[13] Payne and Ammon Bundy's brief begins one section asserting that "each suppressed document provided Defendants with crucial information they did not already possess," *see* Payne Br. 68, but their discussion of the camera does not identify any information in the Burke 302 or the FBI work order that they did not already possess.

The district court also found that the government's failure to produce these two documents earlier was willful because they were prepared by the FBI. 1ER:47, and that finding of willfulness was the court's only basis for finding "flagrant" misconduct warranting dismissal with prejudice with respect to those documents. The government explained why this equating of authorship with willful suppression (and flagrant misconduct) fails as a matter of law, *see* OB 35–38, and Payne and Ammon Bundy's attempt to defend the court's ruling fails for reasons already explained. *See supra* p. 12.

7. Defendants Do Not Rebut the Government's Argument That Its Production of the 2012 Threat Assessments Did Not Constitute Flagrant Misconduct or Cause Substantial Prejudice.

Payne and Ammon Bundy contend the government withheld threat assessments prepared for an unexecuted 2012 impoundment "even though defense counsel requested all threat assessments before trial," and assert that these assessments "contain favorable information that the Bundy family was not violent and desired a nonviolent resolution." Payne Br. 19.[14]

In July 2017, Payne requested "all threat assessments *in this case*," specifying that the defense "[had] the threat assessment provided last month,

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[14] As we noted, OB 51–52, the government disclosed the threat assessments produced for the 2014 impoundment.

but we understand there were threat assessments that took place *during the impoundment* … and the one that was ultimately prepared by the FBI in DC explaining why they need to stop operations") 6SER:1186 (emphasis added). Prosecutors simply did not interpret this request as seeking assessments from a prior, unexecuted impoundment.[15] Even if they should have understood the request as seeking threat assessments prepared years earlier, their failure to do so was not unreasonable, and does not meet the "extremely high" standard for a due process dismissal. *See Toilolo*, 666 F. App'x at 620.

In any event, as we explained, *see* OB 54–55, the government did not view the old assessments—containing predictions such as that the Bundys "will probably get in your face, but not get into a shootout," 1ER:54, 55—as exculpatory or impeaching. And when the issue first arose at trial, the district court agreed. *See* 9SER:2013 (THE COURT: "My recollection also was that it was the defense who elicited the information, not the Government, and that the information that was elicited was favorable … that there was no threat that was found as a result of that Threat Assessment. So it did not sound like there was any need for impeaching of her understanding of what the … study found. And,

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[15] Payne himself later characterized that email as a request for threat assessments "prepared … throughout the operation." CR:2159 at 7.

because that Threat Assessment was for an impoundment that did not occur and not … this current impound, then I don't see the relevance of it being more so than any prejudicial effect that it might have on the jury."). Thus even if the government's assessment was wrong, it was not unreasonable, and certainly did not constitute outrageous misconduct.

B. The Court Should Reject the Defendants' Attempts to Inject Confusing, Untested, and Meritless Issues into This Appeal.

1. The District Court Correctly Rejected the Defendants' Numerous Accusations of Discovery Violations.

In their answering brief, Payne and Ammon Bundy re-allege accusations of earlier discovery violations that the district court considered and rejected. These include claims that the government engaged in "dilatory discovery tactics" regarding Phase III discovery, *see* Payne Br. 8–9; Ryan Bundy's request for information about surveillance equipment, *see id.* 9–10; and information about an investigation into a BLM special agent for unrelated acts of misconduct that occurred long after the assault in Bunkerville, *see id.* 10. These assertions are incorrect in light of the district court's rulings and the record, and

in any event could not serve as an independent basis on which to affirm the district court's dismissal with prejudice.[16]

a. The government properly opposed, and the court correctly rejected, Payne's request for earlier Jencks Act and expert witness disclosures.

Payne and Ammon Bundy contend that, in October 2016, Payne requested certain discovery, the government "balked," and the court "eventually ordered disclosure of this material by October 1, 2017, one month before trial." Payne Br. 8–9. This recitation implies that the government fell

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[16] In purporting to summarize government statements, Payne Br. 60–61, these defendants repeatedly mischaracterize the record and erroneously accuse the government of misunderstanding the law. *Compare*, *e.g.*, Payne Br. 61 (suggesting the government was "ignoring" *Kyles* in making a particular assertion in a pleading at 13SER:2926), *with* 13SER:2926 (government citing and quoting *Kyles*, in that pleading, in the sentence immediately preceding the assertion); *and compare* Payne Br. 62 (criticizing the government for arguing that *Brady* "does not require the government to disclose every scrap of evidence that could conceivably benefit a defendant"), *with Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 823 (10th Cir. 1995) ("The Constitution, as interpreted in *Brady*, does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant."). Cliven Bundy likewise makes numerous misstatements of fact. *Compare*, *e.g.*, CBundy Br. 2 (asserting that Bundy was "ordered to solitary confinement for several months"); *with* CR:421, at 29–30 (district court noting the absence of any order requiring solitary confinement); *and compare* CBundy Br. 14 (asserting that Ryan Bundy's motion for information about the surveillance camera "was denied by Judge Navarro based on false representations from the USAO"), *with* 1SER:11 (Magistrate Judge Leen's order denying the motion because Ryan Bundy did not meet and confer before filing it or provide "reasoning establishing that the materials he seeks are discoverable"). Space limitations prevent us from correcting every misstatement in the defendants' briefs.

short of its obligations and "balked" when called to account, and that the court took the government to task. As the pleadings and order make clear, that characterization is inaccurate.

In fact, in his October 2016 motion, Payne acknowledged the government had provided Phase I and II discovery (pursuant to the case management order), and had provided some Phase III discovery (though the case management order did not address it). 13SER:2858–2859. And he acknowledged the government had agreed to provide Jencks Act and expert witness disclosures at least 30 days before trial. 13SER:2859. But he asked the court to order the government to provide Jencks Act and expert witness disclosures at least *90 days* before trial, and to issue an order regarding summaries, 404(b) material, and "evidence favorable to the defense." 13SER:2860.

The government responded that Payne violated the court's local rules by filing his motion without first meeting and conferring, and noted Payne had never before raised or expressed any concern about any of the requests in his motion. 13SER:2866, 2868–2870. It reiterated it was relying on the case management order as it prepared for trial, and thus opposed Payne's motion. 13SER:2871.

The magistrate judge agreed that the defendants should have met and conferred with the government as required by local rules, 13SER:2893, but nevertheless entertained the motion: she *rejected* Payne's request for an order requiring earlier disclosure of Jencks Act material; ordered the government to provide expert disclosures 30 days before trial (as we had already agreed to do); and ordered Rule 16(a) disclosures (most of which had already been disclosed) and Rule 16(b) reciprocal discovery 60 days before trial. 13SER:2894–2895. Payne and Ammon Bundy cannot reasonably rely on this litigation as evidence of the government's "dilatory discovery tactics."

b. The government properly opposed, and the court correctly denied, Ryan Bundy's motion to compel disclosure regarding "mysterious devices" near the Bundy residence.

Payne and Ammon Bundy also contend that the government "fought disclosure" of information sought by Ryan Bundy regarding "every piece of equipment being used on the hills above the Bundy home." Payne Br. 9. In fact, the government noted that Ryan Bundy "fail[ed] to explain how the information he seeks is relevant to either the charges or defenses in this case or how it is material to preparing a valid defense," and argued that "information about surveillance cameras around the Bundy residence … is immaterial to the charges" in the superseding indictment. 1SER:7–8.

The magistrate judge agreed, denying the motion primarily because Ryan Bundy did not meet and confer before filing it as required, but also noting Bundy's failure to "articulate[] reasoning establishing that the materials he seeks are discoverable." 1SER:11. More important, the district judge later *endorsed* the magistrate judge's conclusion that the relevance of information about the surveillance camera was not apparent at the time, and found no evidence of bad faith by the government. *See* 4ER:709–10 ("[I]t appears from the Court's order that there was no apparent or readily apparent materiality of the item requested, and so the Government does not appear to have acted in bad faith by not providing that."). As we argued, *see* OB 48–49, the district court's finding that the materiality of the information was not apparent until after the government had disclosed it negates any basis on which to find flagrant misconduct with respect to those disclosures.

c. The government consistently sought, and followed, the district court's guidance regarding disclosure of allegations that a BLM agent engaged in unrelated acts of misconduct many months after the assault, and the district court explicitly found no Brady *violation with respect to those disclosures.*

In December 2016, while preparing for the first trial of the Tier-3 defendants, prosecutors learned that a BLM agent, who was expected to be a government witness at trial, was under investigation for misconduct alleged to have occurred many months after the assault. The government submitted the

matter to the the district court for *in camera* review in an *ex parte* sealed submission, and the district court advised that, because the allegations were unsubstantiated, the government did not need to disclose the investigation to the defense. *See* CR:2950 at 7–8 (district court recounting procedural history). Over the following months, the government submitted "quite a few" *in camera* submissions regarding the matter. *Id*. at 8. After OIG issued a report sustaining the allegations, the court ordered the government to disclose unredacted copies of the report and other material, and we did. *Id*. at 9.

Payne immediately filed a "motion to dismiss the indictment, or for other relief in light of OIG disclosures." CR:2727. He asserted that "the defense's main concern … is the U.S. Attorney's concealment" of the agent's misconduct, and alleged that "by all indications, the U.S. Attorney had no intention of revealing anything about [the agent's] OIG investigation or misconduct to anyone," *id*. at 21, 22, urging dismissal of the indictment because "the government's failure to meet its obligations demand[s] a thorough remedy" by the court. *Id*. at 26.

At a hearing on the motion, the court disabused the defendants of their faulty assumptions. It noted five *ex parte* government submissions and related orders, and stated it "does not agree that there's been any *Brady* violation or a series of *Brady* violations." CR:2950 at 9. During the sealed portion of that

hearing, the government objected to the "aspersion[s]" that had been cast its way. *See* 8ER:1585. The court noted that the defense had not been privy to the government's *ex parte* submissions, and thus found that Payne's motion was not "necessarily in bad faith considering they're in the dark." 8ER:1586. The court ordered the government to undertake additional review of some material, but found no basis for dismissal, and reiterated that it "made a finding … that there's no *Brady* violation that has occurred, much less a pattern of any *Brady* violations. I think everybody's doing the best they can faced with the information that we have." *Ibid*.

Defendants' attempt to portray this issue as evidence of the government's "dilatory discovery tactics" is nonsensical. To the contrary, this episode is just another example of how, again and again, the defendants made spurious accusations of misconduct, were set straight by the court, refused to accept the court's ruling, and continue to press the same, rejected, accusations.

2. This Court Should Not Consider the Untested Wooten Allegations in This Appeal Because the Defendants Insisted the District Court *Not* Hold a Hearing on the Matter, and Those Allegations Were Not a Basis for the Court's Ruling.

a. Ryan Bundy's accusation that the government withheld the Wooten memo is meritless.

As an initial matter, Ryan Bundy accuses the government of "fail[ing] to provide the defense with Wooten's memo for nine days," and says this "amounted to goading a mistrial." RBundy Br. 7. The record belies Bundy's accusation.

Associate Deputy Attorney General Andrew Goldsmith received the email from Wooten on November 27, 2017 (the Monday after Thanksgiving), *see* sealed CR:2939, and forwarded it to prosecutors on November 29. Prosecutors disclosed it—with a memorandum summarizing an investigation into some of Wooten's allegations—to the court *in camera* on December 1, requesting a protective order to allow disclosure to defendants. *Ibid*. The court signed the protective order on December 7. Sealed CR:2964. The U.S. Attorney's Office received the order on December 8, and immediately disclosed the email and the memorandum to the defense. *See* 12SER:2591.[17]

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[17] Notwithstanding the protective order, within days of the government's production, multiple news organizations reported on the memo, quoting from it extensively. *See*, *e.g.*, "BLM investigator alleges misconduct by feds in Bundy

As with defendants' meritless accusations that the government withheld the OIG reports regarding the BLM special agent, Ryan Bundy's misconduct allegation may simply reflect ignorance of the government's diligence in submitting the material for immediate *in camera* review. In any event, his accusation is meritless.

b. The Court should reject defendants' attempt to tarnish the government on appeal with accusations they insisted the district court not *subject to adversarial testing, and deny their request to inject this issue into this appeal.*

In a December 10, 2017, pleading, Payne acknowledged that the veracity of Wooten's claims could not be determined without an evidentiary hearing, and represented that the defense would be moving for such a hearing "soon." Sealed CR:2978, at 5. Defendants Cliven Bundy and Ammon Bundy filed that request the next day. *See* Sealed CR:2980.

At a hearing that day, Payne reiterated that he was "not in a position to provide the [c]ourt with what kind of accuracy [the 'Wooten memo'] contains," and that to determine the veracity of the accusations, "there would need to be

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ranch standoff," *The Oregonian*, Dec. 15, 2017, *available at* https://www.oregonlive.com/oregon-standoff/2017/12/blm_investigator_alleges_misco.html (noting "Prosecutors shared [the memo] last week with defense lawyers for Bundy, his two sons and co-defendant Ryan Payne as they were in the midst of their conspiracy trial, but it's not part of the public court record.").

an Evidentiary Hearing." 8ER:1492. But when the government agreed, and asked the court to schedule a hearing so Wooten's accusations could be tested, 8ER:1510–1512, Payne reversed course and *opposed* the hearing he requested, asserting that "[t]he suggestion that Mr. Wooten can come over here and give information is ridiculous." 8ER:1513. The court was justifiably confused by the about-face, *see* 8ER:1518 ("THE COURT: I thought you requested a hearing."), and Payne then denied having requested the hearing, *ibid*. ("No. I don't think that we can have a hearing. I think this case needs to be dismissed… with prejudice.").

Thus, notwithstanding Payne's explicit admission that the veracity of Wooten's allegations cannot be determined without a hearing, Sealed CR:2978, at 5, the defense urged the district court *not* to hold such a hearing, and the court acceded to their reversal of position and did not schedule one.[18] The court ultimately dismissed the indictment against these defendants for other reasons (which are at issue in this appeal); the untested accusations in the "Wooten memo" were not a basis for the dismissal.

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[18] Despite Payne's repeated acknowledgement that the veracity of these allegations presently undetermined, defendants state the accusations in their briefs on appeal as if they are fact. *See*, *e.g.*, Payne Br. 21–22; RBundy Br. 19; CBundy Br. 35.

On appeal, Cliven Bundy asks this Court to act as fact-finder. His mis-named "excerpts of record" includes hundreds of pages of documents that are not, in fact, in the record. *See* CBundy SER 76-403. His brief presents arguments based on assumptions regarding these extra-record documents, none of which has been considered or decided by the district court. *See* CBundy Br. 27–35. In addition to making arguments to this Court based on those documents, he asks this Court to order a "limited remand" to the district court to "develop" Wooten's testimony. The Court should deny that request.

The Wooten memo was not a basis for the dismissal ruling underlying this appeal—nor could it have been, given that, as the defendants acknowledge, the truth or falsity of the allegations in it are undetermined. Cliven Bundy requests a "limited remand" to develop that issue, apparently in hopes of bolstering the rationale for the dismissal order now under review. He cites no authority for such a procedure, and the government is aware of none.

If, as the government argues, the district court erred and abused its discretion when it dismissed the case with prejudice, this Court should reverse that dismissal and send the case back to the district court for further proceedings. Cliven Bundy's suggested course of action—that the Court retain jurisdiction over the appeal but issue a limited remand for the district court to

consider other possible reasons to support its order *post hoc*—finds no support in the law.[19]

3. As the District Court Correctly Found, No Double Jeopardy Bar Exists.

"[W]hen a defendant does not object to a declaration of mistrial, the general rule is that 'the Double Jeopardy Clause is no bar to retrial,' because the defendant voluntarily has chosen not 'to have his trial completed before the first jury empaneled to try him.'" *United States v. Mondragon*, 741 F.3d 1010, 1013 (9th Cir. 2013) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982)). That general rule is subject to a single, narrow exception: "'Only where the governmental conduct in question is intended to "goad" the defendant' into moving for or consenting to a mistrial does double jeopardy bar a second trial.'" *Ibid*. (quoting *Kennedy*, 456 U.S. at 676). "In practice, the *Kennedy* standard is rarely met." *United States v. Lopez-Avila*, 678 F.3d 955, 962 (9th Cir. 2012). Ryan

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[19] Of course, if the government prevails in this appeal and the case is returned to the district court, the court presumably will need to investigate the accusations in the memo. Thus, the court will likely need to conduct the evidentiary hearing the government suggested—and that defendants initially requested, but then opposed. And if there is merit to any of the accusations, the district court will need to decide, in the first instance, what, if any, remedy is necessary or appropriate depending on the nature of any misconduct it finds. But those myriad undeveloped issues are unrelated to *this* appeal, and the Court should not consider them.

Bundy argues that this Court should affirm the dismissal with prejudice on the ground that the prosecution compelled the declaration of a mistrial, RBundy Br. 9, and thus the double jeopardy bars trial. This argument lacks merit.

The district court considered and explicitly rejected this contention. "Considering what has occurred throughout the trial up to this point," the court found "no evidence that the government's failure to disclose evidence was a strategy decision on the prosecution's part to abort the trial." 1ER:23. To the contrary, the court noted "it appears the government has attempted to provide the defense with the identified *Brady* evidence in order to move forward with trial and not to purposely goad the defense into moving for mistrial." *Ibid*.[20]

The out-of-circuit district court cases Ryan Bundy cites are readily distinguishable. *See* RBundy Br. 12–17 (*citing United States v. Sterba*, 22 F. Supp. 2d 1333, 1343 (M.D. Fla. 1998); *Petrucelli v. Smith*, 544 F. Supp. 627, 633 (W.D.N.Y. 1982), *on reconsideration sub nom. Petrucelli v. Coombe*, 569 F. Supp. 1523 (W.D.N.Y. 1983), *vacated*, 735 F.2d 684 (2d Cir. 1984)). Most obviously, the courts in those cases found that the prosecutors *had* intentionally goaded the defendant into moving for a mistrial, whereas the court here explicitly found

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[20] This Court reviews for clear error the district court's factual finding that the government did not goad the defendant into requesting a mistial. *See United States v. Fowlkes*, 804 F.3d 954, 971 (9th Cir. 2015).

that the government had not. In addition, in *Sterba*, the court found the prosecutors allowed a government witness to testify under a false name and withheld that fact, and withheld *Giglio* material about the witness, until the trial was nearly over. *See* 22 F.Supp. 2d at 1338. Here, the motions to dismiss were prompted by the government's disclosure of potential *Brady* material during the very early stages of the trial.

Moreover, although the district judge in *Petrucelli* initially found that numerous instances of improper and inexcusable conduct in front of the jury supported an inference of goading, *see* 544 F. Supp. at 638, the court reversed its initial decision after an evidentiary hearing, finding that the prosecutor did not intentionally cause a mistrial. *See Petrucelli v. Coombe*, 569 F. Supp. 1523, 1524 (W.D.N.Y. 1983). And in any event, the Second Circuit ultimately vacated the district court's order with instructions to dismiss the defendant's petition for failure to exhaust state remedies. *Petrucelli*, 735 F.2d at 690.

Ryan Bundy argues that a remand is necessary because "the district court should be afforded the opportunity to decide, in the first instance, whether the government's conduct goaded a mistrial ..." RBundy Br. 26–27. But the district court already decided that question: it explicitly and unequivocally found that the government "attempted to provide the defense with the identified *Brady* evidence in order to move forward with trial and not to purposely goad the

defense into moving for mistrial." 1ER:22–23. Ryan Bundy does not show—and cannot credibly argue—that the district court's finding was clearly erroneous. His claim fails.

III.

CONCLUSION

For the reasons stated above and in the government's opening brief, the government respectfully requests this Court reverse the district court's dismissal of the indictment and remand for further proceedings.

Dated this 8th day of November, 2019.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1

I hereby certify that:

The attached reply brief is proportionately spaced, has a typeface of 14 points, and contains 8,359 words. It therefore complies with Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-2(b) (allowing an additional 1,400 words to a party replying to a longer joint brief filed pursuant Ninth Circuit Rule 32-2(b)).

s/ Elizabeth O. White
ELIZABETH O. WHITE
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Dated: November 8, 2019