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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. RYAN W. PAYNE, et al., Defendants.	2:16-CR-00046-GMN-PAL **GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE DEFENDANTS FROM PRESENTING LEGALLY INVALID DEFENSES**

The United States, by and through the undersigned, respectfully submits the following Motion in Limine to Preclude Defendants from Presenting Legally Invalid Defenses.

BACKGROUND

I. The Present Situation

The government respectfully seeks a pretrial ruling regards the bounds of admissible evidence in this trial. To that end, the government moves in limine for an order precluding the defendants from introducing evidence or argument at trial

that relate to instigation/provocation, self-defense/defense of others, entrapment, justification for violent self-help, impermissible state of mind justification, and collateral attacks on the court orders.

II. The government prepared for trial by relying on legally cognizable theories and defenses, while the defendants are relying on defenses and theories that are not legally cognizable.

Defendants appear to assert that recently produced information concerning the placement of surveillance cameras, individual officers performing surveillance and other legitimate law enforcement tactics and procedures constitute instigation for amassing an armed confrontation against law enforcement officers. This, the government contends, is a thinly veiled attempt to adduce evidence at trial in an effort to nullify any verdict in this case.

The government prepared for trial by relying on the long-established elements of the charged offenses and the legally cognizable defenses available to the defendants. Among other things, the government relied on the Court's prior rulings setting the bounds of the self-defense available to defendants in this case and in Trial 2. But the defendants have not constrained themselves by the law, and are expansively relying on theories of defenses that are not legally cognizable. They impermissibly want to introduce evidence of instigation/provocation, violent self-help, entrapment, impermissible state of mind justification, and collateral attacks on the 1998 and 2013 court orders, none of which present cognizable defenses.

Specifically, the defendants claim they are entitled to defend their violent actions of April 9 and 12 by asserting that the BLM instigated the April 12 stand

off and provoked them and others into confronting BLM law enforcement officers with firearms. The law does not permit the defendants to expand the legally cognizable defense of self-defense against a law enforcement officer by incorporating instigation and provocation. To do so would eviscerate the well-recognized elements of self-defense. Defendants, rather, seek to introduce evidence of instigation and provocation to obtain jury nullification. Jury nullification is illegal.

Most recently, Ryan Payne says he was at Bundy Ranch solely to protect the Bundy's from what "he reasonably and sincerely believed to be a threat of unlawful violence." ECF No. 3027 at 8. He further asserts that his actions were provoked or instigated by "the government's own and unreasonable conduct." *Id.* According to Payne, the government provoked and/or instigated him into doing something lawful – that is, according to Payne, "protect" Bundy without forming any intent to do a criminal act. It remains difficult to see how the information produced in discovery, including recently produced information, supports this claimed defense theory.

Defendant Cliven Bundy, and perhaps others, seeks to rely on the defense of entrapment. But his entrapment defense relies exclusively on his theories of instigation and provocation, when, in fact, neither instigation nor provocation supports a defense of entrapment. Furthermore, not a shred of evidence supporting the legally cognizable elements of entrapment—inducement and predisposition—exists.

All the defendants rely on a defense of violent self-help and a claim of state of mind to justify Ammon Bundy's and others stopping of the April 9, 2014 convoy. Neither are legally cognizable nor available here.

Finally, the defendants incessantly attack the validity of the 1998 and 2013 Court orders by introducing evidence of water law, fencing law, state laws, and boundless other theories. They justify their attacks on the court orders, or their arguments around the court orders by arguing the relevancy of the states of mind or of the justification. Regardless of how they shroud their arguments, they are impermissible attacks on impenetrable court orders, attacks that attempt to obtain jury nullification.

The Court needs to put a stop to these illegal theories and defenses in order for the government to receive a fair trial. The government, too, is entitled to a fair trial. Ruling on this motion in limine as requested by the Government would be the first step. No doubt the Court will need to take additional steps during trial to enforce its rulings.

ARGUMENT

I. Instigation or provocation is not a defense, as self-defense or defense of others against a law enforcement officer is a specific and bounded defense in this circuit that does not include instigation or provocation.

As the government noted in its response to Payne's various motions to dismiss regarding discovery, there is no valid defense of provocation – or the combination of "provocation and instigation" as Payne's counsel explained it in

Court during the December 11, 2017, hearing. 12/11/17 Trans. A victim cannot do something—dress wrong, insult or irritate—to justifiably "provoke" a defendant's use of force. Unless the victim was the first aggressor, nothing else excuses the defendant's use of force. This concept is not new. It is painfully well-established. *Huber v. United States*, 259 F. 766, 770-71 (9th Cir. 1919).

The Court is well-versed in the law of self-defense as it relates to this case, having ruled on this issue before.[1] Although the defendants before the Court now are the Bundys and Payne, the law remains the same and the defense does not apply.[2]

In its Order docketed as 2770, the Court ruled that the present defendants are not entitled to a jury instruction on self-defense because "they have failed to establish the essential elements necessary for the defense." ECF No. 2770, p.5. Specifically, the Court granted the government's motion to exclude evidence of (1) "[s]elf-defense, defense of others, or defense of property, justification, necessity arguments which have no foundation in law;" (2) "[t]hird-party/lay person testimony or opinion about the level of force displayed or used by law enforcement officers during impound operations, including operations on April 6, 9, 12, 2014;" and (5) "[a]llegations that officers connected with the impoundment acted unethically or improperly by the way they were dressed or equipped during the impoundment . . .

[1] ECF Nos. 2770, 2138.

[2] The Court, in addressing the parties during a hearing regarding the TOC log, suggested that it had made its ruling in the previous trials based on government representations regarding the non-existence of snipers. However, as the government reminded the Court, the Court's ruling was based on the case law and facts of the case as applied to them. Specifically, that defendants could not reasonably have been confused as to the officers' identities as law enforcement and that the defendants were not faced with any excessive force at the time that they displayed force to the officers. *See* COURT ORDER ECF No. 2138.

." *Id.* at 3. The Court also excluded "any other evidence relating only to that defense," because it is irrelevant, qualifying its ruling by allowing the defendants to present an offer of proof outside the jury that the instruction should apply. *Id.* The Court made a similar ruling in trial two.

Cliven Bundy had argued in his response to the Government's motion in limine that defendants "may argue preparation for self-defense to offer an innocent explanation as to why they were armed and prepared to defends [sic] themselves from excessive force." #2555, p.15.[3]

The Court excluded Bundy's defense and others, reasoning that when "evidence is not relevant to any of the elements of a charge or a cognizable defense to that charge, the evidence is not admissible." #2770, p.4. *See also* 2138, p.3.

The Court acknowledged that the Ninth Circuit recognizes two forms of self-defense for assault on a federal officer: "'(1) ignorance of the official status of the person assaulted,' [citation omitted]; 'and (2) an excessive force defense,' [citation omitted]." #2770, p.5, fn.2. Self-defense based on excessive force includes an element of an immediate threat. Here evidence of instigation and provocation are irrelevant and should be excluded as it would "only serve to advance [jury] nullification arguments." *Id.* at 3.

The Court's rulings were consistent with case law. In *United States v. Span*, 970 F.2d 573, 577 (9th Cir. 1992), the defendants argued that the standard self-defense instruction to assault on a federal officer was insufficient because it would

[3] Payne responded saying that he did not believe it was necessary to rely on any affirmative defenses. #2568, p.7.

have meant that they could not defend themselves against excessive force if they knew that the person employing that force against them was a federal officer. The court agreed, stating "giving the model instruction is tantamount to refusing an instruction based on the defendant's right to use reasonable force to repel excessive force by a federal law enforcement officer." *Id; see also United States v. Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012).

The present defendants cannot show that the law enforcement officers were employing excessive force – even with the information about so-called snipers, cameras, or number of officers. The defendants' arguments are that officers wearing uniforms, carrying firearms, having specialized training, and so on, came close to their property, and otherwise annoyed or concerned them. Whatever the term "sniper" means to the defendants—it reduces to this: cops have guns and have specialized training, each of which is allowed. The government has no evidence, none, that snipers, or any other federal officer, used any force–let alone excessive force—against the defendants or anyone else. Neither do the defendants. And no matter how the defendants perceived the officers' conduct, the officers use of a camera or "snipers," or their proximity to and purpose for being near the Bundy home on April 5-7, do not constitute immediacy of harm days later on April 12.

The evidence shows the opposite. In his radio-blog interview with Pete Santilli on April 8, Cliven Bundy stated that on the morning of April 7, he left his ranch and "had a least 25 federal agencies" which had their lights on "lining his driveway . . . toward the I-15 highway" and that they were not stopping him, but

they were interrupting him, getting in the road and following him. Gov.Ex. 51C 8:00 to 9:22.

Later, in that same interview, and regarding snipers and the call for militia, Santilli stated that "we need a show of force," referring to Waco and Ruby Ridge and asking C. Bundy whether the people "can win this issue constitutionally over the federal government." Gov.Ex. 51D 2:06 to 4:43.

Also, nothing about the presence of either cameras or snipers provides an excuse, justification, or defense to the charges in this case. These matters are simply not relevant to a claim of self-defense as they are not relevant to any element of self-defense.

Payne's defense claim is even farther away from any cognizable defense than Cliven Bundy's. He claims that he really believes that the Bundys were surrounded in their home by cops with guns and that protestors might be arrested. But Payne's belief does not involve events amounting to excessive force meeting the immediacy requirement implicit in any self-defense claim. It takes more than officers being present with guns and the training to use them to make out such an extraordinary defense.

In this case, "there was no use of force, let alone any excessive force, from which one might reasonably suggest that a cognizable theory of self-defense would lie." *Acosta-Sierra*, 690 F.3d at 1126. In *Acosta-Sierra*, a defendant claimed he attacked an officer because of a mental condition which caused him to fear that the officer might hurt him. The court rejected the argument—a defendant must have a

reasonable belief of an imminent use of excessive force and provide the least force necessary to repel the violence. Neither the Bundys' claim that they were surrounded by officers, nor Payne's decision to marshal a private army to deter government action over days and weeks, rises to this high standard.

A similar situation was addressed—and, "self-defense" was held to have no role—in *United States v. Branch*, 91 F.3d 699, 714 (5th Cir. 1996). There, David Koresh, the leader of a group called "Branch Davidians," told his followers to arm themselves for a battle with the "beast," a term he applied to the federal government as a whole, and to the Bureau of Alcohol, Tobacco, and Firearms ("ATF") in particular. *Id*. at 709. The Branch Davidians duly stockpiled weapons and ammunition at their compound in Waco, Texas in preparation for this battle. ATF, in the meantime, obtained and tried to execute search and arrest warrants at the compound. *Id.* The planned search fell apart when the Branch Davidians opened fire on the ATF agents. This led to a 51-day standoff between with the more than 100 Davidians (some of them children) still in the compound. Eventually, 84 of Koresh's followers set fire to the compound, killing 75.

At the subsequent trial, the *Branch* defendants—some of whom served as armed gunmen for the Branch Davidians at the Waco Siege—sought a self-defense instruction. The district court rejected a self-defense instruction and—emphasizing a citizen's duty to yield to a federal officer's lawful exercise of authority, and citing *Feola*, 420 U.S. at 679—the Fifth Circuit affirmed.

> [T]he district court was not obligated to give the proposed self-defense instruction . . . . It is true, as a general proposition, that self-defense and

> the related defense of another are affirmative defenses . . . *However, these general principles must accommodate a citizen's duty to accede to lawful government power and the special protection due federal officials discharging official duties. See* [*Feola*, 420 U.S. at 679]. "*We do not need citizen avengers* who are authorized to respond to unlawful police conduct *by gunning down the offending officers*." *United States v. Johnson*, 542 F.2d 230, 233 (5th Cir. 1976). *Other, non-violent remedies are available. Id.*

Branch, 91 F.3d at 714 (emphasis added).

Further, the normal activities of a police officer, patrolling, surveilling, effecting arrests, giving chase, displaying insignia, does not provide some basis to resist by force. *United States v. Streit,* 962 F.2d 894, 898-99 (9th Cir. 1992), *as amended* (Apr. 23, 1992) ("Streit has presented no evidence to support his argument that the FBI agents employed unjustifiable force in their attempt to arrest Streit. Once the agents had identified themselves and Streit had attempted to flee, the agents were justified in using force in an attempt to restrain Streit . . . . This evidence is simply not enough to justify a self-defense instruction."); *United States v. Oakie*, 12 F.3d 1436, 1443 (8th Cir. 1993) ("As there was no evidence that Officer Shooter took any aggressive action other than to give chase in a well-marked police car, we agree with the district court that the evidence did not support a self defense instruction."); *United States v. Jennings*, 855 F. Supp. 1427, 1436 (M.D. Pa. 1994), *aff'd*, 61 F.3d 897 (3d Cir. 1995) ("Submission . . . to the lawful commands of corrections officers is fundamental and absolutely necessary to the maintenance of proper order in a correctional facility. A prisoner is not justified in refusing to obey these commands simply because he has a subjective belief that a beating *may* occur. Until there is tangible evidence that the use of unreasonable force is imminent, an inmate is not

justified in using physical force . . . to resist corrections officers.") (emphasis in original) (citing *Streit* and *Oakie*); *cf. Valdez v. United States*, 58 F. Supp. 3d 795, 830 (W.D. Mich. 2014) ("Because no reasonable jury could find that Agent Reynolds acted in bad faith . . . in brandishing his firearm or applying handcuffs . . . , summary judgment is appropriate.").

No matter how many ways the defendants try to argue it, instigation or provocation as a basis for self-defense is simply not available. To the extent defendants seek to offer evidence of surveillance cameras, uniforms, number of officers, weapons carried, and training the officers receive, none of that is relevant to show excessive force or a reason to assault officers. This type of evidence amounts only to nullification arguments – putting the victims in this case in the position of having to justify their every move when no force was used.

Imagine a defendant assembling a group of armed followers to assault Metro officers conducting crowd control on the strip on New Year's Eve, and then claiming, as a defense, that the assembled armed followers were there only to protect the crowd against the Metro officers using force against the crowd. The Fifth Circuit in *Branch* recognized the implication of allowing such a defense under similar facts – that is, setting a precedent where "citizen avengers" would be given authority under the law to attack police officers at will – and rejected doing so. *Branch*, 91 F.3d at 714. The Court should preclude this type of evidence here as well.

II. Entrapment requires a lot more, and a lot different, evidence than the defendants have argued or alleged.

"In their zeal to enforce the law . . . Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). "[E]ntrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement,' but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government." *United States v. Russell*, 411 U.S. 423, 435 (1973).

Entrapment is defense to a crime if two elements exist:

(1) The government induces the crime and
(2) The defendant lacked the predisposition to engage in the criminal conduct.

Mathews v. United States, 485 U.S. 58, 63 (1988). The Ninth Circuit has held that "[a] defendant is not entitled to have the issue of entrapment submitted to the jury in the absence of evidence showing some inducement by a government agent *and* a lack of predisposition by the defendant." *United States v. Rhodes,* 713 F.2d 463, 467 (9th Cir.1983); *see also United States v. Busby,* 780 F.2d 804, 806 (9th Cir.1986) ("The trial court will instruct on entrapment only if the defendant presents some evidence of both elements of the entrapment defense.").

Defendant Cliven Bundy, and perhaps other defendants, theory of entrapment falls short of meeting the elements of entrapment. No evidence of inducement exists. Court after court has held that inducement must be something more than a government agent suggesting a plan and providing the bare opportunity to commit the crime. *See, e.g.*, *United States v. Spentz*, 653 F.3d 815, 818–19 (9th Cir. 2011) "There is no dispute that the government proposed the idea of committing the robbery to defendants and their accomplices, but 'the fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment.'" (quoting *Sherman v. United States,* 356 U.S. 369, 372 (1958). The defendants claimed inducement is not even a plan originating from a government agent—it is a "but-for" standard that had the government not taken a certain action, he would not have committed the crime. Such a claim falls so far afield from anything that entrapment is or ever has been that it is plainly irrelevant.

As best the government can understand, the defendants here contend that government agents took steps to enforce a lawful court order with the subjective intention of provoking the defendants into resisting the execution of that lawful court order, and that this somehow constitutes "entrapment." That contention is meritless for several reasons, not least of which is that the government actors had every right to enforce the lawful court order, and the subjective hopes or intentions of any particular officer or officers are irrelevant.

More important, even if every allegation the defendants make was true, those allegations would amount to nothing more than the government agents "afford[ing] opportunities or facilities for the commission of the offense." *Jacobson*, 503 U.S. at 548. Defendants do not contend, and nothing in the record would support a contention, that any government agent suggested or proposed to the defendants that they interfere or obstruct the BLM, much less that agents engaged in 'repeated and persistent solicitation' or 'persuasion'" that overcame the defendants' reluctance to interfere, obstruct, assault or extort. *See United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991).

Further, the defendants have no good faith basis for questioning witnesses based on their claim that government counsel "entrapped" the defendant by wishing for them to commit a crime. The evidence shows that Ryan Payne proposed "operations" to confront government officials through Operation Mutual Aid prior to April 2014. There has been no explanation even at the most elementary level of the defendants' theory of entrapment and how it comports with the law of this circuit.

Questioning of a witness cannot be random and exploratory. A party must have a good faith basis to ask a question. "No attorney may ask a question if he doesn't have a good-faith basis to ask it; that is, attorneys cannot take a shot-in-the-dark approach to their questions." *United States v. Beck*, 625 F.3d 410, 418 (7th Cir. 2010). A good faith basis cannot be flimsy—such as the suspicion of a defense investigator. *United States v. Katsougrakis*, 715 F.2d 769, 779 (2d Cir. 1983).

Particularly where a line of questioning will degrade a witness or provoke the possibility of prejudice, a good faith basis must stand on actual facts, not inference and inconclusive evidence. *See United States v. Sampol,* 636 F.2d 621, 658 (D.C. Cir. 1980); *United States v. Lundy*, 416 F. Supp. 2d 325, 335 (E.D. Pa. 2005) (reprimand for taking too much sick leave is not sufficient basis to ask questions about whether the officer lied in requesting the sick leave). A line of questioning that accuses government counsel, an officer of the court, of misconduct carries a grave risk of prejudice.

If the defendants have no hope of making out an actual entrapment defense, questioning on this topic is a waste of the jury's time. Rule 403 of the Federal Rules of Evidence 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]"). A defendant who has no hope of actually making out an entrapment defense, and who has no good faith basis for questions which serve only to degrade government counsel, is wasting the jury's time.

III. There is no right of violent self-help under the law – whether in support of self-proclaimed water rights or otherwise.

The defendants numerous arguments that they were entitled to assault officers in order to preserve their water rights (specifically on April 9) or fight an unjust order are not legally permissible defenses. *See Span,* 970 F.2d at 580-81 ("federal law enforcement officers engaged in good faith and colorable performance of their duties may not be forcefully resisted, even if the resistor turns out to be correct, that the resisted actions should not, in fact, have been taken"), ("[T]here is no right to resist an unlawful arrest simply because it is unlawful….").

In *Willfong*, the Ninth Circuit rejected an argument just like the one the defendants make here:

> Willfong also argues that he could not have interfered with Allendorf [a federal officer] because, he contends, Allendorf was attempting to enforce an invalid shutdown order. This argument fails for two reasons. In the first place, the evidence presented at trial indisputably established that Crippa had the authority to suspend the logging operations under the terms of the contract and the authority delegated to her by the Forest Service. Secondly, even if Crippa lacked such authority, Willfong nevertheless had no right to interfere with Allendorf. So long as Allendorf was performing his official duties in the administration of the Forest System, 36 C.F.R. § 261.3(a) prohibits anyone from interfering with those duties. By way of analogy, a person does not have the right to resist arrest even if the charges are false or the arrest unlawful. *United States v. Cunningham,* 509 F.2d 961 (D.C.Cir. 1975). It is undisputed that Allendorf relied in good faith on the validity of Crippa's shutdown order when he sought to enforce it. It was Crippa's job, not Allendorf's, to determine whether a temporary shut down order should be issued under the provisions of the administration contract. If Willfong disagreed with Crippa's order, he had the right to try to get it rectified. He did not have the right to interfere with the officer's enforcement of it.

Id. at 1300-01.

In the case of *United States v. James*, 464 F.2d 1228 (9th Cir. 1972), the Ninth Circuit made short work of a defendant's argument that she was immunized for attacking a federal officer arresting her brother because she believed the arrest to be unlawful.

> Appellant urges that the agents unlawfully entered the house, that the arrest of Charles James was thus illegal, and, therefore, that defendant's assault on the agents was no offense. The contention is without merit.
> Agents of the Federal Bureau of Investigation may make arrests, 18 U.S.C. § 3052, and any civil officer having authority to apprehend offenders under any federal or state law may summarily apprehend a deserter and deliver him into custody. 10 U.S.C. § 808. To accomplish the arrest they may enter premises where they have reasonable cause to believe the deserter may be found.

In *United States v. Branch*, the Fifth Circuit likewise ruled that defendants who opened fire on federal agents attempting to execute a search warrant could not make out a valid defense. *Id.* at 91 F.3d 699, 714 (5th Cir. 1996) (the law "must accommodate a citizen's duty to accede to lawful government power and the special protection due federal officials discharging official duties."). As articulated by the Third Circuit:

> Society has an interest in securing for its members the right to be free from unreasonable searches and seizures. Society also has an interest, however, in the orderly settlement of disputes between citizens and their government; it has an especially strong interest in minimizing the use of violent self-help in the resolution of those disputes. We think a proper accommodation of those interests requires that a person claiming to be aggrieved by a search conducted by a peace officer pursuant to an allegedly invalid warrant test that claim in a court of law and not forcibly resist the execution of the warrant at the place of search. The development of legal safeguards in the Fourth, Fifth, Sixth and Fourteenth Amendment fields in recent years has provided the victim of an unlawful search with realistic and orderly legal alternatives to physical resistance. Indeed, since the validity of written process is readily susceptible to judicial review, it is doubtful whether resistance to written process can ever be justified today, absent a showing of transparent invalidity. This argument is particularly forceful when applied to the execution of search warrants, where

> resistance often leads to violence and physical injury. A public officer supported by written process has a right to expect that citizens will respond peaceably, that neither his life nor those of other parties will be endangered, and that any dispute will be resolved through legal means.

United States v. Ferrone, 438 F.2d 381, 390 (3d Cir. 1971) (footnotes omitted).

The defendants' arguments that they defended themselves against a tyrannical BLM on April 12, or interfered with a BLM exceeding court orders on April 9 have no basis in law.

IV. The defendants cannot collaterally attack the 1998 and 2013 court orders.

In an earlier motion in limine, the government asked the Court to preclude evidence and arguments that collaterally attack the merits of the 1998 and 2013 court orders. The defendants continue to advance these arguments. #2880.

A party is not entitled to collaterally attack the merits of a final order for relief. The doctrine of res judicata precludes a party from re-litigating issues involving the merits of a claim that were or could have been raised in the original action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1982). There the Court stated: "A final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in the action." Id.

Defendants argue that evidence of water rights is interlaced with their defense to the April 9 convoy incident. They think that Cliven Bundy's possession of water rights is relevant to proving that Ammon Bundy and others did not interfere with the April 9 convoy to obstruct court orders on April 9, 2014, but to prevent BLM from

taking action not addressed in the court orders.[4] Only Ammon Bundy of the four defendants on trial was present during the April 9 incident.

First, the defendants' argument that Ammon Bundy stopped the April 9 convoy is contrived. Before trial, Ammon Bundy stated that he stopped the convoy because he believed the convoy was hauling dead cows. In his testimony in his Oregon trial he said, "the protestors wanted to know what was in that backhoe because—we knew they had been shooting. Even though we couldn't get out on the range, we did assume that they were shooting cattle. . . . And we thought the—the dump truck was probably a rendering truck with dead animals in it—our dead cattle in it." Exhibit 1, Tr. Trans. 10/4/16, p.54.

Pete Santilli, who first blocked the convoy with his car, implied that the participants in the April 9 block (including Ammon Bundy) believed that the convoy was carrying dead cows. For example, Santilli, when describing the April 9 block on the Adam Kokesh Show (a blog radio show), said:

> I joined this little convoy of about 120 people . . . and what we were going to do, stop the convoy, and call the Sheriff's department and have them come investigate. So find out if these backhoes and these dump trucks are being used for the purpose of killing animals, because there is no court order, as far as I'm aware of that would offer that mandate or give them the authority to bury cattle out in the middle of BLM territory.

Ex. 73 at 2:25 to 2.

Second, Count Eleven of the indictment charges the defendants not only with obstructing justice, but with attempting to do so. Although the court orders did not

[4] BLM was acting within the scope of its authority by removing range improvements because it was authorized to do so by regulation. Government's Trial Exhibit 7, and Rugwell, Trial Testimony, 11/16/17, p.134.

authorize the removal of range improvements, the defendants believed the truck may have been hauling dead cows, certainly within the scope of the court orders. Thus, Ammon Bundy and the other defendants attempted to interfere with the court orders.

Third, the defendants can prove the dump truck contained water pipes without proving that Cliven Bundy possessed water rights on the public lands. Water pipes are obviously not dead cows. Any witness with personal knowledge of the contents of the dump truck can testify to its contents. Water rights do not have "any tendency to make a fact [that pipes are not cows] more or less probable than it would be without the evidence." Rule 401.

All other attacks on the court orders--fencing laws, open range, state laws, and so on, simply attacks on the court orders, and thus immaterial. *See United States v. Benabe*, 654 F.3d 753, 767 (7th Cir. 2011) (citing cases)); *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980) ("Good faith disagreements with the law or good faith beliefs that it is unconstitutional are not defenses."). Such arguments, as the government has continuously objected at trial, are nothing more than collateral attacks on the court orders.

Evidence or argument advancing such beliefs as a basis for a defense of good faith should therefore be excluded as improper jury nullification arguments. *See United States v. Young*, 470 U.S. 1, 7–10 (1985) (holding that district court has duty to prevent counsel from making 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. Ernst*, No. 10-CR-60109-AA-01, 2014 WL 1303145, at *1 (D. Or. Mar. 31,

2014) ("Defendant was not entitled to question the jury as to the validity of federal law, and he was not entitled to present arguments in favor of jury nullification.").

V. Defendants' argument, that reasons for violent interference with officers shows innocent state of mind, is wrong. It is a concession of criminal intent and a nullification argument that there was a "good motive" for the crime.

The defendants argue that they resorted to violent self-help, such as attacking the convoy on April 9, to protest water rights (or property rights in cattle—the answer changes). They claim that this shows that they did not form the intent to do the crime. This assertion is very wrong. A concession that the defendants stopped the convoy, which they knew to be federal officers exercising their duty (just a duty they didn't agree with) is a concession of the intention to commit the crime. It is also an attempt to provide a praiseworthy motive to the jury in order to nullify the jury.

"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. Reasons, good or bad, are of course relevant to sentencing, but they are not accepted by courts as a basis for verdicts." *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).

Irrelevant facts introduced to show that the defendant should have been allowed to do the crime, notwithstanding the law, are inadmissible.

> 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 (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 (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.").

The defendants' intention to state that they believed they had a good reason for their conduct is not admissible evidence -- it is jury nullification.

VI. Jury nullification is illegal.

When a defendant introduces evidence, 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."); *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) ("[D]efense counsel may not argue jury nullification during closing argument."); *United States v. Ernst*, No. 10-CR-60109-AA-01, 2014 WL 1303145, at *1 (D. Or. Mar. 31, 2014) ("Defendant was not entitled to question the jury as to the validity of federal law, and he was not entitled to present arguments in favor of jury nullification.").

In *United State v. Blixt*, the court issued several curative instructions after defense counsel's closing argument appeared to encourage nullification: counsel decried federal intervention in "local matters," highlighted that the judge was appointed by the President and affirmed by the Senate (arms of the federal

government), questioned why the case was not brought in state court, and pointed out that the government charging the case "is the same government that is at war in Iraq." 548 F.3d 882, 885 (9th Cir. 2008). *See also United States v. Ogle*, 613 F.2d 233, 241 (10th Cir. 1979) (holding that the district judge properly curtailed the defendant's erroneous line of questioning, a "Fourth of July speech" based not "upon our law or upon our system of government"); *United States v. Bryant,* 5 F.3d 474, 476 (10th Cir. 1993) (Trial court properly prohibited defense counsel from inquiring into basis for federal, rather than state, prosecution.); *United States v. Trevino,* 491 F.2d 74, 77 (5th Cir. 1974) (Thornberry, J., concurring in part and dissenting in part) (Evidence that investigation was initiated because of reports of earlier, uncharged thefts "is precisely the kind of evidence which has no place before the jury.").

The Court has precluded such evidence in previous trials. The government respectfully requests that it extend those ruling to this case as well and preclude evidence of instigation and provocation as advancing jury nullification rather than a cognizable defense.

WHEREFORE, the Government respectfully request that the Court grant its Motion in Limine and enter an Order precluding the defendants from introducing evidence or argument at trial that relate to instigation/provocation (including defendant Payne's recent instigation/provocation defense), self-defense/defense of others, entrapment, justification for violent self-help, impermissible state of mind justification, and collateral attacks on the court orders.

DATED this 18th day of December, 2017.

Respectfully,

STEVEN W. MYHRE
Acting United States Attorney

//s//

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Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that the foregoing Motion in Limine was served on defendants by means of the Court's Electronic filing system on December 18, 2017.

/s/

Steven W. Myhre
Acting United States Attorney