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Acting Under Authority
Conferred by 28 U.S.C. § 515
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GIOVANNI VINCENZO TILOTTA (3), aka "Gio Tilotta," WAIEL YOUSIF ANTON (5), aka "Will Anton," Defendants.	Case No.: 19-CR-4768-GPC Date: January 7, 2022 Time: 2:30 p.m. Honorable Gonzalo P. Curiel **UNITED STATES' MOTIONS *IN LIMINE***

The UNITED STATES OF AMERICA, by Linda Frakes, Attorney for the United States Acting Under Authority Conferred by 28 U.S.C. § 515, and Nicholas W. Pilchak and Andrew R. Haden, Assistant U.S. Attorneys, hereby files its Motions *in Limine*.

I.

STATEMENT OF THE CASE

On November 21, 2019, a federal grand jury in the Southern District of California returned a 23-count indictment charging five defendants with firearms and drug trafficking offenses. Defendant Waiel Yousif Anton (5) was arraigned on the indictment on November 22, 2019. Defendant Giovanni Vincenzo Tilotta (3) was

arraigned on the indictment on November 25, 2019. A federal grand jury returned an eight-count superseding indictment against Tilotta and Anton on April 2, 2021. Both men have pleaded not guilty to all charges. Trial is set for January 25, 2022.

II.

STATEMENT OF FACTS

Former Sheriff's Captain M. Marco Garmo engaged in the business of dealing in firearms without a license for years.[1] In particular, he specialized in obtaining "off-roster" handguns by falsely claiming to be their true buyer while intending to furnish them to private parties prohibited by California law from directly obtaining the weapons themselves.[2] As part of that scheme, Garmo repeatedly bought and sold (and straw-purchased) smaller and newer off-roster handguns well-suited for concealed carry.

Garmo was assisted in this illegal enterprise by Mr. Tilotta, Mr. Anton, and others. Tilotta acted as Garmo's willing federal firearms licensee ("FFL")—a licensed gun dealer willing to bend and break the laws for firearms transfers involving Garmo and his close associates. Tilotta knowingly processed straw transfers in which Garmo and Fred Magana—Garmo's immediate subordinate at the San Diego County Sheriff's Department ("SDCSD")—acquired desirable new off-roster handguns for others, especially Leo Joseph Hamel.[3] Tilotta unlawfully processed transfer paperwork for firearms transactions that had not properly speaking even begun, because the parties hadn't yet appeared at his dealer to begin the transfers, and then allowed the parties to backdate the required forms after the fact. Tilotta also processed firearms transactions

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[1] This is a summary statement of facts for purposes of these Motions only.

[2] On September 15, 2020, Garmo pleaded guilty to engaging in the business of dealing in firearms without a license. ECF 108, 110.

[3] On November 22, 2019, Hamel entered a guilty plea to aiding and abetting Garmo's unlicensed dealing in firearms. ECF 8, 13.

at an unlawful location, specifically a firearms transaction for defense attorney Vikas Bajaj inside Garmo's Captain's office at the SDCSD Rancho San Diego station.[4]

For his part, Anton assisted Garmo by setting up a "consulting" scheme to help applicants fill out a two-page application for a SDCSD-issued permits to carry a concealed weapon (commonly known as "CCWs"). In exchange for thousands of dollars, typically paid in cash, Anton fast-tracked applicants' initial appointments with SDCSD's Licensing division, shaving an eight or nine-month wait for the general public down to two weeks for his "clients." Anton accomplished this by leveraging his own cachet at SDCSD from his proximity to powerful SDCSD figures like Garmo and others, and by sprinkling gifts and an unlawful cash payment (and the promise of more) on SDCSD Licensing staff. In turn, Anton paid Garmo a fraction of Anton's "consulting" fee as a kickback for each CCW client that Garmo sent Anton's way.

Anton demonstrated the symbiosis of his CCW "consulting" arrangement with Garmo's unlicensed firearms trafficking when an undercover ATF agent ("UCA") bought two off-roster handguns that Garmo had advertised. When discussing a CCW with the UCA, Garmo told the agent that he could get a faster CCW appointment with SDCSD Licensing by hiring Anton, who was helping Garmo's cousin in the same way.

At a February 5, 2019 meeting, Anton charged the UCA $1,000 for his "consulting" services, which mostly consisted of calling the clerk at the Sheriff's Department to whom Anton had made an unlawful cash payment to secure an appointment about eight months earlier than those then available to the public. During their meeting, Anton showed the UCA Anton's credentials from the Honorary Deputy Sheriff's Association ("HDSA") and a handgun that Anton had purchased from Garmo. Anton also invited the UCA to refer him other "consulting" clients and volunteered to pay a referral fee of $100 a head. In turn, one of the $100 bills paid by the UCA to

[4] On December 9, 2020, Bajaj entered a guilty plea to aiding and abetting the false entry of dealer records by Mr. Tilotta in related case no. 20-cr-3905-JLB. *See* ECF 5, 7.

Anton was found inside Garmo's wallet eight days later, representing a kickback paid to Garmo by Anton from a portion of the "consulting" fee Anton charged the UCA.

After Anton's home was searched by federal agents just eight days after this meeting on February 13, 2019, Anton placed an unsolicited phone call to the undercover agent. During the call, in about six minutes, Anton urged the agent nine times not to tell federal investigators about the $1,000 that the agent had paid Anton for his services.

III.

MEMORANDUM OF POINTS AND AUTHORITIES

A. The Court Should Admit Co-Conspirator Statements.

During the events charged in the superseding indictment, Defendants and their co-conspirators made many statements that were captured on recordings, in emails or text messages, or will otherwise be introduced at trial. These statements are crucial evidence of the charged crimes and should be admitted. Naturally, the Defendants' own statements to each other and to others are admissible as Defendant's own admissions. *See* Fed. R. Evid. 801(d)(2)(A). But Defendants' co-conspirators statements—during and in furtherance of the conspiracy—are also admissible against them, despite the hearsay rule or the Confrontation Clause. Fed. R. Evid. 801(d)(2)(E); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988). Co-conspirator statements do not implicate the Confrontation Clause because they are non-testimonial. *Crawford v. Washington*, 541 U.S. 36, 56 (2004). It is not necessary that the conspiracy be charged to invoke the co-conspirator statement exception. *E.g.*, *United States v. Rutland*, 705 F.3d 1238, 1248 (10th Cir. 2013).

Here, coconspirator statements would include, for example, Garmo's statements to Hamel and Magana coordinating straw purchases involving Tilotta and others. These communications would be made by members of the conspiracy charged in Count 1 and in furtherance of that conspiracy.[5]

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[5] Such statements may be admitted by the United States against the Defendants. The same rule does not apply to Defendants, however; they may not use the co-

B. The Court Should Admit Properly-Noticed Expert Evidence.

The evidence in this case will involve numerous firearms transactions and the several federal (and state) laws and regulations that apply to them. The United States intends to call Senior Industry Operations Investigator ("IOI") Thomas M. Chimileski, Jr., from ATF to explain many of the relevant concepts to the jury. The United States provided notice of its intent to call Mr. Chimileski by letter dated July 21, 2021 and again on November 22, 2021. *See* Exhibits C & F.

Mr. Chimileski is eminently qualified to offer expert evidence about the interlocking laws and regulations applicable to FFLs and California firearms transfers, having served as an IOI for over 16 years and inspected and interacted with over 500 FFLs and FFL applicants. He has also received and delivered extensive training on these topics. His testimony should be allowed to help the jury understand this regulatory framework, which will be crucial for their understanding of the evidence presented.

Under Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court emphasized that the *Daubert* test for scientific expert testimony is a "flexible" one, and that the district court has broad latitude to determine the reliability of expert evidence that is not scientific in

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conspirator exception to the hearsay rule to admit their own prior statements without testifying themselves. *See*, *e.g.*, *United States v. Ortega*, 203 F.3d 675, 679 (9th Cir. 2000); *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988) (per curiam). That is, Defendants are entitled to invoke their right to remain silent at trial, but they cannot invoke that right and also selectively admit their own prior recorded statements without subjecting them to the crucible of cross-examination.

nature. *See* 526 U.S. 137, 141–42 (1999). Indeed, the Ninth Circuit very recently upheld the admission of experience-based expert testimony, which was primarily informed by the expert's interview of thousands of witnesses and her ability to draw conclusions from patterns found in those interviews. *See United States v. Halamek*, 5 F.4th 1081, 1088 (9th Cir. 2021). More specifically, other courts have routinely found that experts may testify about legal and regulatory regimes where that testimony would be helpful to the jury—especially where the regimes are unusually nuanced or outside of the average juror's experience and understanding.[6] The Ninth Circuit agrees. In *Flores v. Arizona*, the Ninth Circuit allowed that in matters where the legal or regulatory scheme is sufficiently complex, expert testimony may be helpful to the trier of fact, even though it may touch an area of law. 516 F.3d 1140, 1166 (9th Cir. 2008). This Court has followed that rule to permit expert evidence in similar contexts. *See Bona Fide Conglomerate, Inc. v. SourceAmerica*, No. 3:14-cv-00751-GPC-AGS, 2019 U.S. Dist. LEXIS 50949, at *39–40 (S.D. Cal. Mar. 26, 2019).

Here, Mr. Chimileski's testimony will help the jury understand (1) the process for becoming an FFL, including the instructions that FFLs receive on the applicable laws and regulations; (2) the FFL compliance and inspection process, which aims to ensure that they understand and comply with the applicable laws and regulations; (3) the process for conducting firearms transfers through an FFL in California, including the interplay of the federal (and state) laws and regulations; (4) the importance of accurate recordkeeping by FFLs; and (5) the purpose and rationale of the applicable laws and regulations, including why inaccurate or untruthful records are significant for the ATF.

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[6] *See*, *e.g.*, *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) ("when the legal regime is complex and the judge determines that the witness' testimony would be helpful in explaining it to the jury, the testimony may be admitted"); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 8930, 837 (1st Cir. 1990).

Importantly, the United States does not anticipate asking Mr. Chimileski for any ultimate legal conclusions—i.e., whether any transfer involved in this case violated any particular law or regulation. He would, however, be asked to explain those laws and regulations to the jury, demonstrate how they interact and relate to each other, and explain the kinds of conduct they prohibit. This evidence will be enormously helpful to the jury in confronting the interlocking laws and regulations applicable to the conduct in this case. It will also be especially important in a case where the United States must prove willfulness—i.e., proof that Defendant knew his conduct was unlawful.

C. The Court Should Exclude Unnoticed Expert Evidence.

This Court ordered the defense to provide expert notice under Rule 16(b) by December 3, 2021. In fact, the current trial date was set after the Court granted a continuance chiefly to enable the availability of an expert witness that Defendant Tilotta intended to call at trial. ECF 178. Nevertheless, to date, neither defendant has noticed an expert. Nor have they identified any individual that might be called as an expert or shared any reports generated by any potential expert. Consequently, the United States moves to preclude any defense expert from testifying at trial.

Rule 16's requirement that the defense must, "at the government's request,[7] give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705," and the "summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications" is "intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16(b)(1)(C); Fed. R. Crim. P. 16 Adv. Comm. Note.

Unlike Rule 16(a)(1)(G) which only requires notice of government experts who will be offered in the government's "case-in-chief" at trial, Rule 16(b)(1)(C) contains

[7] The United States requested defense expert notice May 28, 2021. *See* Exhibit A.

no such limitation and so does not permit defendants to circumvent the notice requirement by deeming a defense expert a "rebuttal" witness. The reason is plain: all defense experts are called in the defense case-in-chief to "rebut" the government's case. Such an exception would eliminate the rule. An unnoticed defense expert should be precluded from testifying at trial absent adequate notice provided sufficiently in advance of trial for the prosecution to consult its own experts and prepare to cross-examine. *See* Fed. R. Crim. P. 16(d); *United States v. Ulbricht*, 858 F.3d 71, 115 (2d Cir. 2017) (court did not abuse discretion by "precluding the defense from calling its proposed experts" when disclosures were "plainly inadequate"), abrogated on other grounds, *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

D. The Court Should Admit Evidence Under Rule 404(b).

1. Evidence of Anton's CCW scheme.

The Court should admit evidence of Anton's underlying CCW "consulting" scheme as substantive evidence of the obstruction of justice charged in Count 8 or, at a minimum, as inextricably intertwined with that evidence. Specifically, the United States plans to call no more than three of the approximately fourteen individuals whom Anton assisted (or offered to assist) with their CCW applications as part of his scheme.

To prove Count 8, the United States will have to show that the information that Anton sought to prevent from being communicated to law enforcement related to the commission or possible commission of a federal offense. 18 U.S.C. § 1512(b)(3). Evidence of Anton's underlying scheme will be necessary to show that his conduct constituted (at a bare minimum) the possible commission of a federal offense. Therefore, evidence of Anton's underlying scheme is not subject to Rule 404(b) evidence and should be admitted as substantive evidence of Anton's crimes.

Evidence of Anton's CCW scheme is also direct or intrinsic evidence of Anton's participation in Count 2: aiding and abetting Garmo's unlicensed firearms dealing. As explained above and pleaded in the superseding indictment, Anton's role in assisting

Garmo's firearms dealing was to furnish Garmo's customers with his assistance getting CCWs, and to pay kickbacks to Garmo based on fees for that service. ECF 152 ¶ 18.

Failing that, the evidence would also be admissible as "inextricably intertwined" with the charged crime. Courts should not treat proof as "other crimes" evidence when the evidence concerning the other crime and the crime charged are inextricably intertwined. *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987). Such evidence may be considered "inextricably intertwined"—and admitted without regard to Rule 404(b)—when it is necessary to offer a "coherent and comprehensible story regarding the commission of the crime." *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004) (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012–13 (9th Cir. 1995). This includes where the prosecution needs the evidence to explain the defendant's motivation for committing the charged offense. *United States v. Hattabaugh*, 295 F. App'x 249, 251 (9th Cir. 2008) (unpublished). This need is particularly acute where the defendant is charged with lying to distance himself from the underlying bad conduct. *E.g.*, *DeGeorge*, 380 F.3d at 1219 (the prior bad conduct "was necessary to assist the jury in understanding why [defendant] had maneuvered to distance himself" from association with the current offense).

Here, it would be impossible to explain to the jury Anton's obstruction of justice in urging the undercover federal agent to lie about Anton's CCW scheme without also explaining the CCW scheme itself. Consequently, evidence of Anton's CCW "consulting" scheme is inextricably intertwined with the evidence of Anton's obstruction as charged in Count 8. Put another way, untangling them is impossible. Accordingly, the evidence must be admitted.

2. Evidence of Anton's association with the SDCSD.

The Court should admit evidence of Anton's deliberate close association with the SDCSD as inextricably intertwined with the evidence of his offense, or in the alternative, under Rule 404(b).[8]

Other acts evidence is admissible to prove motive, opportunity, preparation, plan, knowledge, identity, or lack of mistake or accident. Fed. R. Evid. 404(b); *United States v. Montgomery*, 150 F.3d 983, 1000–01 (9th Cir. 1998). The Ninth Circuit has uniformly recognized that Rule 404(b) is a rule of inclusion, not exclusion, and that other acts evidence is admissible whenever relevant to an issue other than the defendant's criminal propensity. *See United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007); *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982). Other acts evidence can be "critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

"Other acts evidence is admissible under Rule 404(b) if it: (1) tends to prove a material point in issue; (2) is not too remote in time; (3) is proven with evidence sufficient to show that the act was committed; and (4) if admitted to prove intent, is similar to the offense charged." *United States v. Beckman*, 298 F.3d 788, 794 (9th Cir. 2002) (citing *United States v. Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001).

At trial, the United States intends to offer evidence that Mr. Anton held himself out as virtually a member of the SDCSD. For example, when his residence was searched on February 13, 2019, agents discovered a SDCSD duffel bag containing an SDCSD raid jacket, a police duty belt, handcuffs, and SWAT patches, along with a San

[8] The United States provided notice by letter dated July 26, 2021 and November 15, 2021 of the potential Rule 404(b) evidence referenced in these motions. *See* Exhibits D & E.

Diego County fleet access card, and an SDCSD police radio tuned to the band for the Lemon Grove station. Similarly, Anton's text messages contain conversations in which he described himself as acting on behalf of the SDCSD, as when he told associate complaining about an unruly person at his business on January 8, 2019 that he (i.e., Mr. Anton) would "send a unit" (i.e., a Sheriff's deputy) to that location. Likewise, it is anticipated that witnesses from the Sheriff's Licensing department will testify that Mr. Anton used his HDSA credentials to be admitted to non-public areas of Sheriff's Department facilities. It is also expected that one witness in particular will testify that Anton's perceived proximity to powerful political figures, especially Sheriff Bill Gore, was one of the reasons that she provided his "clients" with preferential treatment such as early CCW appointments.

Because this evidence explains, in part, how Mr. Anton was able to commit the underlying conduct that he sought to conceal from federal agents by obstructing justice, the United States respectfully submits that it be admitted as inextricably intertwined with evidence of the charged offense. The evidence will also be offered to show Mr. Anton's motive in committing the charged crimes, including aiding and abetting Marco Garmo's unlicensed firearms dealing (Count 2). Specifically, the United States will offer this evidence to show that Mr. Anton's motive in assisting Mr. Garmo was to further his own professional and political aspirations by continuing to closely associate himself with the person whom he believed to be the future Sheriff of San Diego County. This is a permitted purpose under Rule 404(b), which shows that the evidence tends to prove a material point in issue. It is practically simultaneous with the charged crimes, so it is not temporally remote. It can be proven from sufficient evidence, such as text messages, physical evidence, and witness testimony.

In sum, the evidence is relevant and the probative value of such evidence outweighs any risk of unfair prejudice. *See* Fed. R. Evid. 403. It should be admitted.

3. Evidence of Anton's campaign fundraising for SDCSD and others.

The Court should admit evidence of Anton's campaign fundraising activities for the SDCSD, the HDSA, and local political law enforcement figures as inextricably intertwined with the evidence of his offense, or in the alternative, under Rule 404(b).

At trial, the United States intends to introduce limited evidence (such as text messages) of Mr. Anton's campaign fundraising activities, in part to prove his motive in committing the charged crimes, as explained in the prior section. That is, Anton's motivation in aiding and abetting Garmo and his unlicensed firearms dealing was to further Anton's own professional and political aspirations, which were further demonstrated by his active fundraising for local law enforcement figures. The evidence is also inextricably intertwined with the substantive evidence of Anton's underlying CCW scheme because Anton routinely solicited political contributions from his "consulting" clients at the same time that their CCW applications were supposedly pending. In fact, in some cases, Anton drew a direct link for his clients between their contributions and the likelihood of their success on their applications. For example, while one potential client's request for CCW paperwork was pending, Anton explicitly solicited campaign contributions from him for a prominent candidate for District Attorney, writing that it would get his client on the DA's "[g]ood side" and her "VIP list," which would be "good to have."

This exchange, and others like it, demonstrate how Anton intermixed his campaign fundraising with his CCW "consulting," including by leading his clients to believe that their campaign contributions would help with their CCW applications. This evidence is not "other act" evidence at all, but rather inextricably intertwined with the substantive evidence of Anton's commission of the substantive conduct underlying the obstruction of justice and aiding and abetting Garmo's firearms dealing enterprise. It also qualifies as modus operandi evidence, as it explains the method by which Anton operated the CCW scheme with which he furthered Garmo's firearms dealing.

If construed as 404(b) evidence, however, it should similarly be admitted to prove a material point: Anton's motive in committing the charged crimes, including especially aiding and abetting Garmo's unlicensed firearms dealing. That is, Anton's efforts to position himself for political prominence through fundraising demonstrate his motive in assisting Garmo's rise through firearms trafficking. The evidence likewise bears on Anton's intent in urging the undercover to lie about having paid Anton for CCW services, for fear that scrutiny of his CCW "consulting" would also uncover Anton's questionable relationships with political and law enforcement figures and special access to the SDCSD. The evidence is not remote in time, since it is (again) simultaneous with the explicitly charged conduct, and it can be proved with sufficient evidence, in the form of text messages and witness testimony. The evidence is similar to the crime charged, inasmuch as it is being offered to prove Anton's intent, given that Anton's relevant fundraising was joined at the hip with his CCW consulting activities. The probative value of the evidence also outweighs the danger of any unfair prejudice or confusion under Rule 403. It should be admitted.

4. Evidence of Tilotta's prior inspections.

The Court should admit evidence that Mr. Tilotta and his business were previously inspected by industry operations specialists at ATF and representatives of the California Department of Justice ("Cal DOJ"). For example, the United States intends to call an ATF witness to testify about Tilotta's initial inspection upon his application for an FFL in 2013. The evidence would also include testimony and records concerning information provided to HBF about the applicable laws and regulations.

While this is not prototypical "other act" evidence under Rule 404(b), since it does not principally pertain to acts taken by Tilotta but rather information that was provided to him, the United States nevertheless provided pretrial notice out of an abundance of caution. *See* Exhibit E.[9]

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[9] If construed as evidence under Rule 404(b), this testimony and evidence would be offered to show Tilotta's knowledge of the laws and regulations applicable to FFLs

5. Evidence of Tilotta facilitating a prior straw purchase.

The Court should admit evidence that Tilotta apparently conducted a prior straw purchase—and was admonished about it by Cal DOJ—under Rule 404(b).

The superseding indictment alleges that Tilotta participated in a straw purchase conspiracy with Garmo, Hamel, and Magana, dating back at least to October 21, 2015. ECF 152 at 8, ¶ 21. On or about December 2, 2015, Tilotta was cited by Cal DOJ's Bureau of Firearms for a "possible straw purchase" during a routine inspection. The United States anticipates that a witness from Cal DOJ will testify that she admonished Mr. Tilotta about straw transfers in connection with this citation and reviewed with him the prohibition on conducting such purchases. This evidence will demonstrate Tilotta's knowledge of the prohibition on conducting straw transfers, his intent in conducting the transactions charged in the indictment, and his absence of mistake and lack of accident in committing the charged offense. For example, the United States will offer this evidence to show that Tilotta deliberately conducted straw purchases while aware that they were prohibited by law, and that he did not act under a misunderstanding, or through mistake or accident in conducting the transactions. Similarly, this evidence will establish Tilotta's knowledge and intent in committing the charged offense. These are all material points in issue, and will likely go directly to the only contested elements at

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and dealing in firearms, including (without limitation) the requirement of obtaining an FFL to engage in the business of dealing in firearms under federal law. This evidence would demonstrate Tilotta's knowledge and intent in committing the charged crimes, including aiding and abetting Garmo's unlicensed business of dealing in firearms and in conducting the charged straw purchases and participating in the charged conspiracy. It will also show that Tilotta engaged in such conduct deliberately and not through mistake or accident—or ignorance of the law. For example, evidence that Tilotta was explicitly instructed in the laws and regulations applicable to firearms transfers will tend to show that he was aware of the existence and significance of the requirement that the nominal buyer or transferee of a firearm certify that they were the actual buyer or transferee, and not merely a straw purchaser. This will be exquisitely important evidence of Tilotta's knowledge and intent in his commission of the charged crimes and should be admitted as such. Neither does it raise any danger of unfair prejudice under Rule 403.

trial. The conduct is not too remote in time, as it occurred during the conspiracy charged in Count 1. It can be adequately proved through Cal DOJ records and witness testimony, and it is broadly similar to the offense charged and therefore relevant to intent.[10] This relevant evidence is not unfairly prejudicial, particularly since there was no final determination that Tilotta or Honey Badger engaged in a deliberate straw purchase. *See* Fed. R. Evid. 403. Proof on this point should be admitted.

E. The Court Should Admit Firearms In Court.

During trial, the jury will hear extensive evidence about a wide array of firearms. The best way for the jurors to understand this evidence will be to see and (if allowed) to inspect the firearms themselves. This is particularly important since the United States must prove, beyond a reasonable doubt, that the weapons sold by Tilotta and Garmo were, in fact, firearms. *See* Ninth Circuit Model Inst. 8.53 (dealing firearms without a license); *see also* 18 U.S.C. § 921(a)(3)(A). The jury will also have to make findings as to the specific firearms charged in some of the enumerated counts of the Superseding Indictment. *See*, *e.g.*, ECF 152 at 17 (Count 7 alleges Tilotta unlawfully sold, delivered and transferred a Daniel Defense AR-15 style 5. 56mm rifle bearing serial number DM4107377; a Smith & Wesson Shield 9mm handgun bearing serial number HNH6175; and a Glock 27 .40 caliber pistol bearing serial number RLK240, to Bajaj at the SDCSD's Rancho San Diego Substation).

Admittedly, the evidence in this case involves a large number of firearms. The United States will abide by the Court's limiting instructions as to its usual practices for having firearms present in the courtroom. *See*, *e.g.*, 15-CR-2713-GPC at ECF 28 (requiring firearm to contain triggerlock). Agents from the ATF are extensively trained in the safe handling of firearms and will be responsible for transporting all such weapons to and from court under safe conditions. Moreover, the United States will

[10] To further blunt the danger of any unfair prejudice to Tilotta, the United States would be amenable to a limiting instruction accompanying this evidence.

make every effort to limit the number of trial days that any particular firearms are present in court, or visible to the jury, to minimize the impact on court personnel and the space in the courtroom.

In sum, the United States respectfully submits that, in a case where it must prove that the defendants aided and abetted a person who was engaged in the business of dealing in firearms without a license, it should be permitted to show the jury the unlicensed dealer's inventory of firearms and the specific firearms related to the charged offenses. The evidence is relevant, and the probative value of such evidence outweighs any risk of unfair prejudice. *See* Fed. R. Evid. 401–03.

F. The Court Should Admit Business Records Under Rule 902(11).

The United States intends to admit records of regularly conducted activities under Fed. R. Evid. 902(11), such as telephone and financial records. The United States provided general notice of its intent on June 30, 2021 and specific notice on July 26, 2021, seeking any objection from the defense to this proposed course of action and has received no written response.[11] Exhibits B & D. The United States requests that this evidence be admitted under Rule 902(11) to obviate any need for records custodians to travel to court to lay routine foundation for these records, which the United States does not believe is subject to any good faith objection. Alternatively, the United States requests that the Court consider the business records declarations under Rule 104 at the hearing on motions *in limine*.

G. The Court Should Admit Digital Evidence Under Rule 902(14).

At trial, the United States will seek to admit evidence from digital devices, like text messages extracted from cellphones pursuant to consent or warrant searches. In each case, a part of the forensic review process involves making a copy or taking an extraction of the digital device. The United States does not anticipate that any party will have a good faith objection to the authenticity of these copies or extractions—that

[11] Informally, counsel for Tilotta has indicated that he is unlikely to object.

is, a good faith basis to contest whether the information in the copies or the extractions was really present on the actual digital devices.[12] Accordingly, to streamline the proof and avoid unnecessary testimony, the United States should be permitted to authenticate this evidence through Rule 902(14), which was intended for just such a purpose.

Federal Rules of Evidence 902(13) and (14), which went into effect in December 2017, provide that certain electronic evidence can be self-authenticating. In particular, Rule 902(14) provides:

> Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Fed. R. Evid. 902(14). The Rules Committee noted in enacting these rules that "as with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary." Fed. R. Evid. 902(14), Adv. Comm. Note (2017). "It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance

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[12] In an effort to determine whether such good faith objections might exist, the United States inquired by letter dated June 30, 2021, July 26, 2021, and November 15, 2021 whether defense counsel would object to this procedure. Exhibits B, D & E. Because no formal response has been received, the United States believes that the parties are unlikely to dispute authenticity.

Alternatively, the United States has requested that the parties simply stipulate to the authenticity of extracted digital evidence, without prejudice to the parties' ability to raise other objections (such as relevance, hearsay or unfair prejudice). The United States has not yet received a firm response to this request.

of trial whether a real challenge to authenticity will be made, and can then plan accordingly." *Id*. In this case, Rule 902(14) provides an ideal mechanism to streamline the proof at trial and save the (likely uncontested) testimony of unnecessary witnesses, absent some good faith objection. The United States has complied with the required notice provisions by sending the proposed certificates of the relevant witnesses on June 30, July 26, and November 15, 2021. *See* Exhibits B, C & D. Although objections were solicited, neither defendant has responded with any kind of objection.

This evidence should be admitted as self-authenticating. *E.g.*, *United States v. Dunnican*, 961 F.3d 859, 872 (6th Cir. 2020). Alternatively, the United States requests that the Court consider the business records declarations under Rule 104 at the hearing on motions *in limine*.

H. The Court Should Admit Testimony From A Percipient Witness Who Was Not Acting As An Attorney.

Mr. Tilotta is charged in Count 7 with conducting a firearms transaction in violation of state law, for a firearm sale and delivery that he conducted inside Garmo's office for criminal defense attorney Vikas Bajaj. The United States anticipates eliciting testimony from Bajaj—who pleaded guilty to a misdemeanor for his role in the sale—about this transaction, and potentially one other firearms transaction that he conducted with Garmo. By all appearances, Bajaj was acting in his personal capacity in conducting these deals, and not as an attorney rendering legal advice or representation. Nevertheless, out of an abundance of caution, the United States requests that the Court make preliminary findings that Bajaj was not acting as an attorney for the limited conduct contemplated by this testimony. The United States expects that the parties could proffer undisputed facts as to this transaction that could form the basis for the Court's ruling.[13]

[13] The United States has already attempted to identify whether the parties have any factual disagreement about Mr. Bajaj's role in that firearms transaction, or whether calling him to testify about it would present any potential Sixth Amendment or attorney-

The United States requests that the Court make limited pretrial findings that Mr. Bajaj was not acting as an attorney in conducting the private firearms transaction charged in Count 7, and that neither party anticipates a basis to object to Mr. Bajaj's limited testimony in that regard based on the attorney-client privilege, the Sixth Amendment, or any other basis based on his position as a lawyer.[14]

I. The Court Should Exclude Evidence Under Rule 403.

As mentioned above, federal agents executed a search warrant at Mr. Anton's residence on February 13, 2019. Anton has indicated, through counsel, that his spouse gave birth to a child during that same time period and that members of his family may have suffered adverse health consequences as a result of the stress they experienced from the search. The United States concedes that evidence of events that Anton was aware of before he made the February 13 and 14, 2019 telephone calls constituting the obstruction of justice charged against him would be admissible as bearing on Anton's state of mind, assuming the proper foundation is laid. Evidence of health consequences experienced by Anton's family *after* the charged conduct concluded, however (i.e., after February 14, 2019) is not relevant to any fact in issue in this case.

On the other hand, the risk of prejudice of such evidence would be high, and there would be a substantial risk of such evidence being used for no purpose other than to inflame the jury's passions. As such, it should be excluded under Rule 403. The United

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client privilege issue for either Tilotta or Anton. Specifically, on June 30, 2021, the United States requested by letter that defense counsel notify it if either party intended to raise an objection arising from Mr. Bajaj's status as an attorney or any supposed attorney-client relationships he may have formed during the facts at issue in this case. *See* Exhibit B. Tilotta's counsel has responded that he has no basis for such an objection; Anton's counsel has not responded.

[14] Naturally, this would be without prejudice to either Defendant's ability to raise proper evidentiary objections at trial, such as relevance or hearsay.

States expressly requests that the Court rule on this issue pretrial to avoid prejudicial and inflammatory remarks by counsel during opening statements.

J. The Court Should Preclude An Unnoticed Advice-of-Counsel Defense.

The United States inquired of defendants whether they intended to offer an advice-of-counsel defense by letters dated May 28, 2021; June 30, 2021; and November 15, 2021. *See* Exhibits A, B & E. To date, no response has been received from Anton's counsel.[15] The United States respectfully requests that the Court preclude Defendants from offering such a defense, absent appropriate pretrial disclosure.

Although neither defendant has articulated an intent to rely on a defense of advice of counsel, both defendants associated with attorneys at the time that the conduct was committed. For example, Tilotta summoned an attorney to his initial interview with ATF on February 20, 2019—the same attorney whom Tilotta had asked Garmo to help with his CCW application. Likewise, Anton has had some level of contact with Vikas Bajaj over the periods charged in the indictment, although it is unclear whether Bajaj has ever acted as Anton's attorney.[16]

The law is clear: privilege may not be "'used both as a sword and a shield.'" *Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc.*, 552 F.3d 1033, 1042 (9th Cir. 2009) (*quoting Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)). "To qualify for an advice of counsel instruction, a defendant must demonstrate that he fully disclosed to his attorney all material facts and relied in good faith on the attorney's recommended course of conduct." *United States v. Munoz*, 233 F.3d 1117, 1132 (9th Cir. 2000) (superseded on other grounds as stated in *United States v. Van Alstyne*, 584

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[15] Tilotta's counsel has affirmed that he does not intend to raise such a defense.

[16] As set out below, Anton apparently called Bajaj the same day his residence was searched, and several additional times later that week. The United States has no intention of exploring the content of those conversations with Bajaj at trial (or otherwise).

F.3d 803, 817 (9th Cir. 2009)); *see also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991) (a party may not invoke privilege "to prejudice his opponent's case or to disclose some selected communications for self-serving purposes"). Proving reliance on advice of counsel, of course, involves a waiver of privilege. Defendants here do not qualify for an advice of counsel defense because they have not waived privilege. The United States requests that this determination be made pretrial to avoid the delays and the waste of jury and court time required to explore the contours of any such waiver of privilege midtrial.

K. The Court Should Preclude Prejudicial Evidence Of A Recantation Defense.

Facts. On February 13, 2019 at about 4:59 p.m., Anton affirmatively reached out and called the ATF undercover agent ("UCA") from whom he had taken $1,000 for CCW "consulting" services. In the space of just a few minutes, Anton urged the UCA nine times to lie to investigators if he were contacted as part of the same investigation that had just conducted a warrant search at Anton's home, and falsely deny paying Anton any money. Anton repeated the instructions in a second phone call the next day.

Four days later, on February 18, 2019 at approximately 11:15 a.m., Anton called the UCA again. When the UCA didn't answer, Anton texted, called the UCA again less than an hour later, and called a third time at the end of the business day. At 5:25 p.m., Anton and the UCA finally connected. Anton tried to clarify his deal with the UCA, offering the UCA the option to cancel and get his $1,000 back. Alternatively, Anton volunteered to keep handling the UCA's application, but added "you just got to follow up the rules and everything else, just like everybody else." A moment later, Anton added "if anybody ever asks you . . . if they ask you questions or anything like that you just tell them the truth." Anton added that the UCA should say that Anton "charge[d] you a thousand dollars for consulting fee to help you and guide you and…uh…do the, all the other stuff for you." The UCA asked Anton if there was anyone at Sheriff's Licensing that he should ask for, to use Anton's name if he had any problems. Anton responded that it wasn't like that, and that "[t]hey're just doing their job. They're very

very strict. It's not like we go over there, 'Hey, hook this guy up.' No, it doesn't work like that brother."

The next day, the UCA called Anton back and claimed the FBI wanted to interview him. Anton reiterated that the UCA should "[t]ell them the truth." After Anton repeated that instruction, the UCA added: "I'm saying, you were just telling me, tell them not to say anything about money, so I'm trying to figure it out." Anton falsely denied having said that, claiming instead: "No, I didn't tell you that. No, I didn't tell you that. I told you, yeah, go ahead, you tell them whatever you want to tell them."[17]

Between Anton's exhortation to the UCA to lie on February 13, 2019 and his striking about-face on February 18, 2019, he called several attorneys. On February 13, 2019, Anton exchanged two calls with Vikas Bajaj, including one (at 1:45 p.m.) that lasted approximately 20 minutes. Anton exchanged another three calls with Bajaj on February 15, 2019, including one that lasted 13 minutes. The same day (February 15, 2019) Anton placed a ten-minute call to the law offices of his trial counsel, Eugene Iredale. On February 18, 2019 at 9:23 a.m.—just under two hours before he tried to reach the undercover agent to explain that he only wanted him to tell federal agents the truth—Anton placed a one-minute call to the law offices of Mr. Iredale.

[17] Following this call, Anton and the UCA later exchanged a string of text messages in which Anton repeatedly exhorted the UCA to tell the truth. He also included a variety of other self-serving statements, like pointing out that when he originally talked to the UCA—i.e., when he instructed him to lie to agents—his wife had just gone into labor and he couldn't remember what he had said to the UCA because he "felt like a zombie."

Argument. Anton's crime of attempting to obstruct justice by telling the UCA to lie to federal agents as part of their investigation was complete on February 13, 2019. He even doubled down on that crime by repeating the instructions the next day. Anton's change of heart five days later—apparently after also speaking or meeting with a pair of lawyers—and his attempt to un-obstruct justice is irrelevant and prejudicial.

Evidence of Anton's later "Tell the truth!" statements could, in effect, only be relevant to a recantation defense. Yet this is not a defense to the charged crime. Recantation was not recognized as a defense to perjury at common law. *United States v. Denison*, 663 F.2d 611, 616 (5th Cir. 1981) ("Section 1623(d) changed the common law rule that recantation is not a defense to perjury"). Only in the specific law criminalizing false statements to a grand jury did Congress specifically authorize recantation as a defense. *See* 18 U.S.C. § 1623(d). There is no generally-available defense of recantation to obstruction of justice charges under federal law.

Even where recantation *is* explicitly recognized as an available defense, its applicability is limited. In *United States v. Denison*, the Fifth Circuit found that a witness charged with violating Section 1623 was not entitled to a period of "reflection" during which his conscience could prevail upon him to later recant, but could be convicted of false statements even where the prosecutor immediately confronted him with evidence of his perjury. 663 F.2d at 616–17.

Here, Anton is charged with violating a statute that does not have a recantation defense.[18] Indeed, in the context of Section 1512 prosecutions specifically, at least one court has explicitly rejected the attempt to inject a recantation defense not present in the

[18] Congress did provide for some defenses to this crime, further undercutting any argument that recantation is an "implicit" defense. For example, a defendant's lawful insistence that a witness tell the truth cannot violate the statute. *See* 18 U.S.C. § 1512(e). But that defense, by its terms, does not apply where a defendant (like Anton) has unlawfully urged a witness to lie and then later changed his mind. *Compare* 18 U.S.C. § 1623(d).

statute. *See United States v. Holland*, 2009 U.S. Dist. LEXIS 45253, at *32 (W.D. Va. May 29, 2009) ("Recantation is not a defense to obstruction of an official proceeding under 18 U.S.C.A. § 1512(c)."). Adducing evidence that, days after obstructing justice, Anton later told the putative witness to tell the truth would be irrelevant, confusing and prejudicial. *Cf.* Fed. R. Evid. 403. It would also necessarily raise the thorny legal issue whether the United States may cross-examine the defendant[19] about the fact (although not the content) of his conversations with counsel before his surprising about-face. Instead, the Court should rule that evidence of Anton's belated attempts to un-ring the bell of his obstruction of justice are irrelevant, prejudicial, and precluded from evidence at trial. The United States respectfully requests a ruling on this issue pretrial to avoid prejudice from the subject being referenced in Anton's opening statement.

L. The Court Should Preclude An Entrapment Defense.

The United States moves to preclude Defendants from presenting any claim of entrapment to the jury. The defense of entrapment has two elements: (1) government inducement of the crime; and (2) the absence of predisposition on the part of the defendant. *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994) (citing *United States v. Skarie*, 971 F.2d 317, 320 (9th Cir. 1992)); *United States v. Jones*, 231 F.3d 508, 516 (9th Cir. 2000). "When the defendant presents some evidence of both elements of the entrapment defense, the burden shifts to the prosecution to prove beyond a reasonable doubt either that there was no inducement or that the defendant was predisposed to commit the crime." *United States v. Hoyt*, 879 F.2d 505, 509 (9th Cir. 1989) (citation omitted). The trial judge serves as the gatekeeper for deciding whether an entrapment instruction is merited. "If the trial judge finds that the defendant has not presented sufficient evidence to show both inducement and lack of predisposition, the trial judge is obliged to deny the requested instruction." *Id.*

[19] Obviously, any evidence about Anton's later statements could only come through testimony from Anton himself. Anything else would be self-serving hearsay.

If Anton attempts to offer an entrapment defense, the Court should exclude it as unsupported by the evidence in this case, because Anton's CCW scheme was already well underway by the time the UCA approached Anton for his services after being referred by Garmo. In his referral, Garmo told the agent that Anton was already "consulting" for Garmo's cousin. Likewise, Anton's telephone is replete with text messages with other "clients" going back at least as far as August 2017. Finally, agents searching Anton's residence discovered a variety of other CCW application files. Accordingly, Anton would be unable to show that he was induced by the government to aid and abet Garmo's unlicensed firearms dealing via his CCW scam.[20]

If Anton did pursue an entrapment defense, his predisposition to commit the crime would come into issue, which would open up wide vistas of other evidence of Anton's other unlawful dealings. The United States accordingly requests a pretrial ruling on Anton's ability to invoke an entrapment defense so that it does not introduce needlessly prejudicial predisposition evidence unless and until Mr. Anton has elected whether to argue for entrapment.

IV.

CONCLUSION

The United States respectfully requests that this Court grant these Motions.

DATED: December 10, 2021

LINDA FRAKES
Attorney for the United States
Acting Under Authority
Conferred by 28 U.S.C. § 515

/s/ Nicholas W. Pilchak
NICHOLAS W. PILCHAK
ANDREW R. HADEN
Assistant United States Attorney

[20] A claim of entrapment on the obstruction count would be even less colorable. The undercover agent didn't induce Anton to obstruct justice; *Anton* called *the agent* and urged him to lie.