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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Hon. Gonzalo P. Curiel)

UNITED STATES OF AMERICA, Plaintiff, v. WAIEL YOUSIF ANTON (5), Defendant.	CASE NO. 3:19-cr-04768-GPC Date: January 7, 2022 Time: 2:30 pm Honorable Gonzalo P. Curiel **DEFENDANT ANTON'S RESPONSE TO GOVERNMENT'S MOTIONS *IN LIMINE***

I.
INTRODUCTION

Defendant Waiel ("Will") Anton is a thirty-six year old, naturalized United States citizen. He immigrated to the United States as a ten-year-old child with his family, who fled the Sadam Hussein regime in Iraq. As Chaldeans (Iraqi Christians) the family had been subject to threats and abuse. Mr. Anton was able to learn enough English to ultimately graduate from high school. He attempted twice to complete law officer training academies in San Diego County, but was unable to do so.

Years later, having married and started his own business of garage door installation and repair, Mr. Anton began to participate in political campaigns and fundraising for San Diego officials and political candidates. Among others, he supported and raised campaign funds for William Gore, Bonnie Dumanis, Bill Wells, and the former U.S. Attorney, Robert Brewer, during Mr. Brewer's campaign for District Attorney. Mr. Anton was a member of, and supported, the Honorary Deputy Sheriffs' Association.

Mr. Anton, with the advice of Attorney Vik Bajaj, began a consulting business in which he would assist persons who wanted to obtain a CCW permit, advising them about the process and how best to present an application. This included assistance in filling out the relevant forms, preparing the applicant for an in-person interview and scheduling an appointment. This consulting business never developed, and Mr. Anton only advised about ten persons. He would typically charge $1,000.00 or so for this service. About half of his clients were able to obtain CCW permits, and half were not.

Mr. Anton's presence in this case was due to his friendship with Marco Garmo. The indictment alleges that Mr. Anton knowingly aided and abetted Garmo's "unlicensed firearms dealing" by helping Garmo's firearms customers

apply for CCW permits. (ECF Doc. 152, p. 7) The evidence at trial will show that the only person who ever purchased a firearm from Garmo who was assisted by Mr. Anton in the CCW process was the undercover ATF agent "Sean Jones".

The indictment charges that Mr. Anton "unlawfully paid" a clerk in the Licensure Department $100 in cash "in exchange" for making early appointments for CCW interviews. The evidence will show that Mr. Anton did give $100 to allow the clerk to buy lunch for her coworkers. But there was never any *quid pro quo*, nor any suggestion of one. There will be no evidence of any other payment by Mr. Anton to anyone in the Sheriff's Department, despite prosecution interviews with scores of witnesses, and its review of bank records, phone records, and multiple search warrant executions. The evidence at trial will be conspicuously lacking in one respect: there will be no evidence that Mr. Anton understood that Garmo's conduct was illegal or that Garmo required a Federal Firearms license. There will be no evidence that Mr. Anton aided and abetted Garmo's sales of firearms, save that Mr. Anton did purchase a firearm, legally and in his own name, from Marco Garmo.

Despite these facts, the government executed a search warrant at Mr. Anton's house on 13 February 2019. Armed, armored agents stormed through his home brandishing weapons in front of his pregnant wife and two-year-old son. Within hours his wife went into premature labor. It was on this date that Mr. Anton spoke by telephone with ATF agent "Sean Jones", and asked him, in the unlikely event he were interviewed, not to mention that Jones had paid $1,000 to him for CCW advice and assistance. On 18 February, 2019, "Sean" called Mr. Anton. During this discussion, Mr. Anton made clear that he renounced any previous request that Jones omit or falsify information should Jones be interviewed, telling Jones, "If they ask you questions or anything like that, you just tell them the truth. You know, you bought the gun from Garmo and Marco told you that you know, I could help you

out with the CCW and I charged you a thousand dollars for consulting fee to help you…" "Sean" responds, "Ok."

The government apparently did not like that Mr. Anton was now counseling "Sean" to tell the truth if ever approached by investigators. The very next day, "Sean" called Mr. Anton again. This time he urgently asked to meet with Mr. Anton: "Hey man, I need to meet with you today bro. We need to talk." "Sean" then falsely states he just "got a fucking phone call" and "some people came by my place", "like the fucking FBI, man". Mr. Anton throughout this call repeats that "Sean" should simply tell what happened. During the call, Mr. Anton makes the following statements to "Sean", all before any supposed interview with an imaginary FBI agent is to take place:

> "Yeah, just yeah it's ok. Just tell them whatever it is. Tell them the truth bro. I charge my consulting fee. . .
> " No, no you tell them the truth. You tell them every single thing...no you tell them everything. You tell them everything, the truth. Ok?. . .
> "I did... I'm helping you with the application and that's it there's nothing to hide or nothing about it. I charge a thousand dollars, yeah for to do consulting for you that's it.". . .
> "Yeah I don't know, go talk to them. See what they want to talk to you about. Let them do their job."

"Sean" texted Mr. Anton on the following day, February 20. The text response from Mr. Anton's phone included the following:

> "...If you decide to speak with the police or the FBI, just tell them the truth. Thanks."

There will be no evidence that Mr. Anton knowingly aided Garmo's firearms dealings. Garmo's suggestion of Mr. Anton as a person who could assist "Sean" with a CCW application was unrelated to "Sean's" purchase of any firearm, which had already been completed. The attempted obstruction charge under 18 U.S.C. §1518(b)(3) does have some basis. There is a recording of Mr. Anton telling "Sean" to omit

or deny that he paid money to Mr. Anton, in the unlikely event "Sean" were to be interviewed. Thus, the government could argue that there was a corrupt attempt to obstruct, even though an actual obstruction was impossible because "Sean" was an undercover agent pretending to be a possible witness. But within a brief time, when "Sean" reached out twice to speak with Mr. Anton, the defendant repeatedly remonstrated with "Sean" to truthfully disclose what had actually taken place.

These motions *in limine* are attempts to salvage a conviction despite the lack of evidence of any underlying crime, and the repeated acts of the defendant to encourage the witness to respond truthfully. First, the Court is asked to permit the prosecution to allow evidence of a "CCW scheme". Second, it seeks to paint Mr. Anton's idolization of law enforcement as evidence of criminality. How does Mr. Anton's possession of police paraphernalia or monitoring a police band that is publicly available probative of anything other than an affection for, and fascination with, police and police matters?

Next, the prosecution proposes to put Mr. Anton's constitutionally protected political activity and fundraising before the jury as somehow probative that a crime was committed. The prosecution seeks leave to display, and allow the jurors to inspect the firearms themselves (ECF Doc. 224, p. 15), even though there is no dispute as to the identity of the firearms.

Finally, the prosecution seeks to exclude evidence of the phone calls and texts in which Mr. Anton tells the witness to be truthful because, inconveniently, this would prove that Mr. Anton is innocent of corruptly attempting to obstruct an investigation by countermanding his request the witness omit or deceive before any supposed interview ever was to take place.

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II.
ARGUMENT

A. In the Absence of a Charged Conspiracy, Co-Conspirator Statements Are Inadmissible

The Court has authority to permit admission of statements that fall under the co-conspirator exception to the hearsay rule. Such statements must, however be made during the conspiracy, and for the purpose of furthering the conspiracy. Idle chitchat, speculation or statements that do not have as their purpose the furtherance of the conspiracy remain within the proscription of Rule 802. Moreover, the statement itself must be considered, but does not establish the existence of the conspiracy nor defendant's participation in it.

Defendant Anton is not alleged to be a conspirator with Mr. Garmo or Mr. Tilotta. There is no conspiracy charge against him. He is alleged to have aided and abetted Marco Garmo's illegal firearms sales by consulting with the undercover agent on how to obtain a CCW permit. Thus, as to Mr. Anton, the applicability of 801(d) (2) (E) is questionable and problematic. He is not alleged to have conspired with Garmo to illegally deal in firearms, and there is no evidence he even knew Mr. Tilotta, much less conspired with him. The Court should not permit the prosecution, under the shibboleth of "co-conspirator statements" to elicit hearsay as to any uncharged conspiracy.

B. The Court Should Not Permit Legal Opinion, Legal Conclusion or Argument Under the Guise of Expert Testimony

The Court should prohibit any expert from telling the jurors what the law is or what it requires, as this is a judicial function. The Court should not allow legal opinions or conclusions, evidentiary argument, or credibility determinations of the witness under the guise of expert testimony. The proposed testimony in its vaguely

sketched parameters appears to be an attempt to invade the Court's function by telling the jury what the law is, what it permits, and what it prohibits.

C. The Court Should Preclude Evidence of an Alleged CCW "Scheme"

The indictment alleges that Mr. Anton aided and abetted Garmo's unlicensed firearms dealing "by helping Garmo's firearms customers apply for CCW permits in exchange for cash payments". This is the only allegation in the indictment as to aiding and abetting. The only Garmo customer of whom defense counsel is aware who purchased a firearm from Garmo and consulted with Mr. Anton regarding a CCW was "Sean Jones", the undercover agent. The evidence will show that Jones's undercover purchase was not motivated by Garmo's referral of Jones to Mr. Anton.

The prosecutor's use of "scam" and "scheme" to refer to this consulting process is pejorative and unfair. The prosecution seeks to show that Mr. Anton *ex post facto* gave some money ($100) for several employees to go out to lunch. The prosecution alleges that this was "unlawful" although it has not brought a charge of any kind as to this allegedly unlawful payment. It alleges as well that Mr. Anton paid a "kickback" to Garmo of $100. Evidence these two $100 payments, whether they could be argued to be illegal or not, are not properly admissible in this trial. Neither has anything to do with the issue as to the aiding and abetting charge: did Mr. Anton know Garmo was required to have an FFL license, did he know the full extent of Garmo's gun sales, did he know it was illegal, and did his CCW consulting further or assist Garmo in illegally selling firearms? Whether or not he gave a clerk lunch money or Mr. Garmo a referral fee on one occasion does not relate in any way to the issues of the aid and abet charge.

Knowing the paucity of evidence on the real issue, the prosecution seeks to convict by unrelated conduct, negative character evidence, and the use of epithets such as "scam", "scheme" or "kickback". This should not be permitted.

The prosecution says it will call three clients of the CCW consulting. Their testimony would be probative only if it is that they purchased firearms from Garmo because they were enticed by the prospect of Mr. Anton helping them to apply for a CCW permit. Absent that, such evidence would be irrelevant.

D. Evidence of Mr. Anton's Idolization of Sheriffs and Possession of Law Enforcement Paraphernalia Proves Nothing, Wastes Time, and is Prejudicial

In an attempt to further evade the real legal issue in the case and to blacken the defendant's character, the prosecution seeks to show that Mr. Anton possessed a duffel bag, jacket, SWAT patches and other paraphernalia, that he called the Sheriff's dispatch to ask to "send a unit" to deal with disorderly conduct on one occasion, that he carried and used Honorary Deputy Sheriff credentials, and one witness' opinion that she "perceived proximity" between Mr. Anton and Sheriff Gore and therefore provided his clients with early CCW appointments, even though none of these clients had purchased firearms from Garmo. Aside from its utter irrelevancy, this proposed "evidence" has no legitimate probative value. Mr. Anton was a wannabe cop. So what? The Court should decline this prosecution invitation to waste its time.

E. Evidence of Protected Political Activity Should be Excluded

Next, the prosecution seeks to show that Mr. Anton supported certain local law enforcement political figures and raised money for them. It is true that Mr. Anton has supported and raised contributions for William Gore, Bonnie Dumanis, Robert Brewer, the mayor of El Cajon and others. This is constitutionally protected First Amendment activity. There is no evidence of any kind that anything Mr. Anton did to support various candidates was illegal in any way. Nor will any evidence show that Sheriff Gore did anything illegal or improper for Mr. Anton at any time. This

"evidence", other than implying nonexistent impropriety on the part of candidates, proves nothing. It also comes with the additional prejudice to the defendant, waste of time, enormous confusion of issues, and the use of constitutionally protected and perfectly legal conduct to smear the defendant's character and the reputations of public servants.

F. The Physical Display of Firearms is Unnecessary and Prejudicial

The government proposes to display and to allow the jurors "to inspect" the firearms themselves. This, it claims, is "particularly important" because the government must prove that the weapons sold were, in fact, firearms (ECF Doc. 224, p. 15). Moreover, the prosecution proposes to show a "large number of firearms" because it claims the right to display "the unlicensed dealer's inventory of firearms" as well as the "specific firearms related to the charged offenses".

The prosecution's request to display a large number of firearms is not, defendant suggests, necessary or fair. There will be no dispute at trial that the specific firearms relevant to the charges were actual firearms. Defendant Anton will be happy to stipulate to that fact. Moreover, the prosecution has scores of photographs of firearms, making the threatening and theatrical display proposed entirely unnecessary. What, one may ask, is the difference between showing a photo and bringing into the courtroom for display and "examination" of the same exhibit, particularly when there is no dispute that the item is a firearm?

The effect the prosecution seeks is not the legitimate production of evidence to sustain its burden, but an attempt to overawe and create a sense of foreboding and fear among those jurors who have a dislike or antipathy for firearms. The prosecution's real motive is transparent. Especially as to Mr. Anton, who never sold any firearm to anyone, such a display is needlessly prejudicial. In light of the potential dangers of bringing firearms, even with trigger locks, into the Courthouse,

this request should be denied for both logistic and legal reasons. Especially when there is no dispute as to the issue, a physical display, as opposed to a stipulation, or a photograph, implicates the concerns of FRE 403. Such a procedure will cause unfair prejudice, result in needless delay, waste time, and needlessly present cumulative evidence.

G. The Court Should Require a Specific Offer of Proof as to Mr. Bajaj's Testimony

Mr. Bajaj is an attorney. He has given legal advice to Mr. Anton in the past on various matters. Mr. Bajaj suggested to Mr. Anton that Mr. Anton consider a consulting business involving assistance to persons who wanted to apply for CCW permits. In fact, Mr. Anton had an office in a building of Mr. Bajaj's for use in meeting prospective clients. The prosecution should be required to make a specific offer of proof as to what legitimate evidence it seeks to elicit from Mr. Bajaj.

H. The Defendant Has no Pretrial Obligation to Disclose a Defense Which May Be Based on Advice of Counsel

The prosecution seeks to preclude any so-called advice of counsel defense, claiming that the defendant has some pretrial obligation to notify the prosecution of intent to raise such a defense. There is no such requirement in the Federal Rules of Criminal Procedure. There are provisions for notice of alibi (Rule 12.1), notice of insanity defense (Rule 12.1), and notice of a public authority defense (Rule 12.3), but none for advice of counsel. Whether Mr. Anton ultimately testifies at trial, and what he will say, will be determined at a later time based on the state of the evidence. He is aware that he may not testify to legal advice from an attorney without waiving the attorney client privilege as to all relevant communications. Whether, and to what extent he will testify to such at trial, is a matter that is undetermined at present.

I. Defendant Anton Will Not Raise an Entrapment Defense

Mr. Anton will not argue that he was entrapped. However, the prosecution's use of language in its motion seeking to preclude any evidence of entrapment, raises an important issue. The prosecution refers to Mr. Anton's "CCW scam" and "scheme". The prosecution should be ordered not to use such pejorative language at trial. There is nothing illegal about assisting applicants for CCW licenses to fill out the requisite forms, to explain the application process, and to help them prepare for an in-person interview. The prosecution should not be permitted to argue or suggest that such an activity is illegal or fraudulent. The government, if it felt it could prove it, could have alleged a scheme to defraud. It did not, because there was no evidence of such. The tactic the prosecution may seek to employ is that foreshadowed in its *in limine* motions: to use innuendo and irrelevancies to defame the defendant and to obtain a conviction through character assassination. Prosecution through epithet, rather than evidence, should not be sanctioned.

J. Federal Law Recognizes Abandonment as an Affirmative Defense to An Attempt Charge

Mr. Anton arguably violated 18 U.S.C. § 1512(b) (3) when he told the undercover agent to conceal or dissemble regarding the payment of $1,000 in the unlikely event he were interviewed by law enforcement. However, he abandoned and renounced this attempt, repeatedly remonstrating with the undercover, to tell the truth and to disclose the payment of money if asked. The day after this call, the undercover called again, demanding to meet Mr. Anton because he had been approached by the FBI. Mr. Anton reiterated that "Sean", should he choose to speak, should truthfully disclose the payment.

The prosecution argues that Mr. Anton's improper conduct is relevant but that his renunciation of the attempt to have the witness lie is entirely irrelevant. Citing a case relying on the analysis of a perjury statute with a specific

"recantation" provision, the prosecution then argues that one court in an unpublished decision has found that recantation is not a defense to obstruction of an official proceeding under §15121(e). The two cases cited are inapposite to this issue. First, the issue of abandonment or renunciation as a defense to an attempt charge is not the same as "recantation" as a defense to a perjury charge. Other than the first syllable of the words, there is no equivalence between renunciation of an attempt and recantation of perjury.

In *United States v. $11,500 in U.S. Currency* 809 F 3d 1062, the court discussed at length the history of law of attempt. The court noted in relevant part:

> The problem of punishing thoughts alone creates other complications as well. For example, those who take some overt act as a manifestation of their criminal intent may nevertheless escape conviction for attempt, conspiracy, or solicitation if they can show that they voluntarily abandoned their plans before they were apprehended. Substantive Criminal Law , §§ 11.1(d), 11.4(b)(2), 12.4(b). Although the defense of abandonment—sometimes referred to as the locus poenitentiae, or opportunity for repentance—is not available in all jurisdictions, it has been recognized in some jurisdictions and recommended by the Model Penal Code. Id. (collecting cases and statutes recognizing the defense); see Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6). In this case, for example, it is possible that Charles intended to take the $11,500 into Portland to buy drugs but changed his mind once he got there and decided to bail out Rosalie instead. It would be an interesting case if the police had apprehended him on his way into town; it seems a very different case once Charles entrusts the money to Wood, who goes into the MCDC to pay Rosalie's bail.

Those courts which recognize the defense of abandonment as a defense to an attempt charge include the federal courts. See e.g. *United States v. McDowell* 705 F 2d 426, 428 (11th Cir. 1983); United States v. Jackson 560 F 2d 112, 117-121 (2d Cir. 1977); *United States v. Bailey* 834 F 2d 218,227 (assuming the

existence of the defense); *United States v. Byrd* 24 N.J. 286, 290-294 (Court of Military Appeals, 1990) (voluntary abandonment must be recognized in military justice as an affirmative defense to the charge of attempted criminal conduct).

The *Byrd* case cited additional cases which recognize abandonment to be a defense to the crime of attempt:

> *United States v. Joyce*, 693 F. 2d 838, 841-42 (8th Cir. 1982) (abandonment theory adopted); and *United States v. Jackson*, 560 F. 2d 112, 118-19 (2d Cir.), cert. Denied, 434 U.S. 941, 98 S. Ct. 434, 54 L. Ed. 2d 301 (1977) (abandonment theory adopted). See *United States v. McDowell*, 714 F. 2d 106 (11th Cir. 1983) (criticizes *Joyce*, but adopts abandonment theory as defense to attempt); *United States v. Rivera-Sola*, 713 F. 2d 866, 870-71 (1st Cir. 1983) (distinguishes *Joyce* on facts, but recognizes abandonment theory as defense to attempt). c.f. *United States v. Bussey*, 507 F. 2d 1096, 1098 (9th Cir. 1974) (recognizes abandonment defense to the crime of attempt.
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> *Id.* at footnote 1.

In *United States v. Jackson*, 560 F 2d 112, 118 (2d Cir. 1977), the court quoted the Model Penal Code formulation of the defense:

> (4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

There is a strong public policy as the basis for the defense. As the *Byrd* court noted:

> According to the drafters of the Model Penal Code, the rationale for recognizing this defense is as follows:
> On balance, it is concluded that renunciation of criminal purposes should be a defense to a criminal attempt charge because, as to the early stage of an attempt, it significantly negatives dangerousness of character, and as to the latter stages,

> the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort.

Comment, ALI Model Penal Code §5.01(4), supra at 360. Responding to critics, the drafters of the Model Penal Code observed:

> It is possible, of course, that the defense of renunciation of criminal purpose may add to the incentives to take the first steps toward crime. Knowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation. But this is not a serious problem. First, and consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an opportunity to abandon his effort. Second, the encouragement this defense might lend to the actor taking preliminary steps would be a factor only where the actor was dubious of his planned and where, consequently, the probability of continuance was not great.
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> 24 M.J at 29

Thus, evidence of renunciation is relevant and properly admitted.

Respectfully submitted,

DATED: December 24, 2021

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