SUPPLEMENTAL MEMORANDUM

Mr. Anton is charged with attempting to corruptly persuade another person with intent to hinder, delay or prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a federal offense in violation of 18 U.S.C. § 1512(b)(3). The person whom he is charged with attempting to persuade was a federal law enforcement official, who was recording the conversations and was investigating Mr. Anton at the time. Despite the impossibility of the successful completion of the substantive offense, the prosecution asserts that there was an attempt and that Mr. Anton should be forbidden by this Court from raising the defense of renunciation or abandonment in defending the charge, which carries a maximum penalty of twenty years confinement.

Initially, Mr. Anton did ask "Sean" to conceal or omit mention that he paid Mr. Anton $1,000 for his consultation and assistance in obtaining a CCW permit. Within a brief time thereafter, on three separate occasions, two by telephone, and one through texting, Mr. Anton repeatedly urged "Sean" to give a complete and honest account of the events to any law enforcement official who might speak to him.

The prosecution's attempt to deny this defense to Mr. Anton relies on a citation to the Sixth Circuit, which holds the minority view that renunciation is not a defense to attempt, and a Ninth Circuit case, *Temkin*, which dealt with the statutorily authorized defense of renunciation to a charge of solicitation to commit a federal crime of violence, under 18 U.S.C § 373(b). It is unclear why the prosecution should rely on *Temkin*, which recognizes the defense of abandonment, but upholds the district court's conviction after a bench trial because the defendant failed to establish the defense factually. *United States v. Temkin*, 797 F.3d 682, 689 (9th Cir. 2015). The government then seeks to impugn Mr. Anton because he allegedly spoke with a "pair of criminal defense lawyers"

based on its reading of telephone records. This argument is illogical since the telephone record shows the longest such call, a 23-minute call between Mr. Anton's number and Mr. Bajaj's number, occurred before, not after, the alleged attempt.

The prosecution's position is not well-taken. The majority of circuits recognize that renunciation is a valid defense to an attempt charge. The Eighth Circuit has noted, for example, that "In an attempt case, abandonment precludes liability for the attempt." *United States v. Robinson*, 217 F.3d 560, 564, n.3 (8th Cir. 2000). To be sure, the defense requires that the renunciation must occur before the completion of the substantive offense which is the object of the attempt and that the defendant completely and voluntarily renounce the criminal conduct. Moreover, renunciation is an affirmative defense which a defendant must establish by a preponderance of evidence.

The prosecution appears to misapprehend the nature of the renunciation defense, contending that once the attempt is complete, renunciation is not applicable. But this position is illogical. If a defendant desists while engaged in "mere preparation", and before the "substantive step" for the completion of the object crime, there has been no criminal attempt to begin with, and thus no need for a defense of renunciation since mere preparation is not a crime. The renunciation defense applies after a substantial step, but before the completion of the target offense, and precludes liability for the attempt. To say that renunciation is a defense to mere preparation, but not to attempt itself, is to say that it only applies when no criminal liability could be established in the first instance. In other words, it is a defense which will never apply.

As a matter of public policy, the renunciation defense is ethically and socially justified. The allowance in the law for a "*locus poenitentiae*" permits a person to withdraw from wrongdoing before the substantive crime and encourages people to reconsider and renounce violations of the law. As the Model

Penal Code notes, it is in society's interest to encourage those who contemplate wrongdoing to reconsider. The avoidance of crime and the encouragement of lawful behavior is the aim of the criminal law. The recognition that humans are sometimes weak and subject to temptation, but should be encouraged to renounce wrongdoing is both the moral and instrumental rationale for the renunciation defense. To be sure, it may be that the voluntary and complete renunciation of a criminal attempt before the occurrence of the substantive crime is not common. But the moral intuition underlying the recognition of the defense is critically important.

Finally, the issue of whether Mr. Anton can establish this affirmative defense cannot be determined now. It is a factual issue for the jury. It is clear that Mr. Anton did repeatedly urge "Sean" to tell the truth and that Mr. Anton has a factually sound and good faith basis to rely upon this defense. He should be given the opportunity to do so before a jury of his peers.

Respectfully submitted,

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IREDALE AND YOO, APC

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