MEMORANDUM OF POINTS AND AUTHORITIES

After giving one licensing clerk a $100 bill and offering to "take care of" (i.e., compensate) a second licensing clerk if she would fast-track his CCW clients, Anton took $1,000 from an ATF undercover agent in exchange for expediting his CCW appointment with Sheriff's Licensing. When Anton's home was searched by ATF and FBI agents five days later, he called—totally unprompted—to tell the undercover agent nine times in six minutes to lie to agents if he was interviewed. Anton told the agent not to mention the $1,000 he had paid; to lie and say that he and Anton were friends; and to falsely claim that Anton had helped him as a "favor" because they referred each other business. In case it wasn't clear enough, Anton repeated those instructions in a second call later that night, and then again in a third call the following morning.

At the same time agents were searching Anton's residence on February 13, Garmo was being interviewed by ATF and FBI. The interviewer read parts of the search warrant affidavit to Garmo, including a block quote revealing that the firearms buyer that Garmo had referred to Anton for help with his CCW was actually an ATF undercover agent. After that interview, Garmo and Anton spoke by telephone at least five times between the February 13, 2019 searches and Anton's supposed "abandonment" beginning February 18, 2019. Over the same period, Anton spoke to two criminal defense attorneys. Only then, five days after his directive to lie, did Anton call the undercover agent to try to take it all back. And during that call, he even lied again—falsely claiming that he'd never before told the undercover agent to lie.

These facts underscore why even if the Court wished to break new ground in the Ninth Circuit and establish a "renunciation" defense, this is not the case to do it.

The only new legal authority offered in Anton's memorandum is a citation to dicta in a footnote from an out-of-circuit case, which itself relies upon an out-of-circuit decision that the United States already distinguished in its Reply. ECF 250-1 at 2, citing *United States v. Robinson*, 217 F.3d 560, 564 n.3 (8th Cir. 2000), citing *United States*

v. Joyce, 693 F.2d 838 (8th Cir. 1982).[1] *Robinson* itself has little force on this point. Anton's cited principle is dicta: it is entirely extraneous to the court's holding in that case, which was that the evidence was sufficient to support a conviction for *conspiracy*, not attempt. *See* 217 F.3d at 564. It thus has no precedential authority even in the Eighth Circuit. And the *Joyce* court, upon which *Robinson* relies, actually found that the defendant had abandoned his criminal plan *before* taking a substantial step—that is, that he had not truly committed the crime of attempt. 693 F.2d at 841. Although Anton relies upon *Joyce*, this is precisely the logical reasoning that Anton disparages when he claims that the United States' argument makes abandonment an illusory defense.

Here in the Ninth Circuit, Anton's request to admit evidence of his belated "renunciation" is controlled by *United States v. Bussey*, which the government cited but his memorandum does not address. *See* 507 F.2d 1096, 1098 (9th Cir. 1974). In *Bussey*, the defendant argued that he abandoned his bank robbery attempt after learning that the bank manager was unable to open a timed safe. *Id*. at 1097. The Ninth Circuit disagreed, finding that the defendant's attempt had gone far beyond mere preparation and was simply frustrated by outside circumstances. *Id*. at 1098. The *Bussey* court concluded that abandonment was no defense in such a case.

So too here. Anton supposedly "renounced" his attempt to get the putative witness to lie—days later, and after speaking with lawyers and with Garmo, who had been told the "witness" was really an undercover ATF agent—but can only claim that the alleged renunciation was timely because of the fortuity that the supposed witness was not truly a witness and therefore would never have been interviewed by investigators. In reality, the success of Anton's attempt was not terminated by anything that Anton did in his supposed "abandonment"; it was frustrated entirely by the external

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[1] The *Robinson* court itself took pains to note that "Our decision in *Joyce* has been roundly criticized by other circuits." 217 F.3d at 564 n.3, *citing United States v. Dworken*, 855 F.2d 12, 22 (1st Cir. 1988); *United States v. McDowell*, 714 F.2d 106, 107 (11th Cir. 1983) (per curiam).

circumstance of the "witness's" identity. Focusing on Anton's conduct, he had already proceeded well past mere preparation and repeatedly and vociferously urged the witness to lie. Under *Bussey*, he cannot maintain a defense of abandonment.

Anton's policy argument is also misguided. A *locus poenitentia* for withdrawal could only make policy (or moral) sense where the completed crime required the defendant to take additional steps to bring it to fruition—like an intended murderer who withdraws from an attempted killing before firing the lethal shot. But here, Anton's crime was already fully complete. Anton had already provided the "witness" with strenuous and unambiguous instructions to lie; there was nothing more for Anton to do to perfect his offense. The total about-face that Anton supposedly experienced after speaking with a pair of experienced criminal defense attorneys—and with Garmo himself, who was explicitly told the "witness" he sent to Anton was really an undercover agent—cannot retroactively immunize his completed crime from days earlier.

Finally, Anton's concluding argument that this decision should be deferred to trial when the jury can determine whether he has presented sufficient evidence of abandonment cannot survive scrutiny. The parties' disagreement is not a factual dispute for the jury to resolve. To the contrary: the parties agree on what happened and simply ask the Court to rule on whether these facts may constitute a defense. If so, Anton should be able to present them to the jury. If not, the facts are irrelevant.

Since Anton's "abandonment" evidence is *not* proof of a valid legal defense, as explained above, it clearly fails a prejudice analysis under Rule 403. Absent legal relevance, the purpose of Anton's proof is not to make out a legally sufficient defense; it is simply and obviously to evoke the jury's sympathy and to suggest that although he did seek to obstruct justice on February 13, 2019, the offense was not too egregious given his supposed change of heart five days later. But while this is the kind of equity that the Court can (and must) weigh at sentencing, it is emphatically *not* a factual issue for the jury to consider at trial. It is just a naked ploy to color the jury's view of Mr. Anton with irrelevant evidence, and as such it should be excluded.