Case No. 18-10287

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

CLIVEN D. BUNDY, et al
Defendants-Appellees

From the United States District Court For the District of Nevada
The Honorable Gloria Navarro, Presiding
Case No. 2:16-CR-00046-GMN-PAL-1

APPELLEE'S OPENING BRIEF

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INTRODUCTION AND STATEMENT OF THE CASE

Appellee Cliven Bundy ("Mr. Bundy") was indicted on February 17, 2016 on 16 felony charges related to a standoff that occurred on April 12, 2014 between armed federal agents and protestors who came to the aid of Mr. Bundy and his family (the "Standoff").

The Standoff stems from an invasion by an army of armed federal agents and mercenaries of the land that Mr. Bundy and his family had ranched on for nearly 150 years. Mr. Bundy has long taken the position that the land at issue belongs to the State of Nevada and people of Clark County and not the federal government, thereby rending the federal intervention both unconstitutional and improper. *See* ECF No. 892; *Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction and under Rule 12(b)(5) for Failure to State an Offense*. Mr. Bundy had no contract with BLM at the time of the raid and there was therefore no contractual or other basis for BLM to invade his land.[1] In a legal exercise of their sacrosanct constitutional rights, Mr. Bundy and his family waged a peaceful protest against the would-be invaders who threatened them at gunpoint. Despite the fact that Mr. Bundy's sister, Margaret, and two of Mr. Bundy's sons were beaten up and/or tased, and his bulls – which are necessary for procreation, and therefore,

[1] There is currently a declaratory judgment action before the Nevada Court of Appeals as to whether the land involved in the Standoff belongs to the State of Nevada and Clark County or the Federal Government

ranching – were slaughtered and buried in secret mass graves, Mr. Bundy was at all times peaceful and committed no acts of violence towards the invading armed federal agents. Despite all of this, Mr. Bundy was ultimately indicted, incarcerated, and later tried by the U.S. Attorney's Office in Nevada ("USAO").

Once Mr. Bundy was incarcerated, he was deprived of a litany of his constitutional rights. Mr. Bundy was denied bail, ordered to solitary confinement for several months, deprived of his constitutional right to a speedy trial, and all in all, incarcerated for almost two years. Furthermore, during the entirety of his incarceration, Mr. Bundy was also unconstitutionally deprived of his Sixth Amendment right to counsel of choice.

Presiding over Mr. Bundy's criminal trial was the Honorable Gloria Navarro ("Judge Navarro") of the U.S. District Court for the District of Nevada, who for nearly the entirety of Mr. Bundy's trial, appeared to be simply "rubber-stamping," if not facilitating, instances of gross misconduct by the USAO in addition to depriving Mr. Bundy and the other defendants of his and their numerous constitutional rights. This became so evident that The Las Vegas Review Journal even published an editorial piece severely criticizing Judge Navarro for what it viewed as favoritism towards the USAO and against Mr. Bundy and his co-defendants. EOR 0402 - 0403. As set forth by the mainstream Las Vegas Review Journal:

Government prosecutors have a friend in U.S. District Judge Gloria Navarro.

The judge is presiding over the retrial of four defendants charged with various crimes stemming from their participation in the 2014 Bunkerville standoff near Cliven Bundy's ranch. The first trial ended in April with the jury deadlocked on all counts involving the four men.

On Monday, the judge eviscerated the defense's legal strategy, putting off limits a whole host of issues that might make it more difficult for the government to win convictions. The defendants will be forbidden from arguing that they were exercising their constitutional rights to peaceably assemble and bear arms. They may not highlight the actions of BLM agents in the days leading up to the incident or mention federal gaffes such as the ill-advised "First Amendment" zone created for protesters.

And if imposing these restrictions on the defense wasn't enough, Judge Navarro ruled that prosecutors may introduce testimony about the four accused men and their associations with so-called militia groups.

Judge Navarro made a similar ruling before the first trial. She is going to extraordinary lengths to address prosecution fears of "jury nullification," in which jurors refuse to convict based on a belief that the law or potential punishment is unjust. The practice dates to 1734, when a jury ignored statutes and acquitted publisher John Peter Zenger on charges of criticizing New York's new colonial governor, accepting arguments from Mr. Zenger's attorney, Alexander Hamilton, that the newspaper had simply published the truth.

Federal prosecutors have encountered unexpected difficulty — both here and in Oregon — in securing convictions against those protesting federal control of Western public lands. But the issue here isn't whether one believes the Bundy defendants are courageous freedom fighters or zealous lunatics. Rather it's whether a judge should usurp the rights of the defendants to have a jury of their peers consider their arguments alongside the law, evidence and other testimony.

> Judge Navarro's sweeping order reflects a deep mistrust of the American jury system. EOR 0403.

However, despite all of this, Judge Navarro eventually in the end stood up and did the right thing in dismissing the *supersedeas* indictment on January 8, 2018 against Mr. Bundy and his co-Defendants after correctly recognizing that the gross prosecutorial misconduct by the USAO, as well as the misconduct by federal agents, were so incredibly pronounced and outrageous that a fair trial was entirely impossible. Judge Navarro did this after she had declared a mistrial on December 20, 2017 after finding numerous willful discovery and other violations by the USAO, as well as gross prosecutorial misconduct, lying under oath by government witnesses and a myriad of other illegalities by the government.

As set forth in detail below, Judge Navarro correctly saw that the repeated and flagrant lying of both government agents under oath and the U.S. Attorney, the withholding of exculpatory evidence, and the new potential evidence from a Bureau of Land Management whistleblower - Larry Wooten - were so prejudicial that the only possible remedy was dismissal of the *supersedeas* indictment with prejudice.

Despite Judge Navarro ultimately doing the right thing in dismissing the *supersedeas* indictment, it is indisputable that Mr. Bundy and his family have already been severely punished by being incarcerated for nearly two years and suffered enormous financial loss and damage to reputation after having simply

exercised their sacrosanct constitutional rights. Indeed, it is clear now that the exculpatory evidence was also withheld from the grand jury that indicted Mr. Bundy and his co-Defendants, as they were obviously not disclosed even in part to anyone until well after trial was underway. Had the grand jury been presented with all of the relevant facts, and not just those cherry-picked by the USAO, there would almost certainly have been no indictment. Thus, Mr. Bundy and his family would not have had to have endured nearly two years of incarceration and the deprivation of constitutional and other rights that flowed therefrom. Indeed, Mr. Bundy himself saw his health deteriorate significantly during his incarceration, where he, as just one example, lost a number of his teeth. The Bundy family is also living with the fear that their government will someday, under a new executive branch, return to finish the job that they attempted to do - that is remove them through physical violence and force from the land that the family has ranched for over 150 years.

It is, frankly, inconceivable that the USAO is taking an appeal of Judge Navarro's ruling in good faith, given the avalanche of gross misconduct meticulously set forth in Judge Navarro's ruling. Tellingly, the Office of the Solicitor General has not signed on to this current appeal as it is being handled entirely by the same USAO who was found to have committed gross prosecutorial misconduct and then sought to cover it up. This strongly evidences the fact that this

appeal is nothing more than a last-ditch effort by the USAO to try to cover themselves by hoping for a favorable ruling from this Court in order to try to lessen the sanctions that are almost certainly pending as a result of their own gross prosecutorial misconduct. This is, obviously, not the role of the appellate courts. Judge Navarro's rulings are sound and based entirely on the application of the relevant facts to well-settled law. Thus, Appellants' appeal must be denied and Judge Navarro's dismissal of the *supersedeas* indictment with prejudiced affirmed.

STATEMENT OF ISSUES

Did the U.S. District Court for the District of Nevada ("District Court") err in dismissing the *supersedeas* indictment against Mr. Bundy after finding that the USAO had engaged in gross prosecutorial misconduct, including but not limited to lying under oath and withholding exculpatory evidence, all of which is supported by the existence of a whistleblower from the BLM, Larry Wooten, who Appellee has asked be put under oath after a limited remand to the lower court, should this appeal not otherwise be summarily dismissed by affirming Judge Navarro's dismissal of the *supersedeas* indictment?

SUMMARY OF ARGUMENT

Judge Navarro properly dismissed the *supersedeas* indictment with prejudice pursuant to both the finding of a due process violation and her supervisory authority, as there was flagrant prosecutorial misconduct, severe prejudice to Mr.

Bundy, and no lesser available sanction.

Documents recently received from BLM through the Freedom of Information Act, not having been produced by the USAO or BLM in this case, only serve to confirm Judge Navarro's ruling, and in the unlikely scenario where the Court does not summarily affirm Judge Navarro's ruling, Mr. Bundy respectfully requests leave to take a limited remand to develop the testimony of the BLM whistleblower, Larry Wooten.

STANDARD OF REVIEW

Dismissal of an indictment with prejudice is generally reviewed under the abuse of discretion standard. *United States v. Gilbert*, 813 F.2d 1523, 1531 (9th Cir. 1987). If the dismissal is based upon a due process violation, it is reviewed *de* novo. Thus, if the dismissal is based on the court's supervisory authority, it is reviewed on an abuse of discretion standard. *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991).

The abuse of discretion standard is an extremely high one. "The Supreme Court explained the meaning of the abuse of discretion standard in *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990), where the court stated, 'A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence.' *Id*. at 405. In other words, the Court

defined abuse of discretion review of factual findings in terms of 'clearly erroneous' review, holding that '[w]hen an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.'" *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion by Dismissing The *Supersedeas* Indictment with Prejudice

At the January 8, 2018 hearing, the District Court properly dismissed the *supersedeas* indictment against Mr. Bundy and his co-Defendants on both due process grounds and pursuant to its supervisory authority. EOR 0037 – 0059.

A Court may "dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation. [Second, i]f the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers." *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (quoting *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991)).

A due process violation occurs when the government conducts itself in such a way that is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Restrepo,* 930 F.2d 705, 712 (9th Cir.1991). As

set forth by the District Court, "[o]utrageous government conduct occurs when the actions of law enforcement officers or informants are so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Archie*, 2016 U.S. Dist. LEXIS 10768, at *4 (D. Nev. Jan. 28, 2016).

Even absent a due process violation, a Court may still properly dismiss an indictment pursuant to its supervisory authority. "Dismissal under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice." *United States v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993). The Court in *Barrera-Moreno* also held that "no lesser remedial action…available" is necessary for dismissal under the Court's supervisory authority. 951 F.2d at 1092. Examples of supervisory authority upon which a Court may act are to "implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *Chapman*, 524 F.3d at 10. However, courts are not limited to these three grounds, but they must consider whether to exercise their supervisory power to dismiss an indictment on a fact-specific, case-by-case basis. *United States v. De Rosa*, 783 F.2d 1401, 1406 (9th Cir. 1986).

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A. A Prosecutor Has a Clear Duty to Disclose Exculpatory Evidence to the Defense, Which the USAO Wilfully Chose Not to Obey

Nearly a century ago, the Supreme Court delineated the duties of the United States Attorneys, while recognizing their unique position in the law and their potential to abuse their authority:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935)

Fast forward to the current day, and it is shocking and, frankly, disturbing and unconscionable the extent to which the U.S. Attorney's Office for the District of Nevada has ignored the mandate of the Supreme Court in *Berger* and has sought to serve only its own interests. Indeed, the U.S. Attorney's Office in Nevada has a sordid history of abusing the constitutional rights of criminal defendants and, in particular, the lead prosecutor in the Bundy prosecution, Mr. Steven Myhre, as recognized by even the left leaning publication, The Intercept.[2]

[2] *See* Brooke Williams, Shawn Musgrave, *The Botched Cliven Bundy Case Was Just the Latest Example of Prosecutorial Misconduct in Las Vegas*, The Intercept,

In the landmark case *Brady v. Maryland*, the United States Supreme Court unequivocally held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (hereinafter, "*Brady*"). In addition to requiring prosecutors to turn over such exculpatory evidence, the *Brady* Rule also requires that impeachment evidence be turned over as well. "Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule…. Such evidence is 'evidence favorable to an accused,'…so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (internal citations omitted). "Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (internal quotations omitted). And, where a prosecutor fails to turn over the required *Brady* material, a criminal defendant's due process rights are violated. *Id*.

Crucially - and refuting what appears to be Appellants' primary, albeit inconceivable, "Hail Mary" argument at this point - specifically that they were

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Apr. 26, 2018, available at: https://theintercept.com/2018/04/26/cliven-bundy-case-nevada-prosecutorial-misconduct/

unaware of certain Brady materials – "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006). Indeed, "*Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor." *Id*. "The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). Here, much of the exculpatory evidence at issue was prepared by the Federal Bureau of Investigation ("FBI"), which was directly involved in the investigation of Mr. Bundy and his co-Defendants.

It is easy to see why the courts have instituted this rule. Holding otherwise would allow for dishonest and overzealous prosecutors to have free reign to bury exculpatory evidence simply by packing it up in boxes and sending it to law enforcement agencies, or by "leaving" it on a thumb drive inside of an FBI vehicle for many years. Similarly, it would be just as easy for a dishonest and overzealous prosecutor to feign ignorance of the existence documents that are no longer in its possession.

As set forth below, the USAO here has undoubtedly committed numerous egregious *Brady* violations, as expressly found by the District Court. EOR 0001 -

0035. Furthermore, where the *Brady* Rules does not place any weight on whether the violations were done wilfully, it is abundantly clear from the record that in this instance, the USAO acted wilfully. This was again, expressly found by the District Court. EOR 0001 - 0035. Indeed, where the USAO actively participated in the preparation of certain pieces of exculpatory evidence, as the District Court also found, they would be hard pressed to, in good faith, feign ignorance now.

B. The Government's Extensive, Unheard of, Unprecedented, and Outrageous Level of Misconduct

On December 20, 2017, the District Court declared a mistrial in the prosecution of Mr. Bundy and his co-Defendants. EOR 0024. In doing so the Court meticulously detailed the enormous amount of exculpatory evidence that the Government wilfully withheld from Mr. Bundy and his co-Defendants, in gross violation of *Brady*.

1. Information Related to the Existence of Surveillance Cameras

The District Court pointed out two specific documents, the (1) "FBI Law Enforcement Operation Order" and the (2) "FBI 302 Report" regarding an interview with Egbert. EOR 0008. The District Court found that "this information is favorable to the accused and potentially exculpatory. It does bolster the defense and is useful to rebut the Government's theory." EOR 0008. Specifically, the District Court found that:

> The evidence of a surveillance camera, its location, the proximity to the home, and that its intended purpose was to surveil the Bundy home as opposed to incidentally viewing the Bundy home, this information potentially rebuts the allegations of the defendants' deceit which is repeated in the superseding indictment numerous times, including the conspiracy count as an overt act in allegations number 59, 84, 88, and 92 regarding false representations that were alleged about the Bundys being surrounded, about the BLM pointing guns at them, and using snipers. EOR 0008 - 0009.

Next, the District Court found that the withholding of this information was wilful, as the Law Enforcement Operation Order was dated March 28, 2014, well before the discovery deadline of October 1, 2017. EOR 0009. Tellingly, and in what turned out to be a disturbing pattern and practice, the District Court found that the USAO was aware of the existence of the surveillance camera, but "did not follow-up or provide any information about the reports or the recording that was created." EOR 0010. Even worse, the USAO "falsely represented that the camera view of the Bundy home was incidental and not intentional." EOR 0010. The District Court found that the withholding of this crucial evidence severely prejudiced Mr. Bundy and his co-Defendants. EOR 0010.

Furthermore, Mr. Bundy's co-Defendant and son, Ryan Bundy, even moved for discovery regarding the existence of surveillance cameras, which was denied by Judge Navarro based on false representations from the USAO. *See* ECF No. 2299, *Motion to Compell Discovery*; ECF No. 2340, *Government's Response in Opposition to Defendant Ryan C. Bundy's "Motion to Compell [sic] Discovery"*

(ECF No. 2299); ECF No 2526 *Order*. Then, in the first days of trial, it came to light that there clearly were such cameras. This is just another example of the government and the USAO lying and trying to commit fraud on the Court, for which in large part earned them the dismissal with prejudice of their supersedeas indictment.

2. Information Related to Government Snipers

The District Court specifically identified three documents in this category – (1) the March 3, 2015 FBI 302 Report, (2) the February 9, 2015 FBI 302 Report, and (3) the May 14, 2014 FBI 302 Report. Each of these documents were not produced to Mr. Bundy and his co-Defendants until November, 2017 and December 15, 2017, respectively. EOR 0011. The District Court found that this information was potentially exculpatory, specifically that:

> For example, the March 3rd, 2015, 302 prepared by the FBI provides information regarding BLM individuals wearing tactical gear, not plain clothes, carrying AR-15s assigned to the LPOP on April 5th and 6th of 2014, which bolsters the defense because it potentially rebuts the indictment's allegations of overt acts, including false pretextual misrepresentations that the Government claims the Defense made about snipers, Government snipers, isolating the Bundy family and defendants using deceit and deception to normally recruit gunmen. EOR 0011 - 0012.

Once again, the District Court found that the USAO had to have been aware of the existence of, at a minimum, the March 3, 2015 report, as it was present during the interview with Agent Willis. EOR 0012. The District Court found that the

withholding of this information also significantly prejudiced Mr. Bundy and his co-Defendants. EOR 0012.

3. The FBI TOC Log

The District Court also found that the unredacted FBI TOC log contained favorable information that was potentially exculpatory, as it provided "information about the family being surveilled by a camera, and specifically lists three log entries using the word 'snipers,' including snipers being inserted and that they were on standby." EOR 0013. The District Court further found that this information would have been potentially useful to rebut the indictment's overt acts, "specifically the allegations regarding false pretextual misrepresentations being made by defendants about Government snipers isolating the Bundy family." EOR 0013.

The District Court correctly did not buy the Government's patently unbelievable and, frankly, lazy and lame contrived excuse that failure to disclose this information was "inadvertent" because the report was kept on a thumb drive inside the TOC vehicle and was not turned over the prosecution team." EOR 0013. The District Court correctly pointed out that "the Government is still responsible for information from the investigative agencies, in this case the FBI. The FBI created the documents, was aware of the evidence, chose not to disclose it." EOR 0014. In any event, the District Court found further evidence of willful suppression

from the fact that "the FBI 302 about Brunk that was created by FBI Agent Pratt on April 14th of 2014 mentions a BLM sniper, but then 10 months later in February, February 6th of 2015, the FBI -- Agent Willis drafted a new report, a new 302 report, to clarify that Brunk had never said he was a spotter for the sniper." EOR 0014. Not surprisingly, the USAO was present at the interview of Agent Willis, so they clearly had actual knowledge of the information contained in the FBI TOC Report. EOR 0014.

This intentional withholding of evidence concerning government snipers and related matters clearly and unequivocally prejudiced Mr. Bundy and his co-Defendants significantly, as the District Court correctly found:

> The suppression did prevent the Defense from using the information about the snipers in the opening statement and rebutting elements of the indictment, and the information, the Court finds, does undermine the outcome of the case in favor of the Defense. EOR 0015.

4. Threat Assessment Reports

Next, the District Court discussed five separate Threat Assessment Reports that it found provided information that is "is favorable to the accused and potentially exculpatory. The information does bolster the defense and is useful to rebut the Government's theory." EOR 0016. These include "the 2012 FBI BAU Threat Assessment; also 2012 Southern Nevada Counterterrorism Threat Assessment; the third one is the March 24th, 2014, FBI order; fourth, we have the

Gold Butte Impoundment Risk Assessment; and the BLM OLES Threat Assessment." EOR 0016.

These documents contained directly exculpatory information that directly refuted the USAO's contrived and false theories that Mr. Bundy and his family posed a threat to the lives of federal agents, by providing favorable information about the Bundy's desire for a nonviolent resolution. For instance, the "2012 Southern Nevada Counterterrorism Threat Assessment revealed that the BLM "antagonizes the Bundy family, giving the community an unfavorable opinion of the Federal Government, and that they are trying to provoke a conflict, and that the likelihood of violence from Cliven Bundy is minimal." EOR 0016. Another report, "the undated BLM OLES Threat Assessment drafted between 2011 and 2012 discusses the nonviolent nature of the Bundy family, quote, Will probably get in your face, but not get into a shootout, end quote." EOR 0016. The District Court correctly found that:

> All of this information undermines the Government theory and the witness testimony about whether the Bundys actually posed a threat in relation to the 2012 and 2014 cattle impoundment operations and whether the BLM acted reasonably. It is both exculpatory evidence and potentially impeachment information, and it was not provided before October 30th of 2017. EOR 0017.

The District Court also found evidence of willful failure to disclose the evidence contained in these reports, as they were clearly, at all material times, in the

possession of the FBI. EOR 0017. To make matters even worse and to add insult to injury, these documents were specifically requested by the Defendants on July 5, 2017 and again during trial, but was, incredibly, told by the government that the information was not material. EOR 0018. Even a first year law student would know the materiality of the evidence contained in these reports. This clearly amounts to willful hiding and burying of exculpatory evidence by the government.

5. Internal Affairs Information

The District Court found that an Internal Affairs report documenting that "Special-Agent-In-Charge Dan Love requested for the FBI to place a surveillance camera," EOR 0019, contained favorable information that was potentially exculpatory. The Report further suggested that "there was no documented injury to the tortoises by grazing, and this information would have been useful to potentially impeach Ms. Rugwell who testified that there had been a detrimental impact on the desert tortoise habitat." EOR 0019.

The District Court found that the USAO had blatantly lied by making representations that "this report was an urban legend and a shiny object to distract the Court." EOR 0019. As found by the District Court:

> The report does exist. Now, the Court does note that the Government did provide the information, did locate it, despite the fact that it was misnamed. The Government, however, did know right away that it was misidentified by Dan Love as an OIG report, which has not been explained, and it did not explain how Dan Love knew about the Internal Affairs report. EOR 0019.

C. Dismissal is Proper Because of Due Process Violations

In its January 8, 2018 ruling, Judge Navarro correctly found that "the government's conduct in this case was indeed outrageous, amounting to a due process violation." Despite how the USAO now tries to once again misleadingly spin facts in its favor, nothing can change the fact that they finally chose to disclose exculpatory evidence almost four years after it began its investigation and two years after indicting Mr. Bundy and his co-Defendants. Disclosure was made right the middle of trial, carefully calculated so that Mr. Bundy and his co-Defendants would have no real opportunity to prepare for and use this exculpatory evidence. Even more, by intentionally waiting until the second group of Defendants were tried to reveal their exculpatory evidence, they were able to secure two convictions at trial and seven others through plea and cooperation agreements. This conduct is not only outrageous, but criminal in nature; its called "obstruction of justice, "the same alleged crimes that Mr. Bundy and the other Defendants were falsely indicted for.

This type of gross misconduct is blatantly wrong, not just on legal and procedural levels, but on a simple human, moral level. Mr. Bundy and his co-Defendants were incarcerated for nearly two years, as the USAO willfully withheld exculpatory evidence to try to obtain convictions that they knew there was no basis for. Even more reprehensible is that they are now even taking this baseless appeal,

in what can only be described as a last ditch effort to try to save their own careers and avoid what is sure to be otherwise significant sanctions from the Nevada Bar, which should, under these extreme circumstances, rise to the level of disbarment. Already, the lead prosecutor Steven Myhre has been disciplined by Main Justice and demoted to a lesser role in the USAO. And, an Office of Professional Responsibility and Inspector General investigation by Main Justice is underway, as represented by the department itself. *See* Appellees' Motion to Dismiss filed in *Bundy v. Sessions, et al*, Appeal No. 18-5002 (D.C. Circuit).

D. Dismissal is Proper Under the Court's Supervisory Authority

As set forth above, even in the unlikely event that this Court finds no due process violation, Judge Navarro still properly dismissed the *supersedeas* indictment pursuant to her supervisory authority because there was (1) flagrant misconduct by the Government, (2) no lesser available sanctions, and (3) significant prejudice to Mr. Bundy and his co-Defendants. Mr. Bundy will address these in turn.

1. There was Flagrant Misconduct

The District Court has taken the extra step to find that the Government's withholding of exculpatory evidence was wilful, even when such a finding was not necessary to find a *Brady* violation. For instance, the District Court found:

> And, remember, it doesn't matter for this purpose whether it's willful or inadvertent, but the Court does analyze that and wants to provide

> that information to the parties. The Court does find that it was a willful disclosure/suppression of this potentially exculpatory, favorable, and material information because all of the documents were prepared by the FBI. EOR 0009.

Where the USAO has wilfully withheld exculpatory evidence, there can only be finding of flagrant misconduct. Outside of perhaps actively fabricating evidence, this is perhaps the worst violation of a criminal defendant's constitutional and other rights that a prosecutor can commit. It is criminal in and of itself.

Established case law supports this. In *Chapman*, the U.S. Court of Appeals for the Ninth Circuit found that the District Court did not abuse its discretion in dismissing the superseding indictment based upon facts that pale in comparison to the violations committed by the government here. *Chapman*, 524 F.3d at 1084. In *Chapman*, the government also had almost two years to meet its discovery obligations, much like the USAO did here. *Id*. at 1078. The prosecutors agreed to turn over the necessary documents, and did turn over nearly 400,000 pages. *Id*. However, the *Chapman* court found that "There were…early indications that the government had not fully complied with its discovery obligations." *Id*.

In *Chapman*, the defense eventually received 650 pages of discovery in the third week of trial. *Id*. at 1079. These documents included "rap sheets, plea agreements, cooperation agreements, and other information related to numerous government witnesses, including at least three important witnesses whose testimony was already complete." *Id*. Ironically, in *Chapman*, the prosecution

offered the same patently bogus excuses as they do here - as if it is part of the U.S. Attorney's playbook when caught committing prosecutorial misconduct - initially claiming that much of it had already been provided to the defense, *id*. at 1079, and later insisting that it did not need to be provided under *Brady/Giglio*, *id*. at 1088. Furthermore, the *Chapman* court based its dismissal of the indictment on a review of just 34 of the 650 pages of undisclosed materials, which the Ninth Circuit found to be proper. *Id*. at 1084. Lastly, in *Chapman*, the district court found that the prosecutors had "acted 'flagrantly, willfully, and in bad faith.'" *id*. at 1085, but the Ninth Circuit held that no finding of intentional withholding was necessary. Indeed, all that was necessary was a "reckless disregard" for the prosecution's constitutional obligations. *Id*.

Here, there were over 1000 pages of discovery produced to Mr. Bundy and his co-Defendants between November 8, 2017 at December 15, 2017 – well after the discovery cut-off. This is nearly twice as many documents withheld as in *Chapman*. Furthermore, where the Ninth Circuit has expressly found that intentional withholding is not required to warrant dismissal, it is clear that the USAO has done so here. Indeed, the District Court gave examples of exculpatory evidence that the USAO directly participated in producing, as set forth above. Failure to produce these exculpatory documents clearly constitutes intentional withholding, as it is impossible for the USAO to feign ignorance. Thus, given the

holding in *Chapman* and the facts at issue here, dismissal is the only feasible remedy available.

2. There Are No Lesser Sanctions

Prior to the January 8, 2018 hearing where Judge Navarro dismissed the *supersedeas* indictment, the government had only offered one possible "remedy" – if it could even be called that – an order setting a new trial. EOR 0056. This would clearly be a patently unjust result, as it would essentially result in rewarding the USAO for the gross misconduct by allowing them a "second bite of the apple" while allowing them to shore up any deficiencies that they had in the first trial. And, Cliven Bundy and the other Defendants have already done time, with nearly two years in a maximum security federal prison in Pahrump, Nevada in the midst of the infamous Area 51, which remains contaminated with nuclear waste after atomic bombs were exploded after World War II.

Furthermore, as set forth by Judge Navarro, "[the prosecution's] conduct has caused the integrity of a future trial and any resulting conviction to be even more questionable and suspect. Both the defense and the community possess the right to expect a fair process with a reliable conclusion. Therefore, it is the Court's position that none of the alternative sanctions available are as certain to impress the government with the Court's resoluteness in holding prosecutors and their investigative agencies to the ethical standards which regulate the legal profession

as a whole." EOR 0056 - 0057. Lastly, great deference must be granted to Judge Navarro's decision in this regard. As set forth by the Ninth Circuit in *Chapman*, "[t]he district court is in the best position to evaluate the strength of the prosecution's case and to gauge the prejudicial effect of a retrial." *United States v. Chapman*, 524 F.3d 1073, 1087 (9th Cir. 2008). This makes sense. Only the district court is privy to the day-to-day goings on of each specific trial. An appellate court has the benefit of a paper record, but that cannot replace the district court judge's contemporaneous presiding over a trial.

3. Mr. Bundy and his co-Defendants Have Been Severely Prejudiced

As set forth previously, Mr. Bundy has already been significantly prejudiced by this entire prosecution, having to have suffered through a nearly two-year incarceration period while in his 70's. His incarceration was the result of retaliation over his simply having exercised his constitutional and other rights. During his incarceration, he had numerous other rights violated, including his right to speedy trial and his right to counsel of choice.

All the while, the USAO was burying and hiding exculpatory evidence and lying to the Court, and suborning perjury from government witnesses, in a desperate attempt to win a conviction for which they knew had no basis.

Now, absent dismissal with prejudice, Mr. Bundy will clearly suffer even greater prejudice. Mr. Bundy has already been made to reveal much of his defense

strategy in the month and a half trial that has already occurred. The USAO is already aware of Mr. Bundy's *voir dire* strategy, having already gone through the process, and has had the benefit of listening to Mr. Bundy's opening argument and questioning of government witnesses on the witness stand, which has already given them a roadmap of how to best prosecute Mr. Bundy. Ordering a new trial will allow the USAO to use all of this information that it collected to its benefit, thereby severely prejudicing Mr. Bundy and the other Defendants.

Furthermore, it is extremely telling that the USAO has already failed to secure convictions against nearly all of Mr. Bundy's co-Defendants, evidencing just how weak and frivolous their cases really are. In the first two trials, against the "Tier 3" defendants, the government was unable to secure any convictions against four of the six defendants, and the second jury fully acquitted two of them, which the undersigned counsel also now represents in suits alleging malicious prosecution and other related causes of action. Allowing the USAO a second chance to try Mr. Bundy due to its own flagrant misconduct, while having the benefit of now knowing the defense strategy is egregiously prejudicial. This would be condoning, ratifying, and supporting prosecutorial misconduct.

Judge Navarro recognized as much:

> The Court agrees that retrying the case would only advantage the government by allowing them to strengthen their witnesses' testimony based on the knowledge gained from the information provided by the defense and revealed thus far. The government would be able to

> perfect its opening statements based on the revealed defense strategy in its opening and the government would also be able to conduct more strategic voir dire at the retrial. EOR 0056.

Similarly, the *Chapman* court also recognized this problem. As observed by the trial court in *Chapman*, a retrial means the government "gets a chance to try out its case, identify any problem areas, and then correct those problems in a retrial and that's an advantage the government should not be permitted to enjoy." *Chapman*, 524 F.3d at 1087. Given that the Ninth Circuit in *Chapman* has already held that the trial court is in the best position to weigh the prejudicial effect of a retrial, which Judge Navarro has already done, it is clear that dismissal with prejudice is the only appropriate remedy. Holding otherwise would yield a patently unconscionable result, where prosecutors are rewarded by their flagrant misconduct for violating sacrosanct constitutional rights. This flies in the face of the basic tenets of the American justice system, as well as just simple common sense.

II. Documents Received from the Bureau of Land Management Referring to Whistleblower Larry Wooten Confirm Judge Navarro's Basis for Dismissal and Evidence Motive for Misconduct and Severe Animus Towards Mr. Bundy and his Family

After having been stonewalled, the undersigned counsel, Larry Klayman, Esq., ("Mr. Klayman") on behalf of his public interest group, Freedom Watch, Inc., filed a Freedom of Information Act complaint in the U.S. District Court for the District of Columbia titled *Freedom Watch v. Bureau of Land Management*, *et al*,

1:16-cv-2320 (D.D.C.) (the "FOIA Case"). In the FOIA Case, the Honorable Colleen Kollar-Kotelly finally ordered that the BLM produce documents relating to whistleblower Larry Wooten ("Mr. Wooten"), the former lead case agent and investigator for BLM who wrote an 18-page memorandum detailing gross misconduct by the USAO and BLM as well as efforts to cover up said misconduct. EOR 0060 - 0075. Mr. Klayman has recently received documents from the BLM in this regard, and the documents produced go far beyond what Mr. Wooten initially set forth in his whistleblower memorandum. Crucially, these are only the documents that BLM voluntarily released, as they hide behind numerous exemptions and privileges for many of the other over 1000 pages of documents. EOR 0076 - 0084. In fact, as evidence that the cover-up continues, many of the names of the BLM and other federal agents and prosecutors are redacted in the production of documents – something that BLM has no basis to do. They are simply still trying to protect their own.

However, even just the documents that BLM voluntarily produced not only confirm what Mr. Wooten had previously written in his whistleblower report, EOR 0060 - 0076, but also provide much more relevant and salient information. Indeed, Mr. Bundy only provides the Court with certain excerpts of the documents received from BLM, as they would be too voluminous to attach in full. However, even just this relatively small sampling clearly shows insight into the USAO's

motivation behind its egregious prosecutorial misconduct and it provides evidence that the USAO and BLM intentionally buried exculpatory evidence, as well as disturbing personal animus towards Mr. Bundy, his family, and his religion.

A. Documents Show That the USAO Planned, Supervised and Executed the Bundy Standoff

Among the documents released by BLM is an email from presumably a BLM agent (whose name has been redacted) that was sent to BLM OLES Director Salvatore Lauro and Amy Lueders. This email shows that it was, in fact, the USAO who usurped the role of law enforcement and planned and executed an illegal entrapment of the Bundys in the days leading up to the Standoff. EOR 0091 - 0097. This email, dated March 27, 2014 stated:

> [a]s for the rest of the operational guidance, **it appears the NV USA is directing tactical decisions**, something I've never seen in 19 years of law enforcement, and is directly contradictory to the guidance we received from the same office 2 years ago. If I execute a search warrant, an attorney is not going to tell me whether or not to go in with a drawn weapon. That's my training and experience, not an attorney's…[I]'m in a unique situation in which **I must work with a prosecution agency that is attempt to direct my enforcement efforts**. EOR 0093. (emphasis added).

This email apparently sent in response to an email that the same BLM Agent received the night before from who appears to be from AUSA Nadia Ahmed, the USAO prosecutor who, not coincidentally. was on the team that prosecuted Mr. Bundy and his co-Defendants. EOR 0094. In that email, which is heavily redacted, Ms. Ahmed dictates to BLM Agents the USAO's ultimate goal in setting up the

Standoff. EOR 0094. In that same email, Ms. Ahmed reveals plans to visit the Bundy ranch prior to the Standoff. EOR 0094. Mr. Bundy has pictures confirming that Ms. Ahmed, along with her colleague, Daniel Schiess, did in fact "scope out" the Bundy ranch beforehand, should the Court wish to entertain them. This shows the USAO's motivation to create a false pretext to initiate criminal prosecution against the Bundys, if not orchestrate a raid which could have tragically resulted in killing them. Another email from BLM Agent Lauro dated March 26, 2014 sent to a redacted recipient mentions speaking with the then U.S Attorney himself, Daniel Bogdon, in response to the email from Ms. Ahmed. EOR 0091.

These emails demonstrate the nefarious motivation behind the USAO's gross prosecutorial misconduct during Mr. Bundy's trial, including but not limited to burying and hiding exculpatory evidence, suborning perjury, and knowingly making numerous false statements to the Court and the defendants. As it turns out, it was the USAO whose proverbial "neck" was on the line in the aftermath of the failed Standoff, as they had usurped the law enforcement role of the BLM to plan and execute the Standoff. As the unknown BLM agent stated, never in his 19 years of law enforcement experience had he been faced with a prosecutorial team directing tactical decisions. These emails provide insight into the mindframe of the USAO as to exactly why the USAO committed such egregious, never before seen levels of prosecutorial misconduct. It is because they were behind the Standoff and

the entrapment of the Bundys to begin with and obviously wanted to cover up the tracks of their egregious and illegal actions.

B. Documents Show That Both the USAO and BLM Buried and Hid Exculpatory Evidence

In a heavily redacted email from what appears to be Mr. Wooten to BLM Agent Lauro dated April 27, 2017, Mr. Wooten expressed concerns that the BLM was withholding exculpatory information from the USAO. EOR 0101. "In issues related to turning over the necessary information to the U.S. Attorney's Office, it became clear to me that BLM [redacted] hadn't been keeping the Prosecution Team informed of important verbal information that I had shared with him." EOR 0101. Furthermore, in a 250-page report authored by Mr. Wooten, he wrote that:

> During the investigation, I also came to believe that the case prosecution team at United States Attorney's Office out of Las Vegas in the District of Nevada wasn't being kept up to date on important investigative findings about the BLM SAC's likely alleged misconduct. **I also came to believe that discovery related and possibly relevant and substantive trial and/or exculpatory information wasn't likely turned over to, or properly disclosed to the prosecution team**. EOR 0151. (emphasis added).

> I also came to believe there were such serious case findings that an outside investigation was [redacted] on several issues to include misconduct, ethics/code of conduct issues, use of force issues (to include civil rights violations), non-adherence to law, and **the loss/destruction of, or purposeful non-recording of key evidentiary items**. EOR 0151. (emphasis added).

It would appear that is simply part of a larger pattern and practice by BLM. Members of the House of Representatives Committee on Oversight and

Government Reform wrote a scathing letter to Mary L. Kendall, Depute Inspector General of the Department of the Interior, dated February 14, 2017 lamenting BLM's history of "intentional withholding of documents responsive to a congressional inquiry." EOR 0085. The letter stated, "As a federal law enforcement officer [redacted] actions have the potential to not only taint your investigation, but to seriously undermine the trust in BLM's law enforcement office and thwart congressional oversight of the Bureau." EOR 0086 - 0087.

The USAO comes off no better in the released documents. In the same 250-page report, Mr. Wooten stated, "I also became aware of troubling potential misconduct issues and a strategy not to disclose the issues to the defense counsel or make the evidence available unless required by the court." Furthermore, in an email to Mark Masling of the Office of Professional Responsibility, Mr. Wooten writes:

> However, I believe that [redacted] was blinded by his apparent desire to obtain convictions at all costs, even to the point [redacted[would conceal exculpatory/impeachment material, fail to insist on internal investigations into serious alleged reported BLM Supervisory Law Enforcement Official misconduct, and refuse to at a minimum seek guidance from the Court and notify the Court and/or the Defense Counsel of misconduct and excessive use of force related information reported to likely be inadvertently captured on Dave Bundy's iPad during his April 6, 2014 arrest. It should be noted that specifically, in my presence [redacted] and [redacted] were informed of the likely iPad issues by BLM [redacted], but at least to be, it seemed that [redacted] had wished he hadn't of been told of the issues. EOR 0110.

While reference to the USAO directly is "cleverly" redacted, it is clear from the context of the paragraph that Mr. Wooten can only be speaking of USAO prosecutors directly involved in the prosecution of Mr. Bundy, likely then senior AUSA Steven Myhre and his associated AUSA's Schiess and Ahmad. Furthermore, in the preceding paragraph, Mr. Wooten directly speaks about the USAO. The "however" that he begins this paragraph with indicates that he is on the same subject.

These are but a sampling of the numerous references that Mr. Wooten makes to both BLM and the USAO burying and hiding exculpatory evidence. To cover all of them would in an of itself require Mr. Bundy to move for leave to file additional pages, but many more examples are included in Mr. Bundy's Excerpts of Record.

C. Documents Showing Prejudice and Deep Animus Towards Mr. Bundy, His Family, and His Religion

Many of the documents which Judge Kollar-Kotelly ordered released by BLM show the truly cringe-inducing and extremely disturbing religious based and general hatred towards Mr. Bundy and his family exhibited by BLM agents. As just a few examples: (1) "a potential key witness, who later testified at trial sent out an email to [redacted] titled "FTB" (meaning Fu*k the Bundys) that mentioned it made the witness warm inside knowing that Cliven Bundy is sh1tting in cold stainless steel; (2) "…a potential trial witness sending out photo shopped images of suspects, to include Ryan Bundy holding a giant pen1s or di1do …."; and (3)

"individuals openly referred to as ret*rds, r*dnecks, Overweight woman with the big jowls, d*uche bags, tractor fact, idiots, in-br*d, etc…." EOR 010.

Furthermore, Mr. Wooten witnessed "[e]xtremely biased and degrading fliers were also openly displayed and passed around the office. A booking photo of Cliven Bundy was (and is) inappropriately, openly, prominently and proudly displayed in the office of a potential trial witness and my supervisor. Additionally, altered and degrading suspect photos were put in to what amounted to be a public office presentation by my supervisor." EOR 0154.

Much of the hatred and animus from BLM, for whatever reason, apparently stemmed from Mr. Bundy and his family's faith as members of the Church of. the Latter-day Saints. As Mr. Wooten set forth:

> Additionally, it should be noted that there was a "religious test" of sorts. On two occasions, I was specifically asked "You're not a Mormon are you," I was also specifically, and individually asked to agree that the defendants (who are reportedly Mormon) are like a "cult" and I was asked "I bet you think I am going to hell, don't you." Time after time I was subjected to disrespectful comments and opinions about the Church of Jesus Christ of Latter-Day Saints (LDS), faith, such as a BLM ASAC making fun of a Mormon child on a school trip in which he was a chaperone and speaking poorly of Mormon farmers. EOR 0156.

As further evidence that BLM was hatefully targeting the Bundys, documents revealed a June 14, 2016 forum titled "*Countering Extremism of America's Public Lands*." In attendance as a member of the witness panel was Richard Cohen, President of the far leftist, atheist and disreputable Southern Poverty Law Center.

EOR 0103 – 0104. There, the Bundys were labeled as domestic terrorists, much like former Senator Harry Reid had done to further his own interests, as reportedly he and his son Rory were attempting to sell the land which the Bundys ranch on to Chinese environmental interests.[3]

Lastly, the animus towards the Bundys was clearly not limited to BLM. As revealed by Mr. Wooten, "senior staff member and prosecuting attorney at the U.S. Attorney Office shook the hands of myself, another BLM SA, and a BLM ASAC and stated something along the lines of get these "shall we say Deplorables." EOR 0230.

CONCLUSION

Mr. Bundy had previously moved the Court to have a limited remand to take Mr. Wooten's testimony. In the unlikely event that this Court does not summarily affirm Judge Navarro's dismissal of the *supersedeas* indictment with prejudice, Mr. Bundy respectfully renews this motion, as the Court has indicated that Mr. Bundy could do in his opening brief. The excerpt of documents attached to this brief clearly validate Mr. Wooten's whistleblower memorandum, but also do much more. They provide insight into the USAO's motivation behind its egregious prosecutorial misconduct and it provides evidence that the USAO and BLM

[3] Lucy Mccalmont, *Reid: Bundy's 'domestic terrorists'*, POLITICO, Apr. 18, 2014, available at: https://www.politico.com/story/2014/04/cliven-bundy-nevada-ranch-harry-reid-105811

intentionally buried exculpatory evidence.

While it is abundantly clear from the applicable law applied to the facts on the existing record that Judge Navarro correctly dismissed the *supersedeas* indictment against Mr. Bundy as a result of flagrant misconduct and a violation of due process and other sacrosanct constitutional rights, the documents ordered to be produced by BLM as a result of the FOIA case puts the final "nail in the coffin" of the government's inappropriate, vexatious and frivolous appeal, designed only with a "Hail Mary" plea to this Court to reverse Judge Navarro's findings contained in her dismissal with prejudice of the supersedeas indictment. This concocted and calculated non-meritorious appeal is thus designed to try to shield the USAO prosecutors from career ending sanctions, if not their own criminal prosecutions, as their severe prosecutorial misconduct, their suborning of perjury, *Brady* violations and their false statements to the Court and the trier of fact are currently under investigation by Main Justice's Office of Professional Responsibility and Inspector General.

Dated: August 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the Ninth Circuit's CM/ECF system, causing it to be served upon any counsel of record in the case through CM/ECF

/s/ *Larry Klayman*

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 8,922 words.

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Dated: August 21, 2019 /s/ Larry Klayman_____