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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IVAN SOTO-BARRAZA,
JESUS LIONEL SANCHEZ-MEZA,

Defendants.

Case No.: 11-CR-0150-TUC-DCB-BPV

UNITED STATES' MOTIONS IN LIMINE TO:

1. **PRECLUDE REFEREERNCE TO OPERATION FAST AND FURIOUS;**
2. **ADMIT THE GOVERNMENT'S PROPOSED EXPERT TESTIMONY;**
3. **ADMIT COURT CERTIFIED TRANSLATIONS OF STATEMENTS MADE IN SPANISH;**
4. **ALLOW THE GOVERNMENT TO RECALL CERTAIN WITNESSES;**
5. **ORDER THE DEFENDANTS TO MAKE AN OFFER OF PROOF REGARDING SELF-DEFENSE;**
6. **PRECLUDE THE DEFENDANTS FROM RAISING A DURESS DEFENSE;**
7. **REQUIRE THE DEFENDANTS TO PROVIDE RECIPROCAL DISCOVERY;**

8. **PREVENT THE DEFENDANTS FROM ELICITING SELF-SERVING HEARSAY TESTIMONY;**
9. **ALLOW THE GOVERNMENT TO INTRODUCE A RECREATION VIDEO INTO EVIDENCE;**
10. **ADMIT PHOTOGRAPHS OF VICTIM BRIAN TERRY;**
11. **ADMIT PRESENT SENSE IMPRESSION STATEMENTS OF BORDER PATROL AGENTS;**
12. **ADMIT STATEMENTS MADE BY VICTIM BRIAN TERRY;**
13. **ALLOW THE GOVERNMENT TO BRING FIREARMS INTO THE COURTROOM;**
14. **PRECLUDE THE DEFENDANTS FROM ELICITING EVIDENCE REGARDING THE BORDER PATROL'S USE OF FORCE POLICIES; AND**
15. **ADMIT EVIDENCE UNDER FED. R. EVID. 609**

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Laura E. Duffy, United States Attorney, Todd W. Robinson and David D. Leshner, Special Attorneys, and hereby files its Motions In Limine.

I

INTRODUCTION

While performing his official duties on December 14, 2010, United States Border Patrol Agent Brian Terry was shot and killed during an encounter with five armed "rip crew" members in a remote area of Southern Arizona known as Mesquite Seep. Defendants Ivan Soto-Barraza ("Soto") and Jesus Lionel Sanchez-Meza ("Sanchez") have admitted to being two of the five members of the "rip crew." In addition to the admissions made by defendants Soto and Sanchez, DNA and fingerprint evidence recovered from the murder scene also establishes their participation in the "rip crew."

On August 6, 2014, a grand jury sitting in the District of Arizona returned a Fifth Superseding Indictment charging defendants Soto and Sanchez with the following offenses: first degree murder (Count 1); second degree murder (Count 2); a Hobbs Act robbery conspiracy (Count 3); attempted Hobbs Act robbery (Count 4); assault on Border Patrol Agent Brian Terry (Count 5); assault on Border Patrol Agent William Castano (Count 6); assault on Border Patrol Agent Gabriel Fragoza (Count 7); assault on Border Patrol Agent Timothy Keller (Count 8); and using and carrying a firearm during and in relation to a crime of violence (Count 9). The defendants' trial on those charges is scheduled to begin on September 22, 2015.

In anticipation of certain issues which may arise during trial, the Government submits the below-noted in limine motions. The Government believes that the pretrial resolution of the issues addressed herein will result in a more succinct and orderly presentation of evidence at trial.

II

MOTIONS

1. THE DEFENDANTS SHOULD BE PRECLUDED FROM MENTIONING OPERATION FAST AND FURIOUS

Two firearms used by members the "rip crew" were recovered at the scene of Agent Terry's murder. A records check has revealed that both of those firearms were purchased in connection with the ATF's controversial investigation dubbed "Fast and Furious." Informing the jurors in this case of the connection between the firearms and the "Fast and Furious" investigation will serve no legitimate purpose because that connection is irrelevant to the charges against the defendants. See Fed. R. Evid. 402 ("Irrelevant evidence is not admissible."); Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Evidence of the "Fast and Furious" investigation will not make any fact of

consequence any more or less probable; thus, any reference to "Fast and Furious" should be excluded from trial. See Fed. R. Evid. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

2. THE COURT SHOULD ADMIT THE GOVERNMENT'S PROPOSED EXPERT TESTIMONY

On August 18, 2015, the Government provided defendants with notice of its intent to call five expert witnesses under Fed. R. Crim. Pro. 16(a)(1)(G) and Fed. R. Evid. 702. (Attached hereto as "Exhibit 1" is a copy of the Government's expert notice.) The Government requests an order permitting those witnesses' testimony.

"If specialized knowledge will assist the trier of fact in understanding the evidence or determining an issue, a qualified expert witness may provide opinion testimony on the issue in question." United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997) (citing Fed. R. Evid. 702). The trial judge is the gatekeeper regarding the type and scope of expert testimony that should be admitted in any particular trial and has "broad latitude" in determining the relevance and reliability of such testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999). Each of the five proposed expert witnesses will provide the jury with relevant opinions and evidence based on their specialized knowledge and training.

A. FBI Laboratory Witnesses

Law enforcement authorities submitted multiple items collected at the crime scene to the Federal Bureau of Investigation ("FBI") laboratory for testing. That testing will be the subject matter of three witnesses.

1. Latent Fingerprints – Andrea Elliott

FBI Physical Scientist/Forensic Examiner Andrea Elliott will testify regarding her comparison of latent fingerprints developed from the crime scene evidence against known fingerprints for defendants Soto-Barraza and Sanchez-Meza and co-defendant

Manuel Osorio-Arellanes.[1] The Government expects Ms. Elliott will opine that latent fingerprints developed on two plastic bags and a stove burner found at the crime scene match the known fingerprints for Soto-Barraza, Sanchez-Meza and Osorio-Arellanes. This evidence is directly relevant to establish defendants' presence at the crime scene.

2. DNA - Amber Carr

FBI Supervisory Biologist Amber Carr will testify regarding her analysis of DNA recovered from crime scene evidence. The Government expects Ms. Carr to testify that Soto-Barraza, Sanchez-Meza and Osorio-Arellanes are major contributors of DNA found on certain items at the crime scene.[2] In addition, Ms. Carr will testify regarding the statistical probabilities with respect to DNA recovered from other crime scene items. This evidence is directly relevant to establish defendants' presence at the crime scene.

3. Firearms/Toolmarks – Erich Smith

Federal Bureau of Investigation Firearms/Toolmarks Examiner Erich Smith will testify regarding his analysis of the two firearms, magazines, cartridges and cartridge casings recovered at the crime scene. The Government expects Mr. Smith will testify that (1) that insufficient evidence exists to determine whether the bullet that killed

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[1] Ms. Elliott performed the analysis of the latent fingerprints found on the above items. Three other FBI Forensic Examiners – Stephanie Stewart, Sherine Ali and Stephen Rolando – developed the latent fingerprints on these items that preceded Ms. Elliott's analysis. The Government intends to call Ms. Stewart, Ms. Ali and Mr. Rolando as witnesses solely to describe their development of the fingerprints on the items. They will not testify to any comparison of the fingerprints with the defendants' known fingerprints.

[2] Ms. Carr performed the DNA analysis of the items. However, other FBI biologists participated in the DNA extraction, collection, quantification, dilution and amplification that preceded Ms. Carr's analysis. The Government intends to call these biologists as witnesses to testify solely to their handling of the evidence at issue. The biologists will not testify to any comparison of the extracted DNA with the defendants' known DNA.

Agent Terry was fired by either of the recovered firearms and (2) the Colt M4 rifles utilized by the Border Patrol agents did not fire the bullet that killed Agent Terry.

B. Pathologist – Eric Peters, M.D.

Eric Peters, M.D., performed an autopsy of Agent Terry on December 15, 2010. Dr. Peters will testify regarding the autopsy findings and the cause of death.

C. Drug trafficking – Jason Weatherby

Border Patrol Agent Jason Weatherby will testify regarding the network of foot trails in the area of southern Arizona where Agent Terry was killed. Agent Weatherby has personal knowledge of these trails through his training and experience with the Border Patrol, and he has apprehended drug traffickers utilizing the trails on multiple occasions. Agent Weatherby will describe how drug traffickers utilize the trail network to import drugs into the United States and how "rip crews" utilize the trail network to steal drugs from the traffickers. Agent Weatherby also will testify regarding the trail cameras located in this area and the photographs taken by the cameras.

Much, if not all, of Agent Weatherby's testimony will be law testimony because it is "rationally based on his perceptions." United States v. VonWillie, 59 F.3d 922, 929 (9th Cir.1995). However, the Government provided expert notice in an abundance of caution as Agent Weatherby's testimony regarding drug trafficking and robberies in the area where Agent Terry was killed is independently admissible as modus operandi testimony. See, e.g., United States v. Freeman, 498 F.3d 893, 906 (9th Cir. 2007) ("Government experts may testify as to the general practices of criminals to establish the defendants' modus operandi which helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior."). Here, testimony regarding the modus operandi of drug traffickers to import marijuana on foot into the United States explains why defendants were armed with assault rifles and travelling on foot at night as they sought victims to rob of their marijuana.

3. THE COURT SHOULD ADMIT COURT CERTIFIED TRANSLATIONS OF STATEMENTS MADE IN SPANISH

The Government intends to offer into evidence a translation of the Spanish language Miranda advisal form used in connection with the post-arrest interviews of the defendants. The translation was done by a court certified interpreter. A copy of the translation has been filed with the Court. See Doc. No. 393-2, filed May 4, 2015. A certified translation of defendant Sanchez's Spanish language post-arrest statement, which was reduced to writing, has also been filed in opposition to his motion to suppress.[3] The Court should admit the court certified Spanish language translations into evidence.

4. THE COURT SHOULD ALLOW THE GOVERNMENT TO RECALL CERTAIN WITNESSES

To the extent feasible, the Government intends to present the evidence in this case in a chronological fashion. That is, we will walk the jury through the events leading up to the murder of Agent Terry, followed by a presentation of the events on the evening he was murdered. The Government will conclude its case-in-chief presentation by detailing the results of the investigative efforts following Agent Terry's murder.

The presentation of that evidence will necessitate calling several witnesses on multiple occasions throughout the trial. For example, FBI Special Agent Terwilliger will first be called as a witness to describe the evidence she collected at the murder scene. Later, she will be recalled as a witness to describe taking buccal swabs from the defendants after their arrest in Mexico, and the submission of items for DNA

[3] Due to Bruton concerns with the contents of defendant Sanchez's post-arrest statement, the Government intends to merely elicit testimony about what was said during the interview of Sanchez. However, if the defendants choose to challenge the accuracy of that testimony, it may become necessary to put a certified translation of a redacted version of Sanchez's written confession into evidence.

comparison to those buccal swabs. Likewise, DNA expert Carr will be called to describe, in general terms, the manner in which the FBI lab processes evidence for DNA analysis. After eliciting testimony from the biologists who processed the submitted evidence for DNA samples, Ms. Carr will be recalled as a witness to describe the results of the DNA analysis.

The Government's proposed method of presenting evidence will serve the two purposes contemplated by Fed. R. Evid. 611 [Mode and Order of Interrogation and Presentation], which provides:

> **(a) Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time . . .

Rather than presenting the jury with a jumbled morass of evidence with the hope that they will be able to compartmentalize and sort it as they hear it, the Government proposes to present its case in a much more understandable format. If the Court allows the Government to proceed with its case-in-chief presentation as set forth above, the Government requests a pretrial order that the subject of cross examination of the Government witnesses will "be limited to the subject matter of their direct examination and matters affecting [those witnesses'] credibility." Fed. R. Evid. 611(b).

5. THE DEFENDANTS SHOULD BE ORDERED TO MAKE AN OFFER OF PROOF REGARDING SELF-DEFENSE

A. Introduction

The Court should require a pretrial offer of proof from defendants regarding their intent to offer evidence of "self-defense." An offer of proof is needed because, under the facts of this case, self-defense likely will be unavailable as a matter of law. As such, any reference to self-defense in the defendants' opening statements or introduction of evidence relating to self-defense would confuse the jury and prejudice

the Government if, at the conclusion of the case, the Court determines that self-defense is unavailable to defendants and declines to instruct the jury on self-defense.[4]

B. The Relevant Facts

Defendants are charged with multiple offenses, including first degree murder, second degree murder and assault on federal officers. The Fifth Superseding Indictment alleges that defendants committed first degree felony murder in that they killed Border Patrol Agent Brian Terry during an attempt to interfere with commerce by robbery.

The Government expects the evidence to show that, on the night of December 14, 2010, defendants Soto-Barraza, Sanchez-Meza and their co-defendants were engaged in a scheme to rob drug traffickers transporting marijuana into the United States. The defendants' group entered the United States on foot, armed themselves with assault rifles and ammunition and were searching for a group of drug smugglers to rob. As the defendants' group walked through a wash carrying their weapons at the "ready" position, a team of four BORTAC Border Patrol agents announced their presence. Two or more of the armed group members turned toward the agents and fired on the agents. A single bullet struck Agent Terry. His fellow agents administered first aid, but Agent Terry died at the scene.

C. Self-defense Is Unavailable To The Aggressor

Defendants may claim they (or their group members) fired on the agents in self-defense. In the context of assault of a federal officer under 18 U.S.C. § 111, a defense may exist based on "the defendant's honest mistake of fact or lack of knowledge that the victim was a law enforcement officer." United States v. Morton, 999 F.3d 435, 437 (9th Cir. 1993). "The defense consists of (1) a mistake or lack of knowledge as to authority, (2) a reasonable belief that force was necessary to defend against an

[4] This motion would be moot if neither defendant intends to raise a self-defense claim. However, the Government raises this issue in an abundance of caution because the theory of defense for both defendants is unknown.

immediate use of unlawful force, and (3) the use of no more force than appeared reasonably necessary." Id. at 437-38. See also Ninth Circuit Model Criminal Instruction No. 8.5. However, under the facts of this case, self-defense likely will be unavailable to Soto-Barraza and Sanchez-Meza as a matter of law.

Self-defense is unavailable as a matter of law where the defendant is the aggressor, because "[o]ne who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation." United States v. Wagner, 834 F.2d 1474, 1486 (9th Cir. 1987) (citation omitted); Andersen v. United States, 170 U.S. 481, 508 (1898) (where "the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self-defense cannot avail"). Consistent with this principle, federal courts recognize that self-defense is unavailable where "the defendants' need to defend themselves arose out of their own armed aggression.'" United States v. Branch, 91 F.3d 699, 717 (5th Cir. 1996) (citing United States v. Thomas, 34 F.3d 44, 48 (2d Cir. 1994)).

Branch was a prosecution arising from the ATF's 1993 confrontation with Branch Davidian sect members near Waco Texas. The defendants, Davidian sect members, were convicted of multiple offenses. On appeal, the Fifth Circuit held, inter alia, that the district court properly declined to give a self-defense jury instruction requested by the defense because the evidence showed that "the defendants knew their targets were federal agents," id. at 714, and the "Davidians fired the first shots that morning." Id. at 716. But even assuming the ATF agents fired the first shots, the defendants would not be entitled to a self-defense jury instruction because "[i]t is a necessary precondition to the claim of self-defense that the defendants be free from fault in prompting the ATF's use of force." Id. at 717. Where the Davidians had stockpiled weapons to fight the federal government, and one of the members had proceeded to the front door with an assault rifle to confront the ATF agents, that member was not entitled to claim self-defense: "A member of a conspiracy to murder

federal agents, who dresses for combat, retrieves an assault rifle, and proceeds to the front door to confront government agents executing a lawful warrant, is not entitled to claim the benefit of self-defense when the hoped-for confrontation with the agents occurs." Id. at 718.

The Second Circuit's decision in Thomas also is instructive. There, the defendants were convicted of "various charges stemming from the drug-related killing of an undercover police officer, deputized as a federal agent." Thomas, 34 F.3d at 45. The undercover officer and a confidential informant had arranged to purchase cocaine from two of the defendants, who, in turn, were planning to rob the informant. Id. at 46. During the robbery, one of the defendants (Lawrence) killed the undercover officer (Howard). Id. The defendants were convicted of multiple charges, including first degree felony murder "in the attempt to perpetrate a robbery," in violation of 18 U.S.C. §§ 1111 and 1114.

The Second Circuit held that the district court properly declined to give a self-defense jury instruction: "[G]iven the jury's finding that the defendants committed the killing of Agent Howard in an attempt to rob him, the defendants were not entitled, as a matter of law, under the circumstances, to rely on the defense of self-defense." Id. at 48. It did not matter who fired the first shot:

> It was undisputed that Stewart and Lawrence approached Howard's car armed respectively with .22 and .357 revolvers, and that seconds later Lawrence shot and killed Howard. The jury necessarily found in its verdict on Count VI [first degree felony murder] that the defendants killed Howard in the course of their attempt to rob him. Even in the unlikely event that, as Stewart and Lawrence testified, Howard was the first to draw his gun, and that Lawrence believed Howard would kill him if he did not draw his gun, the defendants were nonetheless not entitled (given the jury's finding of attempted robbery) to the defense of self-defense because their need to defend themselves arose out of their own armed aggression.

Id. See also United States v. Desinor, 525 F.3d 193, 198-99 (2d Cir. 2008) (citing Thomas and affirming denial of self-defense jury instruction where defendants were

the "initial aggressors" because they entered building armed and intending to kill members of rival drug gang notwithstanding defendants' claim that they shot victim in building because he attempted to shoot them first).

The Court may also look to Arizona law for guidance regarding the parameters of self-defense. See id. at 199 ("Because the law pertaining to self-defense is a matter of federal common law . . . we find it appropriate to look to state court decisions for guidance on the novel question we now address") (internal citation omitted). Under Arizona law, "[i]n a felony-murder prosecution, a person who is found by the jury to be engaged in an attempted robbery must be considered the initial aggressor; it is immaterial whether the victim of the robbery or the defendant fired first." State v. Celaya, 135 Ariz. 248, 254 (1983). See also State v. Jones, 95 Ariz. 4, 8 (1963) ("We follow the general rule a plea of self-defense is not available to one who was at fault in provoking the difficulty that resulted in the homicide."); Lucas v. Schriro, 2008 WL 1701647, *3 (D. Ariz. 2008) (unpub.) ("Arizona courts do not instruct on self-defense if the charge is felony-murder.") (citing Celaya).

D. Conclusion

By walking with their assault rifles at the ready position in the middle of the night during their ongoing attempt to rob drug traffickers, the defendants assumed the role of initial aggressors in any ensuing conflict with law enforcement. And that is precisely what happened when the defendants failed to submit after the Border Patrol agents announced their presence. Under these circumstances, defendants' decision to fire at the agents would not be justified as a matter of law, and defendants could not claim that Agent Terry's murder was an act of self-defense.

For these reasons, the Court should require defense counsel to make an offer of proof regarding any intended theory of self-defense prior to opening statements. The Court may then determine whether either defendant has a good faith belief that evidence of self-defense will be admissible at trial that would allow counsel to raise the issue in opening statements.

6. THE DEFENDANTS SHOULD BE PRECULDED FROM RAISING A DURESS DEFENSE

The United States hereby moves for a pretrial evidentiary ruling precluding defense counsel from making any comments during opening statement or in their the case-in-chief that relate to any purported defense of "duress" unless they first make a prima facie showing satisfying each and every element of that defense. The United States respectfully requests that the Court rule on this issue prior to opening statements to avoid the prejudice, confusion, and invitation for jury nullification that would result from such comments.

If the defendants intend to raise the affirmative defense of duress, they should be required by the Court to first proffer facts sufficient to satisfy the elements of such a defense. If the defendants are unable to proffer such facts, the Court should exclude any duress defense, and should preclude the introduction of any evidence or argument concerning duress. See United States v. Moreno, 102 F.3d 994, 997-98 (9th Cir. 1996); see also United States v. Bailey, 444 U.S. 394, 415 (1980) (requiring a defendant to make a prima facie showing of duress before it is presented to the jury).

In order to raise a duress defense, a defendant must establish three elements: "(1) an immediate threat of death or serious bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) lack of a reasonable opportunity to escape the threatened harm." United States v. Shryock, 342 F.3d 948, 987 (9th Cir. 2003) (quoting Moreno, 102 F.3d at 997). "Ordinarily the duress defense is submitted to the jury. . . . If the evidence is insufficient to support the defense as a matter of law, however, the court may exclude evidence of the defense or refuse to instruct on its elements." United States v. Karr, 742 F.2d 493, 497 (9th Cir. 1984); see also United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984); United States v. Glaeser, 550 F.2d 483, 487 (9th Cir. 1977). Moreover, "[f]ear alone is not enough to make a *prima facie* case of duress. The defendant must also establish the other two elements of the defense – an *immediate* threat of harm and no reasonable opportunity

to escape." United States v. Jennell, 749 F.2d 1302, 1305 (9th Cir. 1984) (emphasis added). In the case at hand, the defendants cannot meet the three-pronged duress standard as a matter of law and, therefore, they should be precluded from raising any duress defense and from introducing any evidence or argument concerning such a defense.

As noted above, the Ninth Circuit requires a defendant who wishes to raise a duress defense to establish that the threat of death or serious bodily injury was "present, immediate, or impending." Contento-Pachon, 723 F.2d at 694; see also Karr, 742 F.2d at 497 (precluding duress defense in a case where threats were made to the defendant's life, along with the lives of his daughter and wife, including a threat with a gun, because there was no "*immediate* threat") (emphasis in original). A "veiled threat of future unspecified harm" will not satisfy the immediacy requirement for the duress defense. Contento-Pachon, 723 F.2d at 694. In evaluating the immediacy requirement, the Eleventh Circuit has noted that "[t]he requirement of immediacy of the threat is a rigorous one; [sic] and it is clear that fear of *future* bodily harm to one's self or to others will not suffice. In order that the danger may be viewed as imminent and impending, it is ordinarily necessary to show that the coercing party was present." United States v. Sixty Acres In Etowah County, 930 F.2d 857, 861 (11th Cir. 1991) (emphasis in original) (citation omitted). Along these lines, the Ninth Circuit in Shryock upheld a district court's preclusion of a duress defense in a case in which the defendant failed to present "any facts on which we could conclude that he took certain actions because the Mexican Mafia figuratively held a gun to his head." Shryock, 342 F.3d at 988.

The defendants cannot demonstrate an immediate threat in this case. In fact, each defendant admitted to voluntarily joining and participating in the activities of the "rip crew." The most that the defendants could possibly claim is that they were somehow afraid to withdraw from the conspiracy because they were afraid of potential retaliation by the other members of the "rip crew." As noted above, such generalized

fear is not sufficient to support a duress defense. See Jennell, 749 F.2d at 1305; see also United States v. Becerra, 992 F.2d 960, 964 (9th Cir. 1993) ("Fear alone is not enough to establish a prima facie case of duress; the defendant must establish all three elements."); Moreno, 102 F.3d at 997 (holding same). Therefore, the defendants cannot establish a duress defense as a matter of law.

Moreover, the defendants cannot demonstrate the third prong of a duress defense – a "lack of a reasonable opportunity to escape the threatened harm" – as to any of the alleged acts in the Indictment. At no time did any of the defendants approach law enforcement officers in order to take steps to escape any potential threats arising out of a refusal to participate in "rip crew's" illegal activities. Indeed, just two days before Agent Terry was murdered the "rip crew" encountered law enforcement officers. Rather than disclose any fear to those Border Patrol Agents or use the encounter as a justification to withdraw from the conspiracy, the defendants chose to flee from the Agents and subsequently arm themselves in order to rob drug smugglers. As such, none of the defendants can satisfy the third prong of the duress defense. See e.g. United States v. Peltier, 693 F.2d 96, 98 (9th Cir. 1982); United States v. Wood, 566 F.2d 1108, 1109 (9th Cir 1977).

In light of the above, the Court should preclude any duress defense by the defendants, and should exclude any evidence or argument concerning duress at trial.

7. THE DEFENDANTS SHOULD BE ORDERED TO PROVIDE THE GOVERNMENT WITH RECIPROCAL DISCOVERY

The Government has fully complied with its discovery obligations under Rule 16 of the Federal Rules of Criminal Procedure. To date, the defendants have not provided the Government with any reciprocal discovery, even though they are obligated to do so under Rule 16(b). Of particular concern is the defendants' failure to provide timely notice of expert testimony under Rule 16(b)(1)(C). The Court should enter an order requiring the defendants to comply with Rule 16(b).

8. THE DEFENDANTS SHOULD BE PREVENTED FROM ELICITING SELF-SERVING HEARSAY TESTIMONY

The defendants should be precluded from eliciting their own out-of-court statements through cross examination of the Government's witnesses. For example, during their post-arrest statements, both defendants said that they did not hear anyone say "Police!" prior to gunfire erupting on December 14, 2010. If either defendant wishes to make that claim to the jury, they must do so by testifying at trial.

It is axiomatic that an attempt to prove one's own statements through the testimony of another witness is impermissible because those statements are hearsay. Furthermore, the defendants cannot rely on Rule 801(d)(2) of the Federal Rules of Evidence to introduce such statements because the they are the proponent of the evidence and because the evidence is not being entered against them. In essence, the defendants must not be allow to have self-serving hearsay brought before the jury without subjecting themselves to cross examination. See United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988) (defendant who chose not to testify at trial was properly kept from eliciting self-serving statements during the cross examination of a Government witness because that is "precisely what the hearsay rule forbids"); Fed. R. Evid. 801(c).

Similarly, the defendants cannot rely on Fed. R. Evid. 106 or 612 to admit their statements through cross examination. Federal Rule of Evidence 106 provides for a "rule of completeness" for writings or recorded statements where another part of the writing "ought in fairness to be considered contemporaneously with it." By its plain meaning, Fed. R. Evid. 106 does not concern oral statements and therefore does not advance defendants' position. See United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987) ("neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district court judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit

unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception"); United States v. Mitchell, 502 F.3d 931, 965 n.9 (9th Cir. 2007) ("Rule 106 does not render admissible otherwise inadmissible hearsay."); United States v. Sine, 493 F.3d 1021, 1037 n.17 (9th Cir. 2007) ("The Federal Rules of Evidence's 'principle of completeness' also does not allow the admission of otherwise inadmissible statements."). Similarly, Federal Rule of Evidence 612 does not contemplate the admission of the defendant's self-serving hearsay statements.

Finally, if either of the defendants improperly elicits his own hearsay statements from the Government's witnesses, the Government will, pursuant to Fed. R. Evid. 806, introduce "evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement . . . ." Additionally, the Government will attack the credibility of the declarant (i.e., the non-testifying defendant), utilizing "any evidence which would be admissible for [that] purpose if [the] declarant had testified at trial." Fed. R. Evid. 806. Such impeachment is proper under Rule 806 even though the scope of that Rule is explicitly limited to statements admitted under Rule 801(d)(2), (C), (D), or (E), because those limits presuppose compliance with Rule 802. Should any of the defendants choose to circumvent Rule 802, the underlying rationale of Rule 806 must control:

> The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.

Fed. R. Evid. 806, Advisory Committee Note.

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9. THE GOVERNMENT SHOULD BE PERMITTED TO INTRODUCE A RECREATION VIDEO INTO EVIDENCE

As the defendants are aware, Border Patrol Agent Castano and Agent Keller were using enhanced nighttime optical devices on the evening of Agent Terry's murder. Those devices enabled the agents to not only observe that the "rip crew" members were armed, but that they were also carrying the firearms in a "ready" position. To illustrate what Agent Castano and Agent Keller were able to observe through their optical devices, law enforcement officers conducted a recorded re-enactment of what they observed on December 14, 2010.[5] The re-enactment occurred at the scene of Agent Terry's murder on an evening with lighting conditions similar to that on December 14, 2010. Both Agent Castano and Agent Keller participated in the re-enactment and will be able to testify that the video footage of the re-enactment fairly and accurately depicts what they were able to observe the night of Agent Terry's murder.

The re-enactment video will enable the jurors to more accurately understand what transpired on December 14, 2010. As such, the Court should permit the Government to use the video during its case-in-chief presentation. (A copy of the proposed re-enactment footage is being lodged with the Court on a compact disc.)

10. THE GOVERNMENT SHOULD BE PERMITTED TO INTRODUCE PHOTOGRAPHS DEPICTING THE FATAL GUNSHOT WOUND WHICH KILLED AGENT TERRY

Out of the several dozen post-mortem photographs which depict the injuries suffered by Agent Terry and the autopsy procedure, the Government has selected just two pictures for presentation to the jury. The first of the two photographs depicts Agent Terry's back, documenting where the fatal shot hit him. The second photograph is merely an enlargement of the entry wound depicted in the first

[5] The video footage of the re-enactment was provided to the defendants in discovery over a year ago.

photograph. (The two photographs are being submitted to the Court on the same compact disc containing the re-enactment video, as described above.)

Given the charges in this case, the photographs depicting the reason for Agent Terry's death are clearly relevant and should be admitted into evidence. So as to not implicate to concerns underlying Fed. R. Evid. 403, the Government has selected two discreet photographs and has excluded numerous other probative, but arguably prejudicial ones. The Ninth Circuit has rejected Fed. R. Evid. 403 challenges to the admission of autopsy photographs (of a much more graphic nature than the two at issue here), and this Court should similarly reject any such challenge by the defendants. See e.g., United States v. Boise, 916, F.2d 497, 504 (9th Cir. 1990) (autopsy photograph of child victim in murder prosecution); Barchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982) (nude photographs of homicide victim).

11. THE GOVERNMENT SHOULD BE PERMITTED TO ELICIT PRESENT SENSE IMPRESSION TESTIMONY

The Government intends to introduce evidence of several radio transmissions following the firefight between the BORTAC agents and the "rip crew." In those radio transmissions, the broadcasting officers are relaying events as they perceive them. For example, there were radio transmissions regarding the status of Agent Terry: "time to get the EMS rolling . . . officer still breathing"; "at this time he's unresponsive;" "this time we can't get a pulse." The Court should permit the Government to admit statements conveying the present sense impressions of the declarant. Fed. R. Evid. 803(1) (regardless of the availability of the declarant, the rule against hearsay does not exclude "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."); United States v. Gil, 58 F.3d 1414, 1422 (9th Cir.1995) (contemporaneous observations of law enforcement officers admissible as present sense impressions).

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12. THE STATEMENTS MADE BY AGENT BRIAN TERRY AFTER BEING SHOT SHOULD BE ADMITTED INTO EVIDENCE

After being shot, Agent Terry said, "I've been shot. I can't feel my legs." Those two statements are admissible under several exceptions to the rule against hearsay. First, they are admissible under Fed. R. Evid. 803(1) as a present sense impression. Second, they are also admissible as an excited utterance, as getting shot and the consequences of getting shot are clearly statements "relating to a startling event or condition, made while the declarant was under the stress of the excitement that it caused." Fed. R. Evid. 803(2). Third, the statements also concern a "then-existing physical condition," rendering them admissible under Fed. R. Evid. 803(3) See Fed. R. Evid. 803(3)(regardless of the availability of the declarant, the rule against hearsay does not exclude "[a] statement of the declarant's then-existing physical condition"). Finally, Agent Terry was shot in a remote area of the desert and was well-aware that the only medical assistance he would immediately receive was from his BORTAC team members. Thus, when he informed them that he had been shot and could not feel his legs, it is likely he made those statements for purposes of medical diagnoses and treatment, rendering the statements admissible under Fed. R. Evid. 803(4).

13. THE COURT SHOULD PERMIT THE GOVERNMENT TO BRING FIREARMS INTO THE COURTROOM

The Government will seek to introduce into evidence firearms seized in connection with this case. Prior to bringing those firearms into the courthouse, the Government will render them safe and inoperable. The firearms will also be cleared with the United States Marshals Service prior to trial. The Government respectfully requests a Court order allowing the firearms into the courthouse.

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14. THE DEFENDNTS SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE OF THE BORDER PATROL'S USE OF FORCE POLICY

On August 24, 2015, counsel for defendant Sanchez requested that the Government produce various items, including Border Patrol "use of force" policies. Sanchez sought, in relevant part:

> 5. A copy of any and all Rules, Regulations, Policies, Procedures that in any way specify, suggest or discuss how and when (less than lethal) bean bag rounds must be or should be used.
>
> 6. Also a copy of any Rules, Regulation, Policies, Procedures on the use of deadly force.

Sanchez requested this discovery less than one month before trial, thereby leaving insufficient time for the parties to litigate a discovery motion regarding whether the policies are subject to disclosure under Fed. R. Crim. P. 16. As such, the Government agreed to produce the requested policies without waiving its right to challenge their admissibility at trial.

The Court should exclude evidence of "use of force" policies unless and until Sanchez can establish their relevance to an issue in dispute. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, evidence regarding policies governing the Border Patrol's use of force does not make any fact of consequence any more or less probable. Sanchez's counsel has stated that he has retained a "ballistics expert" and that he requested these documents are for his expert to review. No expert notice has been provided to this point, however, so the Government is unaware of the opinions the unnamed expert may intend to offer and to what extent the expert will rely on use of force policies in forming those opinions. In any event, to the extent defendant Sanchez intends to elicit testimony from this "ballistics" witness, the Court should preclude the witness from testifying regarding the use of force policies unless Sanchez can establish that the

witness will offer admissible opinion testimony and the probative value of this otherwise inadmissible evidence regarding use of force "substantially outweighs [its] prejudicial effect." Fed. R. Evid. 703.

15. THE COURT SHOULD ADMIT EVIDENCE UNDER FED. R. EVID. 609

In November 2007, Soto-Barraza was convicted of possession of marijuana for sale in Arizona state court and thereafter sentenced to 4 years' prison. Should Soto-Barraza elect to testify, the Court should admit evidence of this felony conviction to impeach him under F.R.Evid. 609.

"Under Rule 609(a), evidence of a prior conviction may be admitted for impeachment purposes if the probative value out-weighs the prejudicial effect of admission." United States v. Martinez-Martinez, 369 F.3d 1076, 1088 (9th Cir. 2004). The Ninth Circuit utilizes a five-factor test to balance "the relative probativeness and unfair prejudice of a prior conviction." Id. These factors include: "(1) the impeachment value of the prior crime; (2) the temporal relationship between the conviction and the defendant's subsequent criminal history; (3) the similarity between the past and the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue." Id. "While a trial court need not analyze each of the five factors explicitly, the record should reveal, at a minimum, that the trial judge was aware of the requirements of Rule 609(a)(1)." Id. (citation omitted).

Each of these factors weighs in favor of allowing the Government to impeach Soto-Barraza with his felony conviction. First, the Ninth Circuit recognizes that convictions for drug offenses are probative of veracity. See, e.g., United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995) (district court properly admitted evidence of prior convictions for robbery and possession of cocaine for sale – "We have previously stated that prior convictions for robbery are probative of veracity . . . The same is true of prior convictions for drug offenses.") (citation omitted, emphasis added); Cordoba, 104 F.3d at 229 (same). Second, the prior conviction occurred only

3 years before the offense in this case. Third, there is little similarity between the prior offense and the crimes charged in this case, which mitigates against any claimed prejudice. Finally, Soto-Barraza's credibility will be a critical issue should he elect to testify at trial, because presumably he will deny committing the charged offenses or otherwise dispute the agents' testimony. Alexander, 48 F.3d at 1489 ("When a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue."); United States v. Browne, 829 F.2d 760, 764 (9th Cir. 1989) (upholding admission of defendant's prior robbery conviction in prosecution for bank robbery where, inter alia, defendant's "credibility was certainly central to his defense").

Should Soto-Barraza elect to testify, the Government should be allowed to impeach him with his felony conviction. The Government recognizes that, as a general matter, "only the prior conviction, its general nature, and punishment of felony range are fair game for testing the defendant's credibility." United States v. Osazuwa, 564 F.3d 1169, 1175 (9th Cir. 2009) (citation omitted). The Government will abide by these limits in its cross-examination.

III

CONCLUSION

The Court should grant the Government's in limine motions, as set forth above.

DATED: August 31, 2015

Respectfully submitted,

LAURA E. DUFFY
United States Attorney

/s/ David D. Leshner
TODD W. ROBINSON
DAVID D. LESHNER
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. IVAN SOTO-BARRAZA, JESUS LIONEL SANCHEZ-MEZA, Defendants.	Case No. 11-CR-150-TUC-DCB-BPV CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the attached pleading on the following parties by electronically filing the foregoing with the Clerk of the District Court:

Andrea Matheson, Esq.
Ramiro Flores, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 31, 2015.

/s/ David D. Leshner
DAVID D. LESHNER

U.S. Department of Justice

LAURA E. DUFFY
United States Attorney
Southern District of California

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August 18, 2015

Via Email

Ramiro F. Flores, Esq.
55 West Franklin Street
Tucson, AZ 85701

Andrea L. Matheson, Esq.
2553 E. Broadway Blvd.
Tucson, AZ 85716

Re: United States v. Osorio-Arellanes, et al.,
11-CR-0150-DCB-BPV

Dear Counsel:

Pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G), I write to provide a written summary of the expert testimony that the United States intends to use pursuant to Federal Rules of Evidence 702, 703, and 705 during the jury trial in the above-referenced matter:

1. Andrea Elliott

The United States intends to call Federal Bureau of Investigation Physical Scientist/Forensic Examiner Andrea Elliott as an expert witness in latent fingerprint analysis. Ms. Elliott's curriculum vitae is attached. You have received in discovery materials pertaining to the fingerprint analysis in this case, including Latent Print Operations Unit reports dated January 18, 2011; February 7, 2011; April 21, 2011; September 28, 2012; and November 14, 2013. As set forth in these reports, Ms. Elliott will provide opinions and conclusions regarding her analyses of the latent fingerprints on certain evidentiary items, including two plastic bags (Q49 and Q162) and a stove burner (Q124).

Ms. Elliott performed the analysis of the latent fingerprints found on the above items. However, three other FBI Forensic Examiners – Stephanie Stewart, Sherine Ali and Stephen Rolando – developed the latent fingerprints on these items that preceded Ms. Elliott's analysis. We intend to call Ms. Stewart, Ms. Ali and Mr. Rolando as witnesses solely to describe their development of the fingerprints on the items. They will not testify to any comparison of the fingerprints with your clients' known fingerprints. As such, we do not believe they will be providing expert testimony. Nevertheless, we are providing you with notice of their anticipated testimony out of an abundance of caution.

2. Amber Carr

The United States intends to call Federal Bureau of Investigation Supervisory Biologist Amber Carr as an expert witness in DNA analysis. Ms. Carr's curriculum vitae is attached. You have received in discovery materials pertaining to the DNA analysis in this case, including Nuclear DNA Unit reports dated March 8, 2011; June 13, 2011; July 27, 2011; December 22, 2011; June 4, 2012; September 18, 2012 and December 6, 2013. As set forth in these reports, Ms. Carr will provide opinions and conclusions regarding her analyses of DNA on certain evidentiary items, including a glove (Q12), a backpack (Q17), a sweatshirt (Q18), plastic bottles (Q19 and Q54), a jacket (Q51), a toothbrush (Q52), a shirt (Q121), a hat (Q301) and a stocking cap (Q302).

Ms. Carr performed the DNA analysis of the above items. However, a total of 13 FBI biologists participated in the DNA extraction, collection, quantification, dilution and amplification that preceded Ms. Carr's analysis. For your convenience, I am attaching a chart describing each biologist's involvement with the evidence at issue. We do not believe the biologists will be providing expert testimony. Nevertheless, we are providing you with notice of their anticipated testimony out of an abundance of caution.

3. Erich Smith

The United States intends to call Federal Bureau of Investigation Firearms/Toolmarks Examiner Erich Smith as an expert witness in firearms and toolmarks examination. Mr. Smith's curriculum vitae is attached. You have received in discovery materials pertaining to the firearms and toolmarks analysis in this case, including Firearms/Toolmarks Unit reports dated December 23, 2010; May 13, 2011; August 30, 2011; November 19, 2011; August 3, 2012; and August 18, 2012. As set forth in these reports, Mr. Smith will provide opinions and conclusions regarding his analyses of (1) the firearms (K2 and K3), magazines, cartridges and cartridge casings recovered at the crime scene; (2) the bullet (Q6) that killed Agent Terry; (3) the bullet fragment (Q10) recovered from Manuel Osorio-Arellanes; and (4) the firearms (K11 and K12) and other items from Border Patrol Agents at the scene.

4. Eric Peters, M.D.

The United States intends to call Eric Peters, M.D. as an expert witness in pathology. Dr. Peters's curriculum vitae is attached. Dr. Peters performed an autopsy of Agent Terry on December 15, 2010. Dr. Peters will testify regarding the autopsy findings and the cause of death. You have received in discovery the autopsy report and photographs from the autopsy.

5. Jason Weatherby

The United States intends to call Border Patrol Agent Jason Weatherby as an expert witness regarding the network of foot trails in the area of southern Arizona where Rito Osorio-Arellanes was apprehended and where Agent Terry was killed in December 2010. Agent Weatherby will describe how drug traffickers utilize the trail network to import drugs into the United States and how "rip crews" utilize the trail network to steal drugs from the traffickers. Agent Weatherby also will testify regarding the trail cameras located in this area and the photographs taken by the cameras. You have received these photographs in discovery. Agent Weatherby will testify based on his training and experience with the Border Patrol. A summary of his qualifications is attached.

Pursuant to Federal Rule of Criminal Procedure 16(b)(1)(C), the United States hereby requests a written summary regarding experts you each intend to call at trial.

Please call me if you have any questions.

Sincerely,

/s/ David D. Leshner
DAVID D. LESHNER
Assistant U.S. Attorney