No. 17-50197

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NERSES NICK BRONSOZIAN,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 2:16-00196-SVW

GOVERNMENT'S ANSWERING BRIEF

NICOLA T. HANNA
United States Attorney

PATRICK R. FITZGERALD
Assistant United States Attorney
Chief, National Security Division

KHALDOUN SHOBAKI
GEORGE PENCE
Assistant United States Attorneys
National Security Division
1500 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012
Telephone: (213) 894-0759
Telephone: (213) 894-2253
Email: khaldoun.shobaki@usdoj.gov
Email: george.pence@usdoj.gov
Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

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I

ISSUES PRESENTED

A. Whether the district court erred when it followed this Court's binding decision in *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996) (per curiam), in holding that 26 U.S.C. § 5861(d) remains constitutional and does not run afoul of defendant's due-process rights.

B. Whether 18 U.S.C. § 922(o) impliedly repealed 26 U.S.C. § 5861(d).

C. Whether the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it did not produce a percipient witness's prior expert opinions offered in an unrelated case, where the other case had nothing at all to do with fact testimony the government elicited, and where the substance of the material was readily ascertainable from public records; and if so, whether the information was material in light of the overwhelming evidence that defendant knew the firearm was a machinegun.

D. Whether the government violated *Napue v. Illinois*, 360 U.S. 264 (1959), when it did not "correct" testimony at trial that was neither false nor misleading; and if so, whether the purportedly false testimony was material.

E. Whether the cumulative effect of any purported *Brady* and *Napue* violations prejudiced defendant.

II

STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

The district court entered judgment on May 22, 2017. (CR 127, ER 1.) Defendant filed a notice of appeal on May 26, 2017. (CR 124, ER 18.) The notice was timely. *See* Fed. R. App. P. 4(b)(1)(A)(i). Defendant is on bond pending resolution of this appeal.

B. Statement of Facts and Procedural History

1. The Offense

On July 7, 2011, defendant Nerses Nick Bronsozian ("defendant") and his friend Albert Kakish drove to a warehouse so defendant could illegally sell guns to a buyer defendant had never met. (GER 78-80.) Defendant sold the buyer two firearms: (1) a semi-automatic Galil assault rifle, and (2) a Military Armament Corporation model Ingram M10A1 .45, fully automatic caliber machinegun (the "MAC-10" or "machinegun").

The buyer was actually an undercover law-enforcement officer, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Special Agent John Carr. (GER 79-80.) A confidential informant ("CI") coordinating with the ATF had arranged the deal. (GER 78-80.) The

ATF operated the warehouse, which was equipped with video- and audio-recording equipment.[1] (GER 80-81.)

Before completing the sale, defendant and Agent Carr discussed the essential characteristics of the Galil semi-automatic assault rifle, using language that betrayed defendant's intimate knowledge of the firearms:

AGENT CARR:	Now, does this fire -- is this semi or does it fire fully?
DEFENDANT:	No, this is not fully.
AGENT CARR:	Oh, is that right. I thought you said it was fully.
DEFENDANT:	The other one is.
AGENT CARR:	Oh, okay. So this one is just semi --
DEFENDANT:	Semiautomatic.

(GER 222-23.)

[1] DVDs of the relevant audio- and video-clips are being lodged with the Court. During trial, transcripts were identified and used for demonstrative purposes alongside the recordings. Relevant transcripts are included in the Government's Excerpts of Record for the Court's convenience, as are screenshots of certain relevant portions of the video-recordings.

Defendant then introduced Agent Carr to "[t]he other one"—the machinegun defendant brought to the warehouse packaged in a cardboard box. (GER 54-55, 223.) Defendant described the second gun as a "bad motherfucker," bragged that it was "small" for a machinegun, and even noted the particular model (Ingram). (GER 225.) Acknowledging that an Ingram-model MAC-10 can be configured to function as either a semi-automatic or a fully automatic weapon, defendant clarified that "[t]he stuff it has inside there, it's automatic. It's set up for automatic."[2] (GER 226; *see also* GER 173-78 (testimony that the MAC-10 was originally manufactured as a semi-automatic, but was later converted to function as a machinegun).) Defendant explained what the machinegun was capable of given the automatic

[2] Defendant also noted that the gun could be reverted to "single fire," although the parts "inside" the gun at the time were "for automatic" firing. (GER 226.)

Defendant admitted in a post-arrest interview in March 2016 that he at least knew the machinegun he sold Agent Carr came with "pieces" that would allow for both semi- and fully automatic firing, although he made self-serving statements denying that he knew how exactly the firearm was configured at the time of the sale. (GER 224, 262-67.)

configuration, confirming that the gun "fires directly at full" and that it was "for spraying" bullets:

AGENT CARR:	And this one fires directly at full, huh?
DEFENDANT:	Yes. When you pull it back, you pull it back, and when you have a clip in there --
AGENT CARR:	Yeah.
DEFENDANT:	And then shoot. You just start spraying.

(GER 226.) Defendant even went as far as to explain what it would feel like to pull the trigger on the fully automatic machinegun: "And then shoot. You just start spraying. . . . And your finger will just be like bbbbbrrrrraaaahhhh." (GER 226-27.)

Before paying defendant, Agent Carr field-tested the gun—in front of defendant—to confirm that it was, as defendant advertised, a fully automatic machinegun. (GER 85-86.) After confirming defendant's statements were true, Agent Carr gave defendant $2,200 for the machinegun, the Galil semi-automatic assault rifle, and the magazines and accessories. (GER 96.)

Before leaving, defendant made sure to let Agent Carr know that he could supply more firearms. Defendant discussed other guns with

Agent Carr, including a Russian sniper rifle defendant bragged could easily be used to "drop fools from here to Lake Boulevard," and also offered to sell Agent Carr homemade silencers. (GER 230-36.) Defendant was relaxed—even confident—throughout the entire transaction. (*See* GER 101.)

Based on defendant's conduct, he was charged in a single-count indictment with possession of an unregistered firearm—the machinegun—in violation of 26 U.S.C. § 5861(d). (CR 1; ER 308.)

2. Pretrial Proceedings

a. Defendant's Confidential Informant Discovery Motion

Defendant filed a motion shortly before trial seeking "the identity of the [CI] and related discovery," including information about the CI's criminal record, benefits he received, and any known instances of false statements. (CR 30; ER 300-01.) The government did not plan to call the CI as a witness, but defendant's filings suggested that he might. (CR 30; ER 304-05.) According to defendant, he had repeatedly described the machinegun as fully automatic because he had succumbed to "pressure[]" from the CI, despite not actually knowing that the firearm was a machinegun. (ER 295.) Supposedly, defendant did what

the CI said because he was "a 'full patch' member of the Vagos motorcycle gang, and that in order to be validated as such the [CI] would have had to commit violent and/or intimidating acts on behalf of the gang."[3] (ER 298.)

On November 7, 2016, during the pretrial conference, by which time the government had already produced to defendant the requested information about the CI's criminal history and payments from the ATF, the court addressed defendant's motion to disclose the CI's identity. (CR 47; GER 1-22.) During an *in camera* hearing, defense counsel explained his subjective-fear theory to the court—that defendant did not *actually* know that the machinegun was fully automatic; that he falsely claimed it was out of fear of the CI; and that he feared the CI based on his membership in the Vagos. (GER 11-12.) Counsel informed the court *in camera* that he intended to present this defense through either calling the CI, calling defendant, or calling Kakish to testify about what was allegedly said during conversations

[3] The theory makes little sense given the circumstances—if defendant was truly afraid, wouldn't he also have feared retaliation if he made demonstrably false representations about the gun before selling it?

between defendant and the CI. (GER 11-13.) On the first day of trial defendant, again *in camera*, suggested that he would use Agent Carr as an expert. (GER 43 (" . . . Agent Carr I think is well aware of all these facts. He knows all about the Vagos.").) The government did not learn the substance of these sealed discussions until after trial. Defendant had not notified the government of an intent to offer any expert opinion, much less to utilize one of the government's fact witnesses for that purpose. Nor did defendant so notify the government at any time before cross-examining Agent Carr. (GER 116-17 (objecting during cross-examination that "[The government] received absolutely no notice regarding the use of our fact witness as an expert.").)

Based on defendant's *in camera* proffer, the court found that defendant had made a sufficient showing for disclosure of the CI's identity. (GER 15.) The government provided the CI's name and birthdate to defense counsel. (CR 100; GER 519.) The government responded to defendant's specific discovery request for "any information" corroborating the CI's membership in Vagos (ER 298), by producing reports of investigation and interview notes disclosing that the CI was a Vagos prospect at the time of the machinegun sale and

later a member, and had worn a Vagos shirt during the sale.[4] (GER 375-76, 378.) The government also made the CI available to defense counsel and a defense investigator at the United States Attorney's Office. (GER 519.) The CI had a brief conversation with defense counsel and indicated that he did not wish to participate in an interview. (GER 519.) Defense counsel served the CI with a trial subpoena. (GER 519.) The CI complied with the subpoena, and was present in the courthouse throughout the trial, although defendant did not call him as a witness. (GER 519.)

[4] Defendant mischaracterizes the requests leading to these disclosures as requests for information relating to the nature of the Vagos generally. (AOB 9-10.) Fairly read in their proper context, the requests related specifically to purported impeachment information about the CI, and whether the CI was a member of a gang with which the defendant was already familiar. (ER 290, 298.) Indeed, the requests clearly convey that defendant already knew Agent Carr was "intimately familiar with that gang and how it operates." (ER 290.) The requests therefore are properly understood to relate to the information about which defendant truly sought corroboration—the CI's membership status—not information about Agent Carr's extensive experience with, and opinion of, the Vagos. (ER 290, 298.)

b. The Government's Motion to Exclude Gang Evidence

On November 12, 2016, the government filed a motion to exclude evidence of the CI's gang affiliation. (CR 51; GER 23-29.) The government's position was that such evidence was irrelevant and inadmissible under Federal Rules of Evidence 402, 403, and 404 unless defendant could make two showings: first, that "defendant knew or believed, at the time of the transaction, that the CI was a full-patch member of the Vagos," and second, "that defendant knew or believed, at the time of the transaction, that in order to become a full-patch member of the [Vagos], the CI had to commit violent or intimidating acts." (GER 27.) Notably, during his post-arrest interview, defendant said that "I don't know if he was in a gang or not, but I know he rode a motorcycle." (GER 27.)

The court addressed the government's motion during a recess after empaneling the jury on November 15, 2016. (GER 37.) Defense counsel represented to the court that he would present testimony that showed that defendant knew that the CI was a member of the Vagos at the time defendant sold the machinegun. (GER 38.) The court was uncertain how defendant could establish his state of mind or knowledge

without testifying. (GER 40.) The court commenced another *in camera* discussion with defense counsel outside the presence of the government, during which defense counsel told the court that Kakish would testify about conversations he overheard involving the CI and the defendant. (GER 41-44.) On the basis of these *in camera* representations, the court denied the government's motion. (GER 44-45.)

3. Trial and Conviction

a. Government's Case-in-Chief

The government's substantive evidence consisted primarily of defendant's own inculpatory statements, captured on the video- and audio-recordings of the sale itself as well as a post-arrest interview.[5]

i. Agent John Carr

On direct examination, Agent Carr testified exclusively as a fact witness. After providing some preliminary background information about his experience working undercover with the ATF for over 26

[5] In addition to the witnesses described below, the government also called another ATF Special Agent to testify regarding the chain of custody for the firearms and accessories defendant sold to Agent Carr, another officer to testify that the firearm was in fact a machinegun, and another ATF employee to testify that the firearm was not registered in the National Firearms Registration Transfer Records database. (GER 144-206.)

years, he explained how the deal with defendant was arranged, what happened during the deal as reflected in the recordings, and identified the machinegun in evidence as the gun he purchased from defendant on July 7, 2011. (GER 66-101.)

On cross-examination, defendant asked questions about the transaction itself (GER 103-11), but also ventured far afield of the fact testimony elicited during direct examination. Defendant questioned Agent Carr generally about the Vagos, purportedly in an effort to bolster defendant's subjective-fear-based knowledge defense. (GER 117-27.) The defense confirmed that Agent Carr had "actually testified as an expert on outlaw motorcycle gangs" before, and proceeded to ask several specific questions about the Vagos. (GER 116.) Defendant confirmed that the CI was a prospective member of the Vagos at the time defendant sold the machinegun. (GER 117-18.) Defendant then asked a series of very specific questions about Vagos members generally, for example: "And in order to obtain full patch membership in the Vagos outlaw motorcycle gang, a prospect is required to commit acts of violence on behalf of the gang; right?" (GER 121; *see also* GER 121-22 (Q: "So the Vagos allow you to become a full patch member

without ever committing any act of violence for the gang." A: "Absolutely." Q: "Never have to commit a single crime on behalf of the gang?" A: "I've known -- I've heard a lot of guys that never have no criminal issues, committing no crimes, correct.").)

Agent Carr responded to defendant's questions truthfully and to the best of his ability, by noting that there was no across-the-board requirement for all full-patch members to commit acts of violence on behalf of the gang. (GER 122-24.) He also confirmed that, although not *every* member was a criminal, he was aware that some Vagos members did engage in criminal and even violent conduct. (GER 122 (Q: "You've also heard a lot of stories about people who have committed acts of violence in order to get their patch." A: "In any organization, sir, there are guys that are criminals and there's some that are not." Q: "And the Vagos outlaw motorcycle gang is a criminal organization?" . . . A: "In law enforcement's eyes, they look at the Vagos as a criminal organization. In the regular community's eyes, they don't see it that way.").) Eventually, the court shut down the line of inquiry. The court ultimately concluded that the questioning was improper and

insufficiently probative of defendant's subjective beliefs, and sustained the government's renewed objections. (GER 124.)

ii. Agent Eugene Hwang

Homeland Security Investigations Special Agent Eugene Hwang testified about defendant's March 2016 arrest. (GER 262-67.) Agent Hwang and another agent interviewed defendant after his arrest. During the interview, defendant acknowledged ownership of the machinegun, admitting that he had gotten it in exchange for a truck about five years before he sold it to Agent Carr. (GER 265-66.) Defendant also admitted that he knew the gun had all the equipment necessary for it to fire as a fully automatic machinegun at the time he sold it to Agent Carr. (GER 224.)

b. Defense Case-in-Chief

i. Albert Kakish

The defense elected to call Albert Kakish, who was with defendant when he sold Agent Carr the machinegun. Kakish testified that he had known defendant for roughly 25 years, and that he met the CI "on the streets" through mutual acquaintances. (GER 276-78.) Kakish testified that he was familiar with the Vagos and that he had seen Vagos members engage in acts of violence and sell drugs. (GER 278, 282.)

Kakish also said that he told defendant that the CI had robbed someone for drugs and that "a few times," the CI "slapped some guy at a friend's house one day." (GER 284.)

With respect to this particular transaction, Kakish testified that he overheard a conversation between the CI and defendant before the sale. (GER 285-86.) Kakish claimed that the CI had used an aggressive tone and suggested that "the club" would not be happy if defendant chose not to sell guns to the CI's buyer (Agent Carr). (GER 288.) Kakish also testified that the CI told defendant to "make sure that you let the guy know that it's a fully automatic." (GER 289-90.) During cross-examination, Kakish admitted that defendant brought two guns to sell to Agent Carr on July 7, 2011 but claimed that only one of them was automatic, despite the CI's supposed instructions to the contrary. (GER 297-98.)

The jury began its deliberations on November 16, 2016 and returned a guilty verdict that same day. (GER 357.)

a. Motion to Dismiss

After the jury was sworn, but before opening statements, defendant filed a motion to dismiss the indictment on the basis that the

underlying statute was unconstitutional, on the same grounds he raises in this appeal. (CR 63.) Because the motion had not even been served on the government before defendant raised it in court (GER 50-51), the court reserved ruling on the motion to afford the government time to respond. The government filed its opposition to the motion on November 22, 2016 (CR 78), and the court denied the motion on November 30, 2016 (ER 12-17). The district court noted that this Court had already rejected defendant's arguments in *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996) (per curiam), and that no post-*Hunter* developments called the rationale of the decision into question enough to disregard "the clear and binding authority from the Ninth Circuit in *Hunter*." (ER 15-17.)

4. Motion for New Trial

On January 27, 2017, defendant filed a motion for a new trial claiming that Agent Carr had testified falsely about the Vagos, and that the government failed to meet its *Brady* and *Napue* obligations. (GER 363-73.) Defendant's motion was based on materials relating to a case in the District of Nevada in which Agent Carr had been proffered as an expert on the Vagos, *United States v. Kane*, No. 2:13-CR-250-JAD-VCF

(D. Nev.). To support his motion, defendant attached the following documents from the *Kane* matter:

- Agent Carr's signed statement of qualifications reflecting his experience investigating motorcycle gangs (ER 102-03);
- The government's expert notice, which was signed by the prosecutors in Nevada (ER 96-101); and
- A transcript from an evidentiary hearing to determine whether Agent Carr could testify at trial. (GER 625-75.)

The government's expert notice in the *Kane* matter indicated that Agent Carr would testify "as an expert in relation to motorcycle gangs and their propensity to commit acts of violence on behalf of the club." (ER 96.) With respect to the Vagos in particular, the Nevada prosecutors noticed Agent Carr to testify that "[p]ersons in conflict with or who might be perceived to have shown disrespect to the gang may be beaten severely or even killed by being kicked repeatedly with steel-toed boots, stabbed, or shot." (ER 98.) In advancing his arguments on appeal, defendant rests his hat primarily on this expert notice, rather than the other materials in the *Kane* case.

The transcript from the hearing in *Kane* at which Agent Carr testified covered a narrower range of topics than what was identified in the expert notice—before the hearing, the court had already excluded the proffered testimony about the gang's propensity for violence. (*See* ER 72.) For that reason, the hearing testimony focused more specifically on the organization and structure of the Vagos. (GER 631.) Agent Carr testified that prospective members "were willin' to do whatever it takes to become a member," and would do "what you're asked to do basically."[6] (GER 648.)

The government opposed defendant's motion. (CR 100.) On April 17, 2017, the court held an evidentiary hearing. (CR 117; GER 579-624.) The court opened the hearing by recapping the parties positions and indicating that "there is merit" to the government's

[6] Defendant also highlights testimony relating to the gang's "sergeant-at-arms," who is "in charge of the supervision or punishment of other members of the chapter." (AOB 19-20, 57-58, 63.) Defendant asserts, without citation, that the CI eventually occupied this role. (AOB 58, 63.) That conclusion finds no meaningful support in the record—defendant merely infers it from the fact that Agent Carr once supervised an informant in that role. (AOB 20 n.5.) Defendant overlooks that Agent Carr has been involved in multiple Vagos investigations and regularly used informants. (GER 587, 602.)

position that Agent Carr's testimony was consistent. (GER 583.) But the court explained, "the defense should nevertheless be given some opportunity to probe on that area." (GER 583.) The court thus allowed counsel for defendant to question Agent Carr at length.

Agent Carr testified that he had been the case agent for four investigations involving the Vagos. (GER 585). Defense counsel questioned Agent Carr about his role as an expert in *Kane*, focusing on the expert notice in particular. (GER 592-98.) Agent Carr confirmed that he could testify about the use of violence by the Vagos in disputes with rival motorcycle clubs. (GER 594-95.) Agent Carr explained that a gang prospect would be expected to come to the aid of gang members during an altercation. (GER 596.) Agent Carr also explained that, in his experience, a prospect would not be required to commit acts of violence to become a "full patch" member of the Vagos. (GER 598.)

Agent Carr explained, as he testified at trial, that, "One point I will make, you don't have to commit a violent act to become a member of Vagos." (GER 612.) Defense counsel specifically asked Agent Carr to defend the truth of his trial testimony, and Agent Carr gave a comprehensive explanation of the bases for his knowledge about the

requirements to become a "full patch" member of the Vagos. (GER 613-16.) Agent Carr explained the bases for his knowledge as including information he had received from: (1) law-enforcement officers who had become, or were in the process of becoming members of the Vagos in an undercover capacity; (2) information from confidential informants; and (3) his knowledge of non-violent Vagos members. (GER 613-16.) Agent Carr even noted that he had consulted with four other motorcycle-gang experts from various law-enforcement agencies after the trial, all of whom shared Agent Carr's opinion that violence is not a prerequisite for membership. (GER 616-17.) After defense counsel completed the questioning, the court indicated that Agent Carr had "given all the relevant answers in the course of the extensive examination," and did not allow redirect by the government. (GER 623.)

On April 19, 2017, the court denied defendant's motion for a new trial. (CR 118; ER 5-11.) The court found Agent Carr credible, consistent, and truthful, and comprehensively rejected defendant's arguments to the contrary:

> The Court now finds that SA Carr did not give false testimony at trial. The Court has had the chance to observe SA Carr at trial and recently at the evidentiary hearing, and it found him credible and forthright. He appeared to answer

defense counsel's questions to the best of his knowledge and gave candid, straightforward answers. During the evidentiary hearing, SA Carr explained his testimony at trial, and his explanations were logical and consistent.

Importantly, the Court has considered SA Carr's testimony both at the trial and in the *Kane* matter and now finds that they do not contradict each other. . . . The question from defense counsel specifically involved whether a prospective Vagos member was actually *required* to perform acts of violence on behalf of the club in order to become a full member. SA Carr answered no. SA Carr's answer was not misleading, as there is an important distinction between holding violence in high esteem and requiring acts of violence before allowing prospects to become full members. . . . Therefore, answering defense counsel's question regarding violence as a prerequisite for club membership in any other way would have been untruthful on SA Carr's part. As a result, SA Carr's testimony was both truthful and not misleading. It does not provide a legitimate basis for a new trial.

Additionally, the jury heard testimony regarding the Vagos's violent tendencies, both from SA Carr and from another trial witness. . . . Therefore, SA Carr's testimony did not give the impression that the Vagos never committed acts of violence or were never associated with violence. . . . Thus, his testimony did not mislead the jury, and there no false evidence presented at trial that would justify granting a new trial.

The second question before this Court is whether the government should have notified the defense of SA Carr's testimony in the Kane matter as part of its obligations under *Brady*. The Court now finds that no *Brady* violation occurred. First of all, SA Carr's testimony in Kane did not provide exculpatory or impeachment evidence. The defense's theory was that the Defendant described the gun in question as a machine gun because he was intimidated by the CI, who

> was a member of a violent motorcycle gang. Therefore, the only relevant information regarding the Vagos was what the Defendant knew about the Vagos at the time of the transaction. . . . SA Carr's specific knowledge or observations of the Vagos's violent tendencies were not directly relevant to the defense's theory because the defense needed to present testimony regarding the Defendant's own knowledge of the Vagos, not SA Carr's knowledge. . . . Obviously, SA Carr's testimony in *Kane* did not concern the subjective knowledge of the Defendant regarding the Vagos. SA Carr's testimony in *Kane* was not the type of evidence that the government would need to turn over under *Brady*, even assuming that they were aware of that testimony.
>
> . . . . [T]he facts of this case clearly demonstrate to the Court that no prejudice to the Defendant could have resulted from not having access to SA Carr's testimony in *Kane*. Thus there can be no *Brady* violation.

(ER 5-7.)

5. Sentencing

On May 25, 2017, the court sentenced defendant to one year and one day in custody, followed by three years of supervised release. (CR 127; ER 1.)

III

SUMMARY OF ARGUMENT

Defendant's challenges to his conviction are meritless. Defendant's argument that 26 U.S.C. § 5861(d) is unconstitutional as an invalid exercise of Congress's power to tax is foreclosed by *Hunter*, in

which this Court rejected the very arguments defendant now advances. Defendant endeavors to avoid this binding precedent by invoking the Supreme Court's holding in the Affordable-Care-Act-related case *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). However, *Sebelius* can readily be reconciled with *Hunter*, which therefore remains the law of this Circuit. Finally, defendant's argument that 18 U.S.C. § 922(o) impliedly repealed § 5861(d) is makeweight and has been rejected by numerous Courts of Appeals.

Defendant also complains that the government did not comply with its obligations under *Brady* and *Napue*. Defendant is wrong. The purported *Brady* material—Agent Carr's expert opinions in an unrelated case—was neither favorable nor discoverable, given that he was testifying as a percipient witness in this case. It also was not suppressed, because it could have been discovered through the exercise of reasonable diligence. As to the purported *Napue* violation, Agent Carr's testimony was not false or misleading, much less knowingly so. Finally, none of the purported *Brady* and *Napue* violations were material or prejudicial to the defendant—overwhelming evidence

demonstrated that defendant knew the firearm he sold Agent Carr was a machinegun, the only fact defendant disputes.

IV

ARGUMENT

A. The Ninth Circuit's Decision in *Hunter* Bars Defendant's Constitutional Challenges to § 5861(d)

Defendant's constitutional challenge to § 5861(d) is squarely foreclosed by *Hunter*, which upheld the provision in the face of the very arguments defendant raises here. There has been no intervening authority that calls that precedent into question, and this Court—like the district court below—should follow it.

1. Standard of Review

"A challenge to the constitutionality of a federal statute is a question of law reviewed *de novo*." *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir.), *cert. denied*, 138 S. Ct. 218 (2017). Likewise, the denial of a motion to dismiss based on a violation of constitutional rights is reviewed *de novo*. *See United States v. Brobst*, 558 F.3d 982, 994 (9th Cir. 2009) (affirming denial of motion to dismiss based on alleged due process violation).

2. Section 5861(d) Is a Valid Exercise of Congress' Power Under the Necessary and Proper Clause

The National Firearms Act ("NFA"), which was enacted in 1934, imposes a tax on the making and transfer of "firearms," as well as a special occupational tax on persons and entities engaged in the business of importing, manufacturing, and dealing in "firearms." *See* 26 U.S.C. §§ 5811, 5821, 5801. The NFA defines a "firearm" as a narrow class of weapons that includes machineguns. *See id.* § 5845(a), (b). Section 5861(d), which is part of the NFA, makes it unlawful for a person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record," which is a central registry of all restricted weapons maintained by the ATF.

In 1937, the Supreme Court upheld a provision of the NFA requiring firearms dealers to pay an annual exaction as properly enacted under Congress's taxing power, as set forth in Article I, section 8 of the U.S. Constitution. *See Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). In *Sonzinsky*, the Supreme Court affirmed defendant's conviction for failing to pay that tax, rejecting defendant's argument that the exaction was not a true tax, but rather a penalty, and therefore beyond Congress's taxing power. *See id.* The Supreme

Court also held that a provision in the NFA requiring importers, manufacturers, and dealers in firearms to register with the government was "obviously supportable as *in aid of* a revenue purpose." *Id.* at 513 (emphasis added).

In 1968, Congress enacted Title II of the Gun Control Act ("GCA"), which amended the NFA in several ways.

> Congress amended the [NFA] so that only a possessor who lawfully makes, manufactures, or imports firearms can and must register them. . . . Only after the transferor's receipt of the approved application form may the firearm transfer be legally made. A transferee does not and cannot register, though possession of an unregistered firearm is illegal.

United States v. Freed, 401 U.S. 601, 601 (1971) (rejecting Constitutional challenge to the NFA as amended by the GCA). Furthermore, the GCA prohibited information or evidence furnished under the NFA to be used as evidence in certain criminal proceedings or to be disclosed to certain authorities. *See id.*

In 1986, Congress enacted the Firearm Owners' Protection Act ("FOPA"), which amended the GCA and generally prohibited the transfer or possession of machineguns. *See* 18 U.S.C. § 922(o)(1). The FOPA, however, excluded from this prohibition transfers of machineguns to, or possession of machineguns by, government agencies,

as well as the transfer and possession of machineguns lawfully possessed before the effective date of the prohibition, in May 1986. *See id.* § 922(o)(2). After the enactment of FOPA, the ATF started to deny any application to make or transfer a firearm if the making, transfer, receipt, or possession of the firearm would place the maker or transferee in violation of § 922(o). *See* 27 C.F.R. § 479.105(a).

After the enactment of FOPA, several Courts of Appeals, including the Ninth Circuit, rejected constitutional challenges to the NFA. In *United States v. Jones*, 976 F.2d 176, 179 (4th Cir. 1992), for example, the Fourth Circuit affirmed defendant's convictions for possessing machineguns made without the approval required by 26 U.S.C. § 5822, in violation of 26 U.S.C. § 5861(c); for transferring machineguns without the approval required by 26 U.S.C. § 5812(a), in violation of 26 U.S.C. § 5861(e); and for transporting machineguns that were not registered as required by 26 U.S.C. § 5841, in violation of 26 U.S.C. § 5861(j).

In so holding, the Fourth Circuit rejected the defendant's arguments that (1) FOPA implicitly repealed the provisions of the NFA and GCA concerning machineguns; (2) those NFA provisions could not

be enforced without constituting fundamental unfairness in violation of due process; and (3) that the NFA cannot be enforced because it has lost its constitutional basis as a taxing provision. *See Jones,* 976 F.2d at 182-84.

The Fourth Circuit readily dismissed the defendant's implied repeal and due process arguments, reasoning that "neither the statutory language nor the legislative history of [the FOPA] affirmatively expresses a congressional desire to except machine guns from the earlier established requirements of the National Firearms Act" and defendant could "comply with both acts by refusing to deal in newly-made machine guns."[7] *Id.* at 183. The Fourth Circuit also found unpersuasive defendant's argument that the FOPA undercut the constitutional basis for the NFA. *See id.* at 183-84. After observing

[7] Defendant's invocation of the United States Attorneys' Manual is a distraction. (AOB 46.) The question this Court must decide (rather, already decided in *Hunter*) is whether § 5861(d) is a valid exercise of congressional power under the Constitution, not the United States Attorney's Manual. *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000) ("[I]t is clear that the [United States Attorney's Manual] does not create any substantive or procedural rights . . . ."); U.S. Attorneys' Manual § 1-1.200 (manual does not place "any limitations . . . on otherwise lawful litigation prerogatives").

that the making of even illegal machineguns continued to be taxed, the Fourth Circuit rejected defendant's argument that the collection of a making tax was irrelevant to a prosecution for possession and transfer without requisite registration, when possession and transfer were not also taxed. *See id.* According to the Fourth Circuit, this argument presented "too crabbed a view of the purposes of requiring registration and authorizations for possession and transfer of firearms subject to a making tax" because "knowing the chain of possession and transfer assists in determining who made the firearm and hence 'is supportable as in aid of a revenue purpose.'" *Id.* (quoting *Sonzinsky*, 300 U.S. at 513).

Although the necessary and proper clause of the U.S. Constitution was not expressly mentioned in either *Sonzinsky* or *Jones*, the courts in both cases relied on the power afforded to Congress under that clause in upholding registration provisions of the NFA. The necessary and proper clause, often called the elastic clause, states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or

in any Department or Officer thereof." U.S. Const. art. I, § 7. It seems clear that the Supreme Court in *Sonzinsky* and the Fourth Circuit in *Jones* were calling out this power when they deemed registration requirements under the NFA "supportable as *in aid of* a revenue purpose." *Sonzinsky*, 300 U.S. at 513 (emphasis added); *Jones*, 976 F.2d at 183.

In *Hunter*, the Ninth Circuit unreservedly followed the reasoning in *Jones*. *See* 73 F.3d at 261-62. The defendant in *Hunter* had pleaded guilty to possession of an unregistered machinegun in violation of § 5861(d). *See id.* at 261. He later filed a § 2255 motion to vacate his sentence, arguing that § 5861(d) no longer reflected a proper exercise of Congress's power to tax. *See id.* The district court denied that § 2255 motion and this Court affirmed, expressly adopting the rationale offered in *Jones*. *See id.* at 262.

Notably, the Third, Fifth, Seventh, Eight, and Eleventh Circuits have all followed suit in endorsing the Fourth Circuit's rejection of constitutional challenges to prosecutions under the NFA. *See United States v. Grier*, 354 F.3d 210, 215 (3d Cir. 2003) ("[T]he NFA remains a proper exercise of the congressional taxing power under the

Constitution."); *United States v. Elliott*, 128 F.3d 671, 672 (8th Cir. 1997) (per curiam) (rejecting the defendant's argument that § 5861(d)'s machinegun-registration requirement was implicitly repealed by the later-enacted § 922(o)); *United States v. Rivera*, 58 F.3d 600, 602 (11th Cir. 1995) ("Because [defendant] can comply with both acts, his conviction under § 5861(d) does not violate due process."); *United States v. Ardoin*, 19 F.3d 177, 180 (5th Cir. 1994) (following *Jones*); *United States v. Ross*, 9 F.3d 1182, 1194 (7th Cir. 1993) ("We find the analysis applied in *Jones* to be well-reasoned and to be equally as applicable to § 5861(d)"), *vacated on other grounds*, 511 U.S. 1124 (1994). *But see United States v. Dalton*, 960 F.2d 121, 123-24 (10th Cir. 1992) (deeming § 5861(d) conviction constitutionally infirm).

Notably, both the Third and Fifth Circuit have observed that, even after the enactment of FOPA, the ATF fully retains the powers granted to it in the NFA to tax and register both legally *and* illegally made or transferred machineguns. As the Third Circuit held in *Grier*:

> [T]hough the ATF chooses not to allow tax payments or registration of machine guns, it still has the authority to do so. Thus, the basis for ATF's authority to regulate—the taxing power—still exists; it is merely not exercised. More importantly, the Supreme Court has stated that "[a] statute does not cease to be a valid tax measure . . . because the

> revenue obtained is negligible, or because the activity is otherwise illegal." *Minor v. United States*, 396 U.S. 87, 98 n. 13 (1969). The Court's position is particularly applicable to the NFA which, despite § 922(o), still retains some revenue generating capacity. As the Government notes, "to the extent that it remains lawful under § 922(o) to transfer machineguns manufactured before May 1986, those transfers require the payment of tax."

354 F.3d at 215 (some internal citations and quotation marks omitted) (alterations adopted).

Against this background, defendant argues that *Hunter* was wrongly decided and that the NFA is no longer a legitimate exercise of Congress's taxing power because "[w]hereas the *making* of machineguns and *transfer* of previously registered machineguns could arguably continue to generate revenue, the mere possession of a previously unregistered machinegun cannot." (AOB 40-41 (emphasis in original).) This argument is doubly doomed. First, a three-judge panel of this Court is not entitled to second-guess the panel that decided *Hunter* absent an intervening and clearly irreconcilable decision of a higher court, such as an *en banc* panel of this Court or the Supreme Court. *See United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017). As detailed below, there is no such intervening decision.

Second, *Hunter* was correctly decided. Defendant's contrary argument improperly conflates the taxing provisions of the NFA with the NFA's prohibition on possessing an unregistered firearm. The taxing provisions may be, and repeatedly have been, evaluated with reference to Congress's tax power. The registration requirement in § 5861(d), by contrast, is plainly not a tax provision but is instead a registration requirement in aid of a revenue purpose. *See Sonzinsky*, 300 U.S. at 513; *Jones*, 976 F.2d at 183. Because FOPA did not strip the ATF of either its taxing power or its power to register machineguns, defendant's argument that FOPA somehow transformed the NFA, a statute properly enacted under Congress's tax and necessary and proper powers, *see Sonzinsky*, 300 U.S. at 513, into a statute devoid of constitutional support, is meritless, *see Grier*, 354 F.3d at 215.

To the extent defendant means to argue that § 5861(d)'s prohibition on the possession of unregistered machineguns is no longer justified under the necessary and proper clause, *Hunter* conclusively establishes that defendant is wrong. In *Hunter*, this Court held that penalizing those who possess unregistered machineguns "is in aid of the taxing power even if the government no longer taxes possession. The

manufacture of machine guns continues to be taxed, and knowing the chain of possession of a firearm would help the government determine who made it . . . ." *Hunter*, 73 F.3d at 262. Defendant has not pointed to any authority, and the government is aware of none, suggesting that ATF's *regulatory* decision not to exercise its authority to tax and register certain machineguns somehow makes § 5861(d) infirm under the necessary and proper clause.

3. The Application of § 5861(d) to Defendant's Conduct Did Not Violate His Due Process Rights

Defendant argues that because the ATF would not have accepted his application to register the machinegun, he cannot be fairly punished for failing to comply with the registration requirement. (AOB 50.) However, defendant concedes that in *Hunter* the Ninth Circuit rejected this argument. (AOB 50.) Not only has defendant failed to argue that the Court's reasoning in *Hunter* on this point was flawed, he has also failed to point to any intervening authority that could possibly allow this Court to reach a different result. *Hunter* therefore clearly bars defendant's due process claim.

4. The Supreme Court's Decision in Sebelius *Is Neither Closely Related to, Nor Clearly Irreconcilable With,* Hunter

Defendant asserts that the Supreme Court's decision in *Sebelius* requires this Court to reevaluate and reject the panel's decision in *Hunter*. (AOB 41-49.) Defendant is wrong.

A three-judge panel "is not allowed to disregard a prior circuit precedent, but rather must follow it unless or until change comes from a higher authority." *Robertson*, 875 F.3d at 1291 (quotation marks omitted). For a three-judge panel to follow the intervening decision of a court of last resort on a closely related, but not identical, issue, that intervening decision "must undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (internal quotation marks and citation omitted) (intervening decision that "chip[ped] away" at theory underlying prior panel decision did not cross that threshold). "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Robertson*, 875 F.3d at 1291.

Sebelius is plainly distinguishable from *Hunter*, and thus does not permit reexamination of that decision. In *Sebelius*, the Supreme Court upheld the individual mandate of the Patient Protection and Affordable Care Act ("PPACA") as a proper exercise of Congress's tax power. *See* 567 U.S. at 561-63. That mandate required that, starting in 2014, non-exempt individuals who failed to maintain "minimum essential" health care coverage pay the government a "shared responsibility payment." 26 U.S.C. § 5000A(a), (b)(1). The Supreme Court reasoned that, despite being termed a "penalty" in the PPACA, that payment actually constituted a tax. In reaching this conclusion, the Supreme Court pointed to a number of factors: taxpayers were required to make the payment when they filed their tax returns; the requirement was found in the Internal Revenue Code and enforced by the Internal Revenue Service; the payments were expected to raise revenue for the U.S. Treasury; the amount due was, by statute, guaranteed to be less than the price of obtaining insurance; the individual mandate contained no scienter requirement; and there was no criminal enforcement mechanism for non-payment. *See Sebelius*, 567 U.S. at 563-67.

In *Hunter*, the Ninth Circuit addressed an entirely different issue—namely, whether a criminal statute enacted in aid of a tax provision remained constitutionally supportable in light of a federal agency's decision, based on a wholly different statute, to deny licensing and registration applications that, if accepted, would have triggered a taxable event. *Sebelius* did not address this baroque question. Moreover, the Supreme Court in *Sebelius* did not purport to overturn any of its prior decisions, much less any decision relied upon by this Court in *Hunter*. Nor did the Supreme Court in *Sebelius* express any intention to overrule cases sustaining convictions under § 5861(d). Because *Sebelius* is plainly distinguishable from *Hunter*, those decisions can be reasonably harmonized, and the Court remains bound by both of them. *See Green*, 722 F.3d at 1150; *see also United States v. Sullivan*, 797 F.3d 623, 632 (9th Cir. 2015) ("Because [*Sebelius*] is not 'clearly irreconcilable' with our precedents, they remain binding."); *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013) (*Sebelius* "did not address the constitutionality of § 922(g)(1), and it did not express an intention to overrule the precedents upon which our cases—and

numerous other cases in other circuits—relied in finding statutes such as § 922(g)(1) constitutional").

Defendant ignores these points and instead relies upon misdirection. He argues that *Sebelius* announced a "significant clarification" of the law concerning Congress's tax authority that undermines the reasoning in *Hunter* and, in his Opening Brief, spends nearly ten pages advancing the wholly irrelevant and uncontroverted claim that § 5861(d) does not impose a tax. (AOB 42-49.) The Supreme Court did not announce any new law in *Sebelius*, and it did not purport to do so. Instead, as defendant concedes elsewhere in his brief, the Supreme Court merely applied long-standing legal rules. (AOB 42 ("The Court examined its precedent to identify the essential features that a law must have to be justified under the tax power.").) Defendant has not claimed, nor can he, that any of these rules were unknown to this Court when it decided *Hunter*. Moreover, as addressed above, none of these rules comes close to suggesting that *Hunter* was wrongly decided. Defendant's reliance on *Sebelius* is therefore misplaced.

5. Alternatively, Congress' Enactment of § 5861(d) Was a Valid Exercise of Its Authority under the Commerce Clause

The Commerce Clause allows Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. "The Supreme Court has interpreted this to mean that Congress may regulate: 1) the channels of interstate commerce, 2) the instrumentalities of interstate commerce, and persons or things in interstate commerce, and 3) activities that substantially affect interstate commerce." *United States v. Henry*, 688 F.3d 637, 641 (9th Cir. 2012) (internal quotation marks and punctuation omitted). In affirming convictions pursuant to § 922(o) for possession of a machinegun, this Court has observed that, "in light of the established and lucrative interstate market for machine guns," *Viriyapanthu v. Brandon*, 686 F. App'x 390, 391 (9th Cir.), *cert. denied*, 138 S. Ct. 193 (2017), the possession of machine guns (or parts thereof) could substantially affect interstate commerce in machine guns and, further, that the regulation of such possession was well within Congress's authority under the Commerce Clause, *see id.*; *see also Henry*, 688 F.3d at 641 (affirming conviction for possession of homemade machinegun); *United States v. Stewart*, 451 F.3d 1071, 1078

(9th Cir. 2006), *overruled on other grounds by Dist. of Columbia v. Heller*, 554 U.S. 570, 594-95 (2008) (same).

This reasoning applies equally to Congress's regulation of machinegun possession under § 5861(d). Additional comfort in the soundness of this conclusion may be found in the decisions of the Fourth and Fifth Circuits, which have both held that § 5861(d) is sustainable as a valid exercise of Congress's Commerce Clause authority. *See Ardoin*, 19 F.3d at 180 ("no one could seriously contend that the regulation of machineguns could not also be upheld under Congress's power to regulate interstate commerce"); *Jones*, 976 F.2d at 184 (same).

Finally, defendant should not be heard to argue that Congress did not expressly rely on its Commerce Clause power in enacting § 5861(d). As *Sebelius* makes clear, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Sebelius*, 567 U.S. at 570.

6. Congress Has Not Impliedly Repealed § 5861(d)

Defendant also makes the throwaway claim that Congress impliedly repealed § 5861(d) when it enacted § 922(o). (AOB 51-52.) "[R]epeals by implication are not favored and will not be presumed

unless the intention of the legislature to repeal is clear and manifest." *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1069 (9th Cir. 2010) (rejecting argument that provision of Immigration Act of 1990 impliedly repealed provision of Anti-Drug Abuse Act of 1988). This Court recognizes implied repeals in two "narrow circumstances"—"(1) where provisions in the two acts are in irreconcilable conflict; and (2) where the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Id.* at 1070 (punctuation omitted).

Neither of these circumstances is present here. As numerous Courts of Appeals have recognized, a person can easily comply with both § 5861(d) and § 922(o) by not possessing unregistered machineguns. *See, e.g., Grier*, 354 F.3d at 214; *Elliott*, 128 F.3d at 672; *Ardoin*, 19 F.3d at 180; *Jones*, 976 F.2d at 183. Defendant ignores these cases in his Opening Brief and provides no meaningful response to their reasoning. Moreover, defendant's suggestion that by its plain terms § 922(o) covers the whole subject of § 5861(d) is absurd. The former bans the transfer and possession of machineguns, with certain exceptions, and the latter makes it a crime to possess an unregistered "firearm," as that term is defined in the NFA. These two statutes are

plainly not coextensive, nor does one statute wholly cover the other one, even if defendant's particular conduct was prohibited by both statutes. *See Jones*, 976 F.2d at 183 ("And, faced with two equally applicable penal statutes, there is nothing wrong with the government's decision to prosecute under one and not the other, so long as it does not discriminate against any class of defendants . . . ."). Defendant's implied repeal argument is therefore meritless.

B. Agent Carr's Proffered Opinion in *Kane* Was Not *Brady* Material

Defendant's argument that Agent Carr's involvement in *Kane* should have been disclosed—either before trial as substantive *Brady* evidence or during trial as impeachment evidence based on testimony elicited during cross-examination—is wholly without merit. Agent Carr's testimony as a percipient witness in this case was unrelated to his involvement as an expert in *Kane*, and the statements he made there were consistent with the testimony he offered in this case. Beyond that, the information conveyed by the *Kane* materials was publicly available and readily ascertainable through the exercise of reasonable diligence. Finally, the prior opinion evidence was immaterial, and defendant suffered no prejudice. Because the

documents are not exculpatory or impeaching, were not suppressed (and the gravamen of the material appears to have been actually known to defense counsel before trial), and would not have affected the outcome of the trial, defendant cannot demonstrate a *Brady* violation.

1. Standard of Review

"A district court's denial of a new trial motion based on alleged *Brady* violations is reviewed de novo." *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001). "To prevail on a *Brady* claim, the defendant must show that '(1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment.'" *Id.* (footnote omitted) (quoting *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997)).

2. The Evidence Was Not Discoverable

The only possible "evidence" that defendant identifies as purported *Brady* material is the public transcript of expert testimony given by Agent Carr, a percipient (not expert) witness in this case. Specifically, defendant argues that Agent Carr's prior expert testimony that the Vagos gang was violent would have bolstered defendant's

argument that he described the gun as a fully automatic machinegun based on fear of the CI, a prospective Vagos member, rather than actual knowledge about the gun.

Defendant maintains that the government was obligated to produce the *Kane* materials for two reasons. First, he argues that materials reveal that Agent Carr, a federal law-enforcement officer, believes the Vagos has members with a proclivity for violence. Second, he maintains the materials had impeachment value, after Agent Carr rendered testimony on cross-examination that defendant casts as inconsistent with his testimony in *Kane* (a position that is not borne out by the record).

Defendant's first argument fails, because the fact that a defendant believes certain expert testimony would help his case does not impose upon prosecutors an obligation to furnish him with an expert witness to testify to that effect. Defendant's argument on this point is simply that (1) the prosecution knew that he intended to support his defense by arguing that he was afraid of the Vagos, (2) Agent Carr had previously offered expert testimony that members of the Vagos could be violent, and (3) thus the prosecution should have suggested Agent Carr's expert

services to defendant.[8] But this incredible claim—that the government is obligated to suggest possibly helpful subject-matter experts to defendants—has no support in *Brady* or is progeny. Defendant was free to retain and notice an expert to testify about the Vagos, but he did not. The fact that defendant failed to do so does not impose upon the government an obligation to suggest or provide experts for him.

The cases on which defendant relies are inapposite (AOB 55-61), because they relate to facts and/or impeachment evidence that directly undermined a critical witness's testimony about the actual *facts* of the case. *See Milke v. Ryan*, 711 F.3d 998, 1016-19 (9th Cir. 2013) (officer who provided *only* and "essential" testimony of guilt had been admonished numerous times for lying under oath and suffered disciplinary actions for being caught "in a lie"—and all these facts were suppressed); *Comstock v. Humphries*, 786 F.3d 701, 708-09 (9th Cir. 2015) (state suppressed purported "robbery" victim's prior statement

[8] That Agent Carr was *also* a fact witness in this case is nothing more than a fortuity. Defendant's argument that the government was obligated to provide Agent Carr's prior expert opinion would apply just as well to every other federal agent who has expressed any opinion memorialized in writing or through testimony about the Vagos.

suggesting item was misplaced, not stolen at all); *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995) (remanding for district court to consider whether testimony of prosecution's "main witness"—a police officer—was contradicted by officer's earlier un-produced police report, and whether officer "misled" others about facts of arrest); *United States v. Kohring*, 637 F.3d 895, 900-01, 903-06 (9th Cir. 2011) (government suppressed evidence that "prosecution's star witness" engaged in "sexual misconduct" with minors that gave him strong incentive to incriminate defendant for the FBI, that he had "difficulty with remembering key facts," and that defendant's conduct may not have been illegal); *United States v. Olsen*, 704 F.3d 1172, 1182 (9th Cir. 2013) (government suppressed evidence criticizing government expert's laboratory practices and "fidelity on the witness stand," but no *Brady* violation because proof of defendant's intent was supported by ample other evidence).[9]

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[9] Defendant also relies on *United States v. Stever*, 603 F.3d 747 (9th Cir. 2010). *Stever* is even more inapposite, because it merely decided that the Sixth Amendment was violated when Stever's proffered expert testimony was excluded. *Id.* at 752-53, 755-57. As this Court later explained, *Stever* merely found constitutional error because "[t]he district court precluded Stever from presenting any defense at

Defendant's second tangential "impeachment" claim is also easily disposed of—the purported impeachment value of the prior *expert* testimony did not even exist until defendant solicited opinion testimony on cross-examination that was well beyond the scope of Agent Carr's direct examination as a *fact* witness. Defendant does not (and cannot) contend that Agent Carr's direct fact testimony about the transaction at issue in this case was somehow contradicted by his prior *expert* opinions in a totally separate case—and the government was under no obligation to guess whether and how defendant might attempt to ask Agent Carr questions that were utterly unrelated to his percipient-witness testimony. *Cf.* Fed. R. Crim. P. 16(a)(1)(F) (requiring certain disclosures when the government "intends to use" expert testimony "during its case-in-chief"); 18 U.S.C. § 3500 (requiring disclosure of witness statements "relat[ing] to the subject matter as to which the [government] witness has testified" on direct examination). In this regard, it bears repeating that defendant mischaracterizes his discovery

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all." *United States v. Torres*, 794 F.3d 1053, 1062 (9th Cir. 2015) (citing *Stever*, 603 F.3d at 752). Here, defendant does not argue that the district court prevented him from putting on a defense. Nor could he—the court granted him considerable leeway in that regard.

requests as requesting information about Agent Carr's general knowledge about the Vagos. (AOB 9-10, 53-54.) These requests were made in connection with a motion for discovery *about the CI*, and tangentially mentioned Agent Carr as possibly having information *about the CI*. *Supra* note 4. Nor is it accurate to suggest that defendant put the government on notice that he might seek to utilize Agent Carr as an expert to support his defense theory (AOB 54)—defendant's disclosures to that effect were made to the court *in camera*, outside the government's presence. (*See* GER 43, 116-17.)

In any event, the district court correctly concluded that Agent Carr's trial testimony was in fact consistent with his testimony in *Kane*, as discussed in detail below. As the district court noted, the question from defense counsel eliciting the disputed testimony "specifically involved whether a prospective Vagos member was actually *required* to perform acts of violence on behalf of the club in order to become a full member." (ER 9.) Agent Carr answered that question accurately and to the best of his ability—the answer is no, which Agent Carr reiterated again and explained further during the evidentiary hearing on defendant's motion for a new trial. (ER 44-58.) As the district court

held, the answer is "not misleading, as there is an important distinction between holding violence in high esteem and *requiring* acts of violence before allowing prospects to become full members." (ER 9 (emphasis added).) Because the testimony was consistent, it had no impeachment value and so was not subject to disclosure under *Brady*.

3. The Evidence Was Not Meaningfully Favorable to Defendant

Defendant's theory was that he "stated that his gun was a machinegun, even though he did not know whether that was true because of pressure from the informant," a potential Vagos member whom defendant supposedly feared. (AOB 8.) Defendant attempted to explain away his detailed and colorful description of the MAC-10 as automatic by claiming that he made it all up to please or placate the informant.

But defendant's improbable explanation for his own highly incriminating statements rests on claims about his own subjective intentions and his relationship with the informant—not on an expert's general knowledge about the Vagos. As the district court recognized, Agent Carr's "specific knowledge or observations of the Vagos's violent tendencies were not directly relevant to the defense theory because the

defense needed to present testimony regarding the Defendant's own knowledge of the Vagos, not [Agent] Carr's knowledge." (ER 10.) Even testimony about defendant's knowledge of the Vagos generally would not have been helpful—what defendant required was evidence about what he believed the CI wanted him to say about the gun and the threat supposedly posed to him by the CI, not general evidence about the Vagos.

The *Kane* materials have nothing to do with what the defendant knew when he sold the machinegun, and they contain no information about the CI or the defendant. Defendant argues that the *Kane* materials—particularly the government's proffer about Agent Carr's testimony—were favorable because they made defendant's claim of fear "more persuasive than it otherwise would be," "corroborated [defendant's] fear," and "corroborated" Kakish's testimony about defendant's knowledge of violent acts perpetrated by the CI and other Vagos members. (AOB 56-59.) But that is a wholly improper use of expert testimony. This Court has recognized that expert testimony proffered for the purpose of bolstering the defendant's claim that a subjective belief precludes liability is inadmissible, or at least must be

severely circumscribed. *See United States v. Komisaruk*, 885 F.2d 490, 494 (9th Cir. 1989) (noting that "expert testimony cannot be offered to buttress credibility," where defendant "attempted to verify the reasonableness of her beliefs by introducing experts who are knowledgeable about the Navstar system"); *see also United States v. Verduzco*, 373 F.3d 1022, 1034 (9th Cir. 2004) (upholding exclusion of defense expert where the testimony "was aimed squarely at establishing Verduzco's subjective fear of police authorities, and only sharp limitations could conceivably have protected the testimony from running afoul of Rule 704(b)"). The expert testimony elicited at trial from Agent Carr, and the testimony defendant now posits he could have elicited if he had only known about the *Kane* case, is all irrelevant and inadmissible for the purposes identified by defendant, and so therefore cannot be considered favorable.

4. The Evidence Was Not Suppressed

Further, the fact that federal law-enforcement officers, including Agent Carr, consider the Vagos a criminal organization was not suppressed because it is readily ascertainable public information. In determining whether evidence was "suppressed" for purposes of *Brady*,

this Court asks "whether the defendant has enough information to be able to ascertain the supposed *Brady* material on his own. If so, there's no *Brady* violation." *Milke*, 711 F.3d at 1017; *see also United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.").[10] If a defendant has "enough information to find the *Brady* material with reasonable diligence," then there is no suppression at all.[11] *Milke*, 711 F.3d at 1018.

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[10] This Court has described this passage from *Aichele* as "dictum," but concluded that the language is nevertheless binding "at least in cases . . . where there is no government action to throw the defendant off the path of the alleged *Brady* information." *United States v. Bond*, 552 F.3d 1092, 1095-96 (9th Cir. 2009). Here, there was no arguable government action to thwart defendant from discovering Agent Carr's prior experience relating to the Vagos.

[11] Other Federal Circuit Courts of Appeals support this reasonable/due-diligence proposition. *See United States v. Cruz-Feliciano*, 786 F.3d 78, 87 (1st Cir. 2015); *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997); *United States v. Pelullo*, 399 F.3d 197, 202 (3d Cir. 2005); *United States v. Catone*, 769 F.3d 866, 871-72 (4th Cir. 2014); *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004); *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000); *United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001); *United States v. Willis*, 277 F.3d 1026, 1034 (8th Cir. 2002); *United States v. Kluger*, 794 F.2d 1579,

The fact that some Vagos members have a proclivity towards violence was well known to defendant, and was certainly not "suppressed" by the government. (*See, e.g.*, GER 11 ("[B]ased on our investigation, [the CI] is involved in a biker gang called the Vagos, a serious violent biker gang.").) That federal law-enforcement officers find many members of the Vagos to be violent criminals is well documented in the public record. Indeed, defendant was obviously aware of the Department of Justice's position on the gang—although it was not received in evidence, one of defendant's trial exhibits was a Department of Justice overview of "The Vagos Motorcycle Club," which described the "club" as an "Outlaw Motorcycle Gang[]" that "poses a serious criminal threat" and has been implicated in criminal activities such as assault, extortion, murder, witness intimidation, and weapons violations. (GER 492, 275.)

Beyond that, the record indicates that defendant was *already aware* that Agent Carr had extensive experience with the Vagos, and had even testified as an expert relating to the gang. Before trial began,

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1583 (10th Cir. 1986); *United States v. Stein*, 846 F.3d 1135, 1146 (11th Cir.), *cert. denied*, 138 S. Ct. 556 (2017).

defendant's counsel noted (in an *in camera* proceeding) that he intended to prove "the truth" of the Vagos's violent proclivities through Agent Carr. (GER 43 (" . . . Agent Carr I think is well aware of all these facts. He knows all about the Vagos.").) Defendant began his line of questioning about Agent Carr's experience with the Vagos by asking questions about his prior experience testifying as an expert, including about the Vagos. (GER 102, 116.) Defendant also asked whether, 20 years before defendant's trial, Agent Carr "put an informant into the field to infiltrate the Vagos outlaw motorcycle gang." (GER 123-24.) It is apparent from these statements that defendant was already aware of Agent Carr's public and well-known experience with and expertise about the Vagos. Given the ready availability of information about Agent Carr's prior expert testimony and the fact that the *Kane* materials are publicly filed documents, the relevant information was available to him and thus not suppressed within the meaning of *Brady*.[12]

[12] In fact, a court order in *Kane* regarding the admissibility of Agent Carr's proffered opinions about the Vagos is available on Westlaw. *United States v. Kane*, No. 2:13-CR-250-JAD-VCF, 2015 WL 3823023 (D. Nev. June 19, 2015).

When public records are readily ascertainable through the exercise of reasonable diligence based on information known to the defendant, a defendant has no *Brady* claim. This includes public records of witness testimony from other proceedings. For example, in *United States v. Delgado*, 350 F.3d 520 (6th Cir. 2003), the Sixth Circuit addressed claims that the government violated *Brady* by "failing to turn over materials that could have been used to impeach Ronald Carboni, an informant who testified for the government," including "transcripts of Mr. Carboni's testimony in previous trials." *Id.* at 527. The court held that as "records of public court proceedings, transcripts of Mr. Carboni's trial testimony, plea hearing, and sentencing hearing were available to [the defense] from sources other than the prosecution." *Id.*; *see also United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998) ("[B]ecause transcripts of Whitley's plea and sentencing hearing were readily available, we reject defendants' argument that the government wrongfully withheld statements [with alleged impeachment value] made by Whitley during the proceedings."); *Willis*, 277 F.3d at 1034 ("Publicly available information which the defendant could have

discovered through reasonable diligence cannot be the basis for a *Brady* violation.").

Publicly available information is "suppressed" only if the defendant "doesn't have enough information to find the *Brady* material with reasonable diligence." *See Milke*, 711 F.3d at 1018. In *Milke*, discovery of otherwise-undisclosed court records reflecting impeachment information required "a team of approximately ten researchers" to spend "nearly 7000 hours sifting through court records." *Id.* Under these circumstances, the *Milke* Court concluded that a "reasonably diligent lawyer couldn't possibly have found the[] records in time to use them" at trial. *Id.*; *see also United States v. Payne*, 63 F.3d 1200, 1208-09 (2d Cir. 1995) (court documents suppressed within the meaning of *Brady* where there was no indication defendant was aware of facts that would have led to discovery of the public records through "diligent investigation" and government had disclosed other court records thereby affirmatively misleading defendant).

By contrast, here defendant already knew that Agent Carr had extensive experience with the Vagos and had even testified as an expert. No cumbersome combing of court-maintained records (the issue

in *Milke*) was necessary. *See Stein*, 846 F.3d at 1146-47 ("Although in some cases a publicly available document practically may be unobtainable with reasonable diligence, *see, e.g.*, *Milke v. Ryan*, 711 F.3d 998, 1017-18 (9th Cir. 2013), [defense counsel] made no effort to establish that this is such a case. In fact, [defense counsel] represented that he located the document on the 'SEC Website.'" (footnote omitted)). For these reasons, Agent Carr's testimony reflecting his opinion that the Vagos gang is violent was neither discoverable nor suppressed within the meaning of *Brady*.

5. The Evidence Was Not Material

Finally, even if the Court were to somehow find the first two prongs of *Brady* satisfied by the *Kane* case materials, there is no colorable argument that those materials would have had any impact on the outcome of the trial. Defendant therefore cannot show that the information was material.

Evidence is material for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Strickler v. Greene*,

527 U.S. 263, 281 (1999) ("[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."); *United States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007) (en banc) (*Brady* prejudice exists only if the "admission of the suppressed evidence would have created a 'reasonable probability of a different result'" (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995))); *Morris v. Ylst*, 447 F.3d 735, 741 (9th Cir. 2006) (materiality not met where there is no "reasonable probability" that "the result of the proceeding would have been different" had the information been disclosed to the defense).

First, the *Kane* materials are clearly inadmissible and thus cannot be *Brady* material at all. Defendant "is barred from introducing" the *Kane* materials "as substantive evidence because" they "contain[] out-of-court statements and do[] not fall within any exception to the hearsay rule." *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("'Inadmissible evidence is by definition not material [for *Brady* purposes], because it never would have reached the jury and therefore could not have affected the trial outcome.'") (quoting *United States v.*

Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983)); *United States v. Sarno*, 73 F.3d 1470, 1505 (9th Cir. 1995) ("Mr. Reynolds' opinion was inadmissible . . . [n]on-disclosure therefore did not give rise to a *Brady* violation."). Similarly, Agent Carr's *general opinion* about the gang was inadmissible for the purpose of bolstering the credibility of defense witnesses testifying regarding defendant's subjective beliefs. *See Komisaruk*, 885 F.2d at 494. This alone should dispose of the materiality question. *See Kennedy*, 890 F.2d at 1059.

Beyond that, defendant *did* ask exactly the sort of questions he says he would have posed had he known about the prior opinion testimony. Defendant asked Agent Carr whether he had "learned during [his] career of acts of violence committed by the Vagos outlaw motorcycle gang in order to obtain membership." (GER 124.) Although an objection to the question was properly sustained—an evidentiary ruling defendant has not challenged[13]—the fact that defendant was

[13] From the outset, the court recognized that the opinion testimony seemed irrelevant: "Well, I don't know where this is going. I didn't think this was the witness you were going to use for that part of your case. What is the point of it? He isn't -- ask a few more questions. Maybe I can see where you're going." (GER 117.)

prepared to ask it is fatal to his argument that disclosure of the transcript would have changed the course of the cross-examination. (AOB 60.)

The so-called impeachment evidence here is not material and cannot furnish the basis for a *Brady* claim, either. As the district court held, the *Kane* testimony did not contradict or undermine Agent Carr's testimony at all. *See Delgado*, 350 F.3d at 528 (noting that defendant had not "explained how the materials that he argues should have been disclosed would have improved his attorney's ability to impeach [the witness] and ultimately to secure an acquittal."). Even if there was some marginal inconsistency (there was not), the impeachment value of the prior testimony would have been limited—Agent Carr's opinion of the Vagos was not relevant to his testimony as a percipient witness. Agent Carr's primary role at trial was to authenticate the video- and audio-recordings showing what defendant said and did during the transaction. He was not a critical witness whose testimony offered the jury the only insight into defendant's actions and statements. *Cf. Milke*, 711 F.3d at 1016-19 (impeachment evidence material where witness provided only and "essential" testimony against defendant);

Hanna, 55 F.3d at 1459 (impeachment testimony relating to "main witness" was material); *Kohring*, 637 F.3d at 900-01, 903-06 (impeachment evidence relating to "prosecution's star witness" material).

Finally, the jury had before it exactly the sort of information defendant hoped to present. "Evidence that is merely cumulative is not material." *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988). Agent Carr accepted defendant's premise that there are members of the Vagos "who have committed acts of violence in order to get their patch" when he responded that "[i]n any organization . . . there are guys that are criminals and there's some that are not." (GER 122 ("In law enforcement's eyes, they look at the Vagos as a criminal organization.").)

Defense witness Kakish also testified about conversations with defendant to show that defendant believed that the Vagos and the CI here were prone to violence. (GER 284-91). Kakish also testified that the CI had intimidated the defendant in connection with the sale of the machinegun. (GER 288-89.) This direct testimony shedding light on defendant's subjective beliefs was relevant to defendant's state-of-mind

at the time he described the essential characteristics of the machinegun. As the district court recognized, Agent Carr's testimony, by contrast, could not possibly have revealed anything about defendant's state of mind: "[A] defense witness testified regarding the violent reputation of the Vagos and that the Defendant was aware of that reputation. [Agent] Carr's personal knowledge of the Vagos's propensity for violence, without any knowledge regarding Defendant's awareness of those same facts, could not have materially affected the jury's conclusion regarding the Defendant's understanding of the CI's violent nature." (ER 11.) In other words, defendant had access to, and presented at trial, evidence far more probative to his defense theory through the testimony of Kakish. The jury therefore had before it the testimony necessary to evaluate, weigh, and properly reject the defense theory.

Finally, the evidence of defendant's guilt was clear—defendant cannot dispute that he sold Agent Carr a MAC-10 machinegun after describing its fully automatic nature and watching Agent Carr field-test the gun. The videos permitted the jury to observe defendant's demeanor to evaluate the merits of the defense theory that he was

misrepresenting his knowledge about the nature of the gun when he confirmed that the "bad motherfucker" of a gun was "set up for automatic," and was "for spraying" bullets "when you have a clip in there." (GER 226.) Even more fatal to defendant's subjective-fear defense is the fact that he admitted in a post-arrest interview—when he was well beyond the reach of any Vagos member—that he sold the gun to Agent Carr knowing full well that it had all the pieces necessary to fire as a fully automatic machinegun. (GER 224.) "[T]herefore, [defendant] received a trial resulting in a verdict worthy of confidence." *Olsen*, 704 F.3d at 1185 (quotation marks omitted) (concluding suppressed information was not material).

C. Agent Carr's Testimony Did Not Violate *Napue*

1. Standard of Review

This Court reviews the denial of a defendant's *Napue* claim de novo, but reviews factual findings underlying that denial only for clear error. *United States v. Renzi*, 769 F.3d 731, 752 (9th Cir. 2014). Under the clear-error standard, this Court must accept the district court's factual findings "absent a definite and firm conviction that a mistake has been committed." *Jackson v. Brown*, 513 F.3d 1057, 1069 (9th Cir.

2008). The district court's credibility determinations are accorded great deference, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Earp v. Davis*, 881 F.3d 1135, 1145 (9th Cir. 2018) (quotation marks omitted) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985)). "When a trial judge's finding is based on his decision to credit the testimony" of a witness who "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* at 1145-46 (quoting *Anderson*, 470 U.S. at 575.

A claim under *Napue* will succeed only when "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Jackson*, 513 F.3d at 1071-72. An alleged *Napue* violation is material only if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 1076 (emphasis omitted) (quoting *Haynes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005) (en banc)).

2. Agent Carr's Testimony Was Truthful and Not Misleading

Defendant's *Napue* claim is destined to fail because the district court's decision to credit Agent Carr's explanation of his testimony was not clearly erroneous, and because the testimony was not false at all.

There is no question that "[t]he knowing use of false evidence by the state, or the failure to correct false evidence, may violate due process." *Towery v. Schriro*, 641 F.3d 300, 308 (9th Cir. 2010) (citing *Napue*, 360 U.S. at 269). But Agent Carr's testimony was not actually false at all. Defendant posed precise questions, and he got precise answers—there is no uniform requirement that every Vagos member commit violent or even criminal acts, and there are in fact people who view the Vagos as a motorcycle club instead of a criminal organization. The *Kane* materials cannot bear the weight defendant puts on them. In a vain attempt to demonstrate that Agent Carr's testimony was perjurious, he quotes—selectively, and misleadingly—from three different types of materials: (1) Agent Carr's statement of qualifications (ER 102-103); (2) an expert notice regarding Agent Carr signed by the prosecutors (ER 96-101); and (3) the transcript of an evidentiary

hearing about Agent Carr's qualifications to testify about the Vagos gang's organization and structure (GER 625-75).

The statement of qualifications is essentially a resume detailing Agent Carr's experience and in particular his work investigating motorcycle gangs. That document makes no representations about the use of violence. It does not even mention the Vagos, or initiation requirements for that or any other gang. (ER 102-03.) The expert notice, signed by the prosecutors in the *Kane* matter, sets forth areas of expected expert testimony. It is neither a statement of nor testimony by Agent Carr. Finally, the transcript from the evidentiary hearing does not include any statements regarding alleged acts of violence by the Vagos, because the court there had already limited or excluded such testimony.

As the excerpts above demonstrate and as the district court found, Agent Carr honestly answered defendant's general question about the gang's propensity for violence, noting that there was no *per se*, across-the-board requirement that members commit crimes or acts of violence on behalf of the gang. (ER 9 (noting that, given Agent Carr's knowledge of and experience with Vagos members, it would have been "untruthful"

for him to answer defense counsel's question "in any other way" than he did).) By the time defendant appreciated that his general question was overbroad and had missed the mark, the court had concluded that the entire line of inquiry was improper because it did not meaningfully relate to defendant's subjective-belief defense, and sustained objections to further testimony to that end. (GER 160.) Not only was there nothing to correct, but the court ruled that the "correction" defendant sought was inadmissible in any event.

Defendant maintains that, despite the fact that Agent Carr's statements were actually true, they were nonetheless sufficiently misleading to give rise to a *Napue* violation. (AOB 69.) First, as the district court held, Agent Carr's testimony was not misleading at all. (ER 9 (Agent "Carr's testimony was both truthful and not misleading.").) Second, to the extent the impression left by Agent Carr's testimony was misleading (it was not), that is nothing more than a result of the precision of defendant's initial questions and the fact that the trial court only later caught up to the irrelevance of the entire line of questioning.

Finally, this Court has reserved judgment on whether "accurate testimony could be delivered in a sufficiently misleading context to make the evidence false for *Napue* purposes." *Towery*, 641 F.3d at 309; *see also United States v. Renzi*, 690 F. App'x 487, 490 (9th Cir.), *cert. denied*, 138 S. Ct. 285 (2017). This Court need not resolve that question here, either—the testimony Agent Carr rendered was actually accurate and not misleading, and the district court found Agent Carr to be "credible and forthright." (ER 9.) Given the great deference afforded this credibility determination, there is "nothing to suggest" that either Agent Carr or the prosecutors in this case "knowingly sought to create a false impression."[14] *Renzi*, 690 F. App'x at 490 (denying *Napue* claim under the second and third prongs); *Jackson*, 513 F.3d at 1071-72 (noting that a *Napue* claim requires actual false testimony that the prosecution knew or should have known to be false).

[14] It bears repeating that the complained-of testimony was elicited *by the defense over government objection*; it was not knowingly elicited by the government to leave the jury with a mistaken impression. *Cf. Renzi*, 690 F. App'x at 490 (prosecutor elicited complained-of testimony).

3. The Purportedly Misleading Testimony Was Not Material

Defendant's *Napue* claim also fails because there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Jackson*, 513 F.3d at 1076 (emphasis and quotation marks omitted). Although this standard is different from the *Brady* materiality standard, the same rationale holds. Again, Agent Carr clearly accepted defendant's premise that there are "some criminals" in the Vagos "who have committed acts of violence," and that law enforcement viewed the gang as a "criminal organization." (GER 122.) Given that Agent Carr's expert testimony was irrelevant to defendant's subjective state of mind (not to mention inadmissible), this testimony from Agent Carr set the record sufficiently straight to render any arguable initial misimpression immaterial. This is particularly true given the fact that Kakish testified at length regarding his and defendant's knowledge of the CI's supposedly violent tendencies. Finally, the evidence against defendant was overwhelming—there is no reasonable likelihood the jury would have been swayed to accept defendant's lying-out-of-fear explanation in light of his repeated inculpatory admissions both during the sale and after his arrest.

D. Defendant's Cumulative Prejudice Argument Also Fails

In the event there are both *Napue* and *Brady* violations, the question whether those violations were material must be analyzed "collectively" using a staged inquiry. *Jackson*, 513 F.3d at 1076. When both types of errors are present this Court "first consider[s] the *Napue* violation[]" and "ask[s] whether there is any reasonable likelihood the false testimony could have affected the judgment of the jury." *Id.* (quotation marks and emphasis omitted). If so, the inquiry ends. If not, this court considers "the *Napue* and *Brady* violations collectively and ask[s] whether there is a reasonable probability that, but for" the violations, "the result of the proceeding would have been different." *Id.* (quotation marks and emphasis omitted).

Even if defendant's *Brady* and *Napue* arguments had any merit (they do not), he would still not be entitled to relief. Even assuming such errors arguendo, defendant's claim of prejudice would fail for all the same reasons identified above. Agent Carr's testimony was factually accurate and not misleading at all. Much of the evidence defendant sought to elicit was ultimately ruled inadmissible (a ruling defendant has not challenged on appeal). There was other testimony

and evidence supporting defendant's position regarding the violent nature of the Vagos. And finally, the evidence against defendant was overwhelming.

V

CONCLUSION

For the reasons set forth above, defendant's conviction should be affirmed.

DATED: June 26, 2018

Respectfully submitted,

NICOLA T. HANNA
United States Attorney

PATRICK R. FITZGERALD
Assistant United States Attorney
Chief, National Security Division

/s/ Khaldoun Shobaki

KHALDOUN SHOBAKI
GEORGE PENCE
Assistant United States Attorneys
National Security Division

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that it is unaware of any cases related to this appeal.

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the brief contains 13,993 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: June 26, 2018 */s/ Khaldoun Shobaki*

KHALDOUN SHOBAKI
Attorney for Plaintiff-Appellee
UNITED STATES OF AMERICA

9th Circuit Case Number(s) 17-50917

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