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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. FRANCIS SCHAEFFER COX, Defendant.	No. CR11-022-RJB RESPONSE TO GOVERNMENT'S RE-SENTENCING MEMORANDUM

Federal Defender Michael Filipovic and Assistant Federal Defender Ann Wagner, counsel for Francis Schaeffer Cox, respectfully submit this Response to the Government's Re-Sentencing Memorandum. The Defendant's Re-Sentencing Memorandum was filed on October 7, and a corrected version filed on October 11. Dkts. 740, 743. The government filed its Re-Sentencing Memorandum on October 21, which included a response to the defense memorandum. Dkt. 748. What follows is a response to specific points made in the government's memo along with support letters for Mr. Cox and additional materials for the Court's consideration (Exhibits 42–47).

I. Introduction and the Government's Reliance on "2-4-1"

In support of its argument that a 26-year prison term is necessary to reflect the seriousness of the offense, the government relies not on the basis upon which the Ninth Circuit upheld the conspiracy to murder conviction, but instead on the so-called "2-4-1" discussions, a theory which the government by the end of trial effectively abandoned as a basis for liability by characterizing it in closing as a "roundtable conversation" and a "debate," rather than an "agreement." Dkt. 646 at 87. But now it seeks to elevate this roundtable discussion and debate to the most dangerous and threatening part of this case, one that posed the greatest risk for harm to others. In considering the government's shift from the limited Stalinesque martial law theory on which the Ninth Circuit upheld the conviction, the Court must first determine whether that theory can even be considered as part of the sentencing analysis under the "nature and circumstances" of the offense of conviction under 18 U.S.C. § 3553(a), or whether it should only be considered generally in assessing Mr. Cox's history and characteristics under section 3553(a). It should not be the driving force in determining the seriousness of the offense and what an appropriate sentence should be where the conviction is not based on that government theory and where the government itself has characterized that theory as merely a roundtable discussion or debate.

II. Guideline Implications of the Government's Reliance on 2-4-1

The government characterizes the defense's (and the Ninth Circuit's) focus on the Stalinesque martial law theory as "vacuous," then appears to abandon that theory for sentencing and instead puts its sentencing focus on 2-4-1. This approach has significant implications for the guideline calculations—it effectively removes the 6-level official victim adjustment and reduces Mr. Cox's guideline offense level from 41 to 35. With a criminal history category II, his range would be 188 to 235 months. And factoring in the overstated criminal history reduction suggested by the Court at the first

sentencing, the range would be further reduced to 168 to 210 months, from the Life range which the Court employed as the starting point at the first sentencing. Dkt. 605 at 19.[1]

As argued in our re-sentencing memorandum, the 6-level victim adjustment under USSG § 3A1.2(b) requires that the victim be a federal government officer or employee **and** that the offense of conviction be motivated by such status. Dkt. 743 at 46–48. The PSR identified the three DHS employees whose names were found buried in a legal pad and the name of a US marshal in Anderson's field manual as the "victims" justifying this adjustment. We challenged that adjustment because the contingency of martial law was not motivated by the federal status of these three DHS employees; rather, they would be targeted if and only if they were carrying out Stalinesque martial law. (The US marshal was not the subject of any agreement, because Mr. Anderson came across his name independently, never told Cox about it, and never added it to the database. *See* Dkt. 629 at 171, 190–91.) Based on the government's shift to the 2-4-1 theory—a theory not recognized by the Ninth Circuit as supporting this conviction—Mr. Cox also objects to this adjustment because there are no federal officers or employees who would be the subject of 2-4-1. The government argues that 2-4-1 could "possibly" be triggered by the arrest of Cox, Barney, Vernon, or family members or the removal of his son by OCS; and that Cox's arrest on his misdemeanor failure to appear in state court arrest warrant was "imminent." Dkt. 748 at 4, 19, 28. As set forth below, the government exaggerates the evidence supporting these claims, but taking the claim at face value requires the Court to find that there is no federal officer or employee who is a victim under this theory. The three DHS individuals and the US marshal identified in the revised PSR do not fall within the 2-4-

[1] The Court stated that criminal history category II "arguably overstates his criminal history," but made no formal finding because at offense level 45 Mr. Cox was in a Life range in both categories I and II. *Id.*

1 scenario as set forth by government. If Cox were arrested on the misdemeanor warrant, that arrest would be by local officials, not federal agents. OCS is an Alaska state agency and an employee of that agency would not qualify for purposes of this adjustment. Moreover, a generalized possibility that some unidentified or unknown federal agent might participate in such an arrest and trigger 2-4-1 against some other unidentified federal agents would not be sufficient, because the guideline only "applies when specified individuals are victims of the offense," and "does not apply when the only victim is an organization, agency, or the government." USSG § 31.2 n.1. Thus the government's reliance on 2-4-1 as opposed to the database is an additional basis for rejecting that 6-level adjustment.

III. The Government's New Assertions About 2-4-1 Are Belied by the Record, Its Own Statements, and the Evidence.

If the Court considers 2-4-1 as a section 3553(a) factor under either the nature or circumstances of the offense or as a history and characteristic of the defendant, a close review of the facts is important. The government embellishes, overstates, and makes incorrect factual assertions as the foundation for its core claim relating to dangerousness. It does so by making broad factual assertions without citation to the underlying factual record, and when it does cite to the record it cites its own Ninth Circuit brief, which in large part suffers from that same flaw. In order to properly assess how much danger, if any, 2-4-1 posed, and thus how much sentencing weight it should be given, the Court should begin its analysis of the facts with the government's assessment of 2-4-1 as recorded in email traffic before the arrests of the defendants and statements it made in closing argument referring to 2-4-1 as no more than a "roundtable discussion" and "debate." In closing, the government made no effort to argue that 2-4-1 amounted to an agreement or plan at all, much less a conspiracy to murder federal employees, but now it argues that 2-4-1 was a firm plan to be implemented upon the

arrest of Mr. Cox or others. Dkt. 748 at 4, 13, 22. The government's trial assessment was much closer to the truth.

The government first claims that there exist "recorded statements made by Cox establishing **his intent to murder** if one of his men were captured by law enforcement, he was taken into custody or any member of his family taken into custody." *Id.* at 3. The record does not support this claim. It goes on to argue, again without citation to the record,

> In the brief, the defense fails to mention the clear, present and real possibility that Cox was clear on 2-4-1. It would occur upon his arrest, an arrest of a militia member, or of a member of his family. [. . .] The reality was and is Cox's arrest was imminent, and if he was arrested his loyal lieutenant Barney, Sergeant Vernon and possibly others were ready to take up his cause—numbers of militia members were irrelevant—all it would have taken was one of these men to implement Cox's plan upon his arrest.

Id. at 4. As the transcripts recording the 2-4-1 discussions make clear, the 2-4-1 discussion never amounted to an agreement at all, *see generally* Dkt. 743-2 at 13–57 (Ex. 2), except perhaps the "definitive plan for Monday" (the day Cox intended not to appear for a court hearing): "try[ing] to lay low Monday and avoid—if they do—if they're coming out with bench warrant, avoid it and try to hit them with paperwork every way I can." *Id.* at 49–50 (Ex. 2 at 37–38). In the event that Cox were arrested or killed, he suggested on February 12, 2011, "the thing that you probably could get everybody to go in on"—i.e., agree to—"is just raise hell. . . . by having—picketing and just like—well, not quite a riot, but almost, you know? And on the radio and on TV and—sit-ins and just every kind of, you know, peaceful protest and just get everybody's panties in a wad . . . ." *Id.* at 50–51 (Ex. 2 at 38–39).

After hearing these conversations, on February 13, Mr. Skrocki wrote to his supervisor and case agent that "Cox is full of it . . . . I have to say, he's a legend in his own mind." Dkt. 743-3 at 48 (Ex. 16 at 2). Far from worrying that the trigger for 2-4-1

was "imminent," as the government is now asserting, Mr. Skrocki told his team that Cox's plan was

> to avoid L/E, and if they have a warrant, he wants to respond back with more paperwork. IF, he gets arrested "or killed," he said "start training for 2-4-1," in the meantime, we "raise hell by rioting, sit ins, radio, tv and peaceful protests"—*We should let him do this. It will buy us time on the weapons investigation and will de-fuse his followers . . . .*

Id. (emphasis added). Mr. Skrocki continued, "I've looked at the statutes again, and nothing fits" and ultimately concluded, "I mean one guy's wife called him at the end of the meeting and gave him the, '*do you know what time it is' thing* . . . and he beat it. It was 1 am. I don't know if this sums this group up, but it's not the stuff of revolutionaries." *Id.* at 48, 49 (Ex. 16 at 2, 3)

In addition to not rising to the level of an agreement, Mr. Cox was clear that no violence should ensue from his arrest or that of Vernon, Barney, or Olson. For sentencing, Mr. Cox's statements on 2-4-1 are mitigating—he resisted Olson's entreaties that they should pursue 2-4-1 if Cox were arrested. He showed more than reluctance, he showed opposition to violence as a response to his arrest. This is supported by the recordings.

The 2-4-1 discussion continued after February 12, often injected into the conversation by Olson the informant who, like Fulton, kept pressing Cox to come up with a plan. *See* Dkt. 743-1 at 30–32 (discussions on February 15 and 19). On at least two occasions Olson attempted to revisit Cox's view, as expressed on February 12, that his arrest or death should only be met with "raising hell," short of violence, Dkt. 743-2 at 50–51 (Ex. 2 at 38–39), and both times Cox remained firm that his arrest was not a reason to start 2-4-1.

On February 14, the topic was raised by Olson:

> MR. OLSON: What – do – should – should we come up with a game plan of what happens if they – if they get you and they capture you and for some reason they all of the sudden won't release you?

Ex. 42, Gov't Trial Ex. 19T, at 2–3.

Cox, consistent with his comments two days earlier, stated: "Just raise hell. . . . Just TV and newspapers and – and Gandhi type, just, passive-aggressive shenanigans out the wazoo. Just be creative and aggressive. . . . Just as much as you can without being – without turning bloody." *Id.* Olson would not let it go, and asks, "Yeah, yeah. At what point does it get bloody?," to which Cox responds "I don't know, man," followed by continued general discussions. *Id.*

Then on February 19, the day that Cox and his family were kicked out of the Vernons' home and moved to Coleman Barney's house, Olson diverted a generalized discussion about "war" vs a "fight" to 2-4-1 with:

> MR. OLSON: -- what happens when -- when they start grabbing us one-by-one? You know, if they were to swoop in. Say -- say -- say they were to swoop in, take Lonnie, take you guys, charge you with -- with all kinds of federal crimes, you know, you're looking at crimes of 20 years.
> [***]
> And -- and I'm -- I'm left out here, you know, Ken [Thesing] and I, and – and a few of these other guys are left out here, and -- and we know our number's next. You know, it'll just be a matter of time before they -- they -- they come in. Then -- then what – what initiates the -- the 241?

Dkt. 743-3 at 92–93 (Ex. 20 at 22–23). Cox again refused to say that 2-4-1 should begin with any of their arrests, and instead gave a vague response about only being valid when the option of "allowing that scale to continue slowly tipping in our favor is totally out of the question and not doable." *Id.*

The government's foundation for its request for a 26-year sentence is its claim that the trial evidence made it "**clear** that Cox stated that in the event of his, or a militia members capture that the '2-4-1' plan would be put into effect [and] in the event he, or a member of his family was arrested [emphasizing the existence of the arrest warrant

for Cox], that arrest would also trigger a violent response." Dkt. 748 at 13. The only "evidentiary" or record support it cites for this claim is its Ninth Circuit appellate brief. One has to peel through that characterization of the facts, to the excerpts of record it cites, and then to the underlying trial documents to determine whether there is anything beyond rhetoric to support its claim. By citing only to its appellate brief the government distorts the meaning of the events it describes in that appellate brief.

Unpeeling this onion reveals that the basis for this foundational fact supporting its sentencing claim is the generalized "academic" discussion when 2-4-1 was first raised on February 12. These discussions are found in government trial exhibit 15T and in Exhibit 2 attached to Defendant's Re-sentencing Memorandum. *See* Dkt. 743-2 at 13. It ignores the more specific discussions and Cox's objection to 2-4-1 as an appropriate response to his arrest as set forth above. It also ignores the statement by Cox made on February 12— "[n]ow keep in mind we are all just speculating now," Dkt. 743-2 at 32 (Ex. 2 at 20)—and its own view of these statements in the email the following day to the US Attorney describing this discussion as generally "kicking around ideas." Dkt. 743-3 at 47 (Ex. 16 at 1).

Mr. Cox did not endorse 2-4-1 as a response to arrests or incarceration, as argued by the government. The only support he expressed for 2-4-1 was in the context of a "war" and if his children were taken away from him during the course of such a war. In discussing an actual war, something that Cox expressed a desire to avoid, he began by observing: "We might lose our family. Some of our wives, children might get killed, so, war." Dkt. 743-3 at 109 (Ex. 20 at 39). Then this theoretical discussion turned to what the response should be if their children were taken away during such a war. It is here that Mr. Cox endorsed a 2-4-1 response. *Id.* at 109–10 (Ex. 20 at 39–40). With knowledge of Cox's previous concern about losing his son to OCS, Olson then pressed

this hypothetical—by this point far removed from reality—and shifted it from the discussion of war to arrests and OCS:

> Mr. OLSON: So -- so -- so -- so, okay, now – now I get back to this, because I want to have this stuff clear in my head. So -- so -- so, if they -- if they come – you know, say -- say tonight, just throwing this out there, they -- they show up at your house because somehow they tracked you here with their satellites or whatever, I mean, this sounds crazy but, and -- and they come in, they -- they arrest you, they take Marty [sic] for aiding and abetting, and they send your kids off to OCS, then -- then is it an order to initiate 241? You know, what -- what -- what if they come and -- and --
> MR. COX: Yeah.
> MR. OLSON: -- take you and your wife --
> MR. COX: I think so.

Id. at 111 (Ex. 20 at 41). Olson then emphasized: "and your kids are gone, too," at which point Cox says "That's an order. When the kids – when they come for the kids—" *Id.* at 111–12 (Ex. 20 at 41–42).

This is a fantastical scenario. The only arrest warrant was the state court misdemeanor warrant for Cox, there were no warrants for Vernon, Barney, and Marti Cox, and there were no issues with OCS or even a suggestion that OCS might take Cox's children from him in February 2011.

The government's reliance on these generalized 2-4-1 discussions is similar to what was rejected by the district court in the *Hutaree* militia case:

> Stone (leader of the group) engages in a conversation with Meeks, Sickles, Piatek, Joshua Stone, and Clough about killing police officers. Stone again brings up the idea of murdering an officer and attacking the funeral procession. Nothing resembling an agreement to spark an uprising with the Federal Government is reached during this conversation. Defendants toss out ideas of ways in which to kill police that are often incredible; more importantly, they never come to a consensus or agreement on ways in which to oppose federal agents by force. Stone even states, "there's a hundred and one scenarios you can use." This back and forth banter, like the other anti-government speech and statements evincing a desire – even a goal – to kill police, is simply insufficient to

> sustain the seditious conspiracy charge; it requires *an agreement and plan of action, not mere advocacy* or hateful speech.

Order of Acquittal; *United States v. Stone*, No. CR10-20123 (E.D. Mich. March 27, 2012), Dkt. 767 at 17.

When it came time to sentence David Stone, the leader of this conspiracy, for possession of a machine gun, which included relevant conduct concerning two other firearms, the Court sentenced him to 24 months and 2 days, a term which he had already served. Ex. 43 at 16 (David Stone Sentencing Transcript). The government properly argued that the weapons were inherently dangerous in the context of an "anti-government organization that engaged in training with these and other similar weapons, ... and Mr. Stone was the leader," and as the leader specifically talked about "the desire and intent to kill law enforcement officers and their families," and that the weapons were "frequently carried in cars in inherently dangerous situations." *Id.* at 9.

Like the *Hutaree* case, the 2-4-1 discussions here never rose to the level of an agreement, much less a plan. And like *Hutaree*, the possession of illegal weapons, along with other weapons, along with such discussions, is concerning and can fairly be considered in sentencing. But as in *Hutaree*, it is important for the Court to distinguish between crimes involving specific plans and agreements to kill and generalized discussions like 2-4-1.

If the government is abandoning its candid admission at trial that 2-4-1 was a "roundtable conversation" and a "debate," rather than ever characterizing it as an "agreement," Dkt. 646 at 87, it should at least provide the parties and the Court with specific record references or other evidence which would support this change of position. Its closing argument characterization of the conversations as a discussion, rather than an agreement, otherwise appears to be accurate. *See* Dkt. 743-2 at 31–32, 20, 22, 28 (Ex. 2 at 19–20, 8, 10, 16) (Cox "want[ed] to get you guys' thoughts" on the subject, reminded Olson, "Now keep in mind we are all just speculating now," and

asked, "anyway, what are your guys' thoughts on 241? I really wanted your feedback."; when Barney asked him for clarification on what would trigger 241, he answered, "I don't know. That's what we've got to talk about.").[2]

Backtracking now on 2-4-1 distracts from the "nature and circumstances" of the "Stalinesque martial law" conspiracy on which the Ninth Circuit based its conspiracy liability, and avoids much of the defense argument concerning the nature of this offense as upheld by the Ninth Circuit. While the government now characterizes defense reliance on that theory as "vacuous," *see* Dkt. 748 at 4 ("[The defense brief] spends a significant amount of time on the 'Stalinesque' takeover of the United States and when that may or not happen. That argument shifts the needle of the issue to the vacuous."), it remains the only legal basis supporting the count 12 conspiracy conviction.

IV. Mr. Cox Should Not Be Held Responsible for the Actions of the Vernons with Respect to Their Separate Conspiracy to Murder a Federal Judge and an IRS Employee, and His Sentence Should Not Be Aggravated Based on That Separate Conspiracy.

In its original sentencing memorandum, the government observed that Lonnie Vernon "was in many ways on his own 'track' with respect to his own actions." Dkt. 550 at 61. But now it tries to more closely link Mr. Cox to Lonnie Vernon by arguing that if Cox was arrested Vernon was "ready to take up his cause," that Cox's attempted weapons purchase on March 10 was in furtherance of arming Vernon, and that even if Cox was not one who would ultimately use violence, "he was perfectly happy to have others" around he could instigate and that "Lonnie Vernon [was] a prime example." Dkt. 748 at 4, 13, 28.

[2] In addition to not constituting any kind of an agreement to use violence, as opposed to engage in First Amendment-protected activity, the discussions themselves never contemplated, even as a hypothetical, *murdering* anyone if one of the militia members were arrested; to the contrary, the hypothetical discussion involved *arresting* two people if one militia member was arrested, and killing two people if one militia member was killed. Dkt. 743-2 at 28 (Ex. 2 at 16).

In fact, the separate conspiracy by the Vernons to murder stands in sharp contrast to the conspiracy in this case. As Mr. Vernon acknowledged in his plea agreement, the Vernons had developed a specific plan and agreement to murder Judge Beistline and IRS Revenue Officer Janice Stowell. He also admitted to having specific plans to carry out that murder which he shared with J.R. Olson, the government informant, in the days leading to his arrest. *United States v. Vernon*, No. CR11-028-RJB, Dkt. 118 at 10–11. When arrested he was conducting a weapons purchase with J.R. Olson and Fulton, separate and apart from a later weapons purchase by Cox and Barney with Olson through Fulton. When he was arrested, Mr. Vernon was found to possess a map with Post It notes of Judge Beistline's family's addresses, and the routes to those addresses highlighted, along with numerous letters to family and friends explaining that if they received the letter the Vernons would no longer be living. *Id.* at 13.

The sentencing memorandum filed by Lonnie Vernon makes no mention of Schaeffer Cox, much less any argument that Cox influenced Lonnie Vernon in his decision making related to Judge Beistline and IRS Revenue Officer Stowell.

At Mr. Cox's first sentencing, the government pressed an argument that Mr. Vernon was a loyal foot soldier of Mr. Cox and the Court commented that Vernon "was also a follower of Mr. Cox, and I can't help but wonder whether – how much Mr. Cox's influence over Mr. Vernon may have lent some impetus to Mr. Vernon's desire to kill a federal judge." Dkt. 605 at 61.

The government was correct that Mr. Vernon was on his own track. Mr. Cox in fact attempted to dissuade Mr. Vernon from using violence in relation to his separate issues concerning the foreclosure of his house, and he distanced himself from the Vernons in the three weeks leading up to their arrests. It is during this time that the Vernons' planning and actions relating to their separate conspiracy took hold. This is

thoroughly documented in numerous recorded conversations between J.R. Olson and the Vernons, conversations and meetings in which Mr. Cox plays no part. These were not offered or played at the trial because they were not relevant to this case.

In earlier conversations with Olson and Lonnie Vernon, concerning the foreclosure proceedings involving the Vernons' home, it was Olson who fed Vernon's violent comments while Mr. Cox tried to dissuade or change the subject:

> MR. COX: I really hope you guys win, with paper.
> MR. VERNON: (inaudible) up in smoke (inaudible).
> MR. OLSON: Well, the problem is, is -- is the judge isn't the one showing up out here to -- to -- you know (inaudible) boost a guy out.
> MR. VERNON: There's a headhunt for him that's (inaudible).
> MR. OLSON: Yeah.
> MR. VERNON: He gets to go hide (inaudible) every day of his life, he'll be looking for that silencer that hits him in the back of the head.
> MR. OLSON: Yeah.
> MR. VERNON: That's right (inaudible) make your bed, you sleep in it.
> MR. OLSON: Well -- well, then it's war declared -- and, you know (inaudible).
> MR. VERNON: It is now.
> MR.OLSON: It is now, basically, with that letter right there (inaudible). The -- the -- the letter they just got today, yeah.
> MR. VERNON: Declaration of war.
> MR. OLSON: Yeah.
> MS. VERNON: Yep.
> MR. VERNON: And uh.
> MR. COX: What about you? They bugging you on anything lately?

Ex. 44 at 1–2 (Transcript_0007087–93).

Then after further discussion about the paperwork and Olson's taxes, Olson escalates the conversation by bringing up the Randy Weaver case and Cox steered the conversation toward Weaver's effort to rebuild his life and his present circumstances, rather than the past violent details of the standoff with the FBI:

> MR. OLSON: Yeah, (inaudible), yeah. No, no. I mean, you know, it's -- it's -- it's war.
> MR. VERNON: That's what it's going to be, is war.

MR. OLSON: Yeah.
MR. VERNON: And, uh, the last thing I'm (inaudible) it pisses me more to see my little dog shot than anything.
MR. OLSON: Yeah. Oh, and that'd be the first thing they'd do (inaudible). Them -- them dirty buggers, they'd come beating through your door and they'd -- they'd take the dogs out right away.
MR. VERNON: Mm-hmm. That's when they get taken out too.
MR. OLSON: Look at -- look at Randy Weaver (phonetic). They knocked his dog out -- the first thing they shot, then they -- then they went for the kids (inaudible).
MR. VERNON: -- for his dog first and the kids.
MR. OLSON: Yeah.
MR. VERNON: That was it.
MR. OLSON: Yeah, I know it. It's sickening. He's doing good though. My mom talks to him quite a bit (inaudible), yeah -- Randy Weaver, yeah.
MR. COX: Where is he now?
MR. OLSON: He's in Kalispell,
MR. VERNON: He went to Kalispell?
MR. OLSON: Yeah, he's living in Kalispell.
MR. VERNON: From Nebraska to Kalispell.
MR. OLSON: Yeah, yeah. They went back there for about three or four years, then they moved out to Kalispell. The daughters got married and --
MR. COX: Lost all his family, man. What's he doing?
MR. OLSON: He -- he -- they -- they live out on a homestead kind of thing, you know, that's 160 acres. They bought 160 acres. They got, you know, the -- which doesn't mean squat, but they got a couple million bucks each, you know.

Id. at 6–7.

This was consistent with Cox's effort to steer both himself and Vernon away from using a violent response to the loss of their homes or property.

Mr. Vernon was involved in sovereign citizen matters and held anti-government beliefs well before he met Mr. Cox. His dispute with the IRS that ended up before Judge Beistline was not part of the conspiracy with which Mr. Cox and Mr. Barney were charged. Cox had a major falling out with Mr. Vernon on February 19, three weeks before the arrests were made on March 10. At that February 19 meeting, Lonnie Vernon went on a long tirade against Cox about being disrespected by Aaron Bennett at

the militia conference earlier that month in Anchorage, Cox's failure to make concrete plans, his irritation with Cox and his family, and Cox's lack of support. Cox unsuccessfully tried to calm Vernon down, but ultimately Vernon kicked him and his family out of his house, saying:

> Make a goddamn plan, which you didn't even plan. You didn't even plan to come out to my house. You didn't even bring a goddamn to-go bag or nothing; you have nothing ready to come to my house. And all that I hear from fucking two days afterward, whine, whine, whine because we don't have this and we don't have that. I'm sorry, but I'm not putting up with whiny fucking people. I hate whiny fucking people. Get your shit together.

Ex. 45 (Transcript_0008478–79) at 1.

And when Cox attempted to respond, Vernon continued the attack and talked about the legal paperwork he and his wife were working on:

> You sound just like that kid. Your wife's whining like a kid, too. I'm tired of that shit. My wife has got so much fucking paperwork to do right now, it's going to take eight days minimum to get our stuff in, and I'm not listening to one second of that no more. We've got to get this shit together.

Id. at 1–2.

That day Cox and his family moved their belongings out of the Vernons' home. Olson maintained contact with each of the codefendants in the Cox case, but had Cox and Barney on one track, and the Vernons on a separate track. Cox and Barney ordered one set of weapons from Fulton through Olson, while Lonnie Vernon placed a separate order, also from Fulton through Olson; each set of weapons was delivered at a separate site and at a separate time.

This Court's earlier musing about how much, if any, Cox's actions and words may have influenced Mr. Vernon and lent "some impetus" to his separate plan, is a legitimate matter to consider. However, reaching a conclusion that Cox influenced Mr. Vernon on the specific conspiracy to kill a federal judge is not supported by the

record or the evidence before the Court, and there is other evidence which would lead one to the opposite conclusion. The defense requests that this separate conspiracy be kept separate and that this unanswered question not be used as a factor in aggravation.

V. In the Context of Cox's Personality and Legal Case, the Web Postings Cited by the Government Are Not Aggravating, but Mitigating.

The government appends as its only exhibits to its sentencing memo various web postings attributed to Cox. Even if these writings are all solely attributable to Cox as opposed to supporters, they show that Cox has shifted his focus from militia activity and preparation for extreme scenarios of societal collapse to working *within* the legal system on his federal case, petitions to the executive branch for redress of grievances, and state and federal FOIA requests. This new focus is both protected by the First Amendment and ultimately, a prosocial effort to obtain relief through existing government institutions.

In many posts he uses his skill at translating legal writing to popular prose by summarizing the legal arguments in his case, *see, e.g.*, the writ of *audita querela*, Dkt. 748-3 at 2; his petition for certiorari, Dkt. 748-12, Dkt. 748-24; and the Ninth Circuit briefs, Dkt. 748-23. (Like a number of people who are actually trained in the legal profession, he does have some difficulty understanding and explaining the Supreme Court's "categorical approach" for defining crimes of violence. *See* Dkt. 748-13 at 3.) And he (or his supporters) raise money for FOIA litigation in which Cox does not have appointed counsel. *See, e.g.*, Dkt. 748-8 at 2. The government's exhibits mostly omit the public comments to his postings, but one example does show how Mr. Cox's internet presence exposes him to cutting criticism from the public. *See, e.g.*, Dkt. 748-49 at 12. In some postings, Mr. Cox expresses dissatisfaction with turns his case has taken. For example, he takes issue with his misdiagnosis with schizophrenia in his original sentencing proceeding and the way it ended up distorting his lived

experience. *See* Dkt. 748-1. But both psychologists at the BOP and a more thorough evaluation by Dr. Cunningham have now shown that he was right to be dissatisfied with the diagnosis. And although the government may be unhappy about certain claims of innocence and overreach by the prosecution in this case, it is important to remember that Mr. Cox was vindicated in part by the Ninth Circuit's vacation of his solicitation conviction: he is innocent of that offense, for reasons of self-defense in addition to federal jurisdiction.

Ultimately, Mr. Cox's internet postings are consistent with Dr. Cunningham's descriptions of his personality. He seeks attention and exaggerates the facts. But these aspects of Mr. Cox's history and characteristics do not counsel in favor of a higher sentence, but rather a quicker integration back into the real world where one cannot attract a following simply by portraying oneself as a political prisoner.

VI. Letters from Family Members and Close Acquaintances

In addition to this response to the government's re-sentencing memorandum, the Court is asked to consider the attached letters from family members and close acquaintances, including his former attorney Robert John who can speak to his interactions with Mr. Cox concerning his dispute with OCS over Cox's son Seth, Cox's present views about the sovereign citizen movement, and the toll that placement at a CMU has taken on Mr. Cox. Mr. Cox's mother Jennifer was interviewed by Dr. Cunningham and much of what she has to share about her son is contained in that report. Her letter focuses on the personal impact the CMU placement has had on her son and the family as a whole. The photographs are submitted to demonstrate that

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Mr. Cox has a close and active family that will continue to support him upon his release from prison.

DATED this 28th day of October 2019.

Respectfully submitted,

s/ *Michael Filipovic*
Federal Public Defender

s/ *Ann Wagner*
Assistant Federal Public Defender

Attorneys for Francis Schaeffer Cox

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I electronically filed the foregoing response and attachments with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all parties of record. I further certify I will provide a copy to Francis Schaeffer Cox at FDC SeaTac.

s/ *Suzie Strait*
Paralegal