No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

GREGORY BURLESON, *Petitioner*,

v.

UNITED STATES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a citizen entitled to act in self-defense or defense of others against law enforcement officers if he has a *reasonable belief* that there is an imminent or immediate use of excessive force by those officers and that such action is necessary to *prevent* injury from such excessive force, or is he required to wait until the excessive force and resulting injury has already occurred? This is an important and recurring issue of federal law that has not been, but should be, settled by this Court.
2. Can a confession or other incriminating post-offense statements alone suffice to prove guilt beyond a reasonable doubt, or is substantial independent corroborating evidence of each element of the alleged offense required to prevent convictions based on false confessions, as this Court ruled in *Opper v. United States,* 348 U.S. 84 (1954) and a series of other Supreme Court precedents? This is an instance in which the Ninth Circuit ruling conflicts with established Supreme Court precedents.
3. Can rulings that are unexplained, and/or are supported by citations to evidence that is contrary to the record and do not support the conclusions, be upheld on appeal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

United States Constitution

Statutes and Rules

Other Authorities

I. PRAYER FOR RELIEF

Mr. Gregory Burleson respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision denying his direct criminal appeal of a conviction and sentence. The basis of this petition is that the Ninth Circuit's denial of Mr. Burleson's appeal is--

1. Based on an erroneous and unreasonable standard of the right of a citizen to act in self-defense or defense of others against law enforcement officers in the use of excessive or unlawful force. This is an important and recurring issue of federal law that has not been, but should be, settled by this Court.

2. In conflict with controlling Supreme Court precedent as to whether a confession or other incriminating post-offense statements alone suffice to prove guilt beyond a reasonable doubt, absent substantial independent corroborating evidence of each element of the alleged offense required to prevent convictions based on false confessions, as this Court ruled in *Opper v. United States,* 348 U.S. 84 (1954) and a series of other Supreme Court precedents.

3. Is as inexplicable as it is unexplained and is supported by citations to evidence that is contrary to the record and do not support the conclusions, calling for an exercise of this Court's supervisory powers.

II. OPINION BELOW

A three-judge panel of the Ninth Circuit denied Mr. Burleson's direct appeal in an Amended Memorandum Decision that was final and

unpublished. *United States v. Burleson,* No. 17-10319 (9th Cir. August 16, 2023), *Appendix A.*

III. JURISDICTION

On August 16, 2023, a three-judge panel of the Court of Appeals for the Ninth Circuit issued an Amended Memorandum Decision that was final and unpublished. *Appendix A.* This is the final judgment for which a writ of certiorari is sought.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime…nor be deprived of life, liberty, or property, without due process of law….

V. STATEMENT OF THE CASE

A. JURISDICTION OF COURTS OF FIRST INSTANCE

The district court had jurisdiction pursuant to 18 U.S.C. §§ 2, 111 (a) and (b), 115(a), 1114, 1951 (a), 1952(a)(2) and 924(c). The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 3742.

B. FACTS MATERIAL TO THE QUESTION PRESENTED

Cliven Bundy ("Cliven")[1] is the elderly patriarch of a large extended family of

[1] Because three of Cliven's grown sons, Ammon, David and Ryan, were co-defendants of Cliven, they will be referred to by their first names herein.

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cattle ranchers in rural Nevada, where they have lived and grazed their cattle since the 1940s. Cliven believes that the federal government (and hence the Bureau of Land Management ("BLM")) has no authority over public lands in Nevada, which he believes belong to the state. Accordingly, while Cliven often grazes his cattle on public land, he has not paid federal grazing fees since the early 1990s. The BLM sued Cliven several times over this issue and obtained various court orders prohibiting Cliven from grazing his cattle on BLM land, which Cliven disregarded.

In 2013 BLM obtained a court order authorizing it to seize any "trespassing" cattle and sell them at auction to pay past grazing fees.

Cliven said that he would "do whatever it takes" with help from his neighbors, friends, family, and supporters if the BLM tried to enforce that order. The Bundys began a social media campaign to encourage people to travel to Bunkerville to resist the BLM's efforts to take his cattle, and hundreds of supporters, many of them armed, arrived from around the country to support them.

One important factual error in the panel's decision must be pointed out. The panel stated that "[Mr.] Burleson was among [the] supporters" that arrived to "prevent BLM from carrying out the court order" to take his cattle. In fact, there was ***no*** evidence presented at trial that Mr. Burleson ever saw those particular social media posts, and the sole evidence in the new trial proceedings was that Mr. Burleson did not know that a court order was involved and was not motivated to go to Nevada because of the cattle roundup. The evidence was also clear that Mr. Burleson did not know any member of the Bundy family or any of

its supporters. The evidence is that he went to Nevada to support the Bundys because he saw and heard the following:

1. A viral online video of Margaret Houston, an elderly cancer patient and mother of 11, being picked up and slammed to the ground by government agents during a protest of the BLM project.

2. A viral online video of Dave Bundy being arrested for taking photographs by the side of the road and being physically abused by agents rubbing his face in the gravel.

3. A viral online video of Ammon Bundy being assaulted by a police dog and tasered three times during a protest.

4. An online photo of a small patch of desert that BLM set up far from the cattle operation and designated as the sole place for public protest.

5. YouTube videos stating that government agents had surrounded the Bundy home and used surveillance cameras on their house. (Which the government denied during Mr. Burleson's trial but during the second trial produced documents showing it was true).

6. That government agents had deployed snipers against the Bundy family and/or their home. (Which the government also denied but which turned out to be true, at the Bundy home, the Dave Bundy arrest, and at the Standoff).

7. That Nevada Governor Sandoval had condemned BLM for violating the constitutional rights of the Bundy family and supporters and for engaging in misconduct and creating an atmosphere of intimidation.[2]

8. That the government agents were antagonizing and provoking the Bundy family in various ways, including the above.

Believing the Bundys to be a family of peaceful ranchers who were attempting a peaceful solution by asking the Sheriff to help them, Mr. Burleson was motivated to go to Nevada *not* to retrieve a stranger's cows, but to help what he saw as victims of government oppression, and the government presented no evidence to the contrary. In fact, before he went to Nevada, Mr. Burleson posted his reason for going on Facebook, stating "I Stand With CT Gun Owners video: MUST WATCH! Bundy Ranch Protesters Attacked, Tazed by Feds."

Mr. Burleson was not involved in any of the events leading up to what came to be called the "Standoff" between government agents and a couple of hundred protesters. He arrived at the desert wash as the Standoff was already under way and stayed there for about 90 minutes. He told a police officer on arrival that he "was just there to support those at the Bundy ranch." What Mr. Burleson knew at that time is crucial to this case and this Petition:

(a) Mr. Burleson arrived at the wash having seen extensive video and social media evidence of what he and many, many others saw as excessive force and violations of law by BLM agents, including beating and tasering protesters,

[2] Many other prominent politicians, including several United States Senators, also condemned the BLM's conduct.

surrounding the family's home, and threatening them with snipers, among other aggressive and provocative actions.

(b) The moment Mr. Burleson arrived a hysterical woman shouted that the agents were pointing their weapons at unarmed civilian protesters.

(c) He saw what appeared to him and to other trial witnesses to be snipers on the mesa above him and in the wash behind the agents at ground level.

(d) He went down into the wash where he personally saw the agents (dressed in battle gear with body armor and assault rifles in what was supposed to be an operation to round up cattle) pointing their weapons at a crowd of unarmed protesters—mostly women and children--and heard them use a bullhorn to repeatedly *threaten to use lethal or deadly force against them if they did not back off.*

Testimony from a government witness, from several defense witnesses, and video recordings from a Fox News reporter and a local news reporter all confirmed the agents' threats to use "lethal" and "deadly" force to fire into the crowd of mostly unarmed men, women and children protesting a government program that the Governor of Nevada and many other public officials had condemned. One reporter was even filmed repeating the agents' bullhorn warnings of "lethal" or "deadly" force and repeatedly shouting to the protesters to "get the children out of there!"

Although the situation was tense, and a minority of protesters also had (legal) guns, which frightened some of the agents as much as the agents' guns frightened the protesters, no shots were fired by either side, the agents were ultimately

ordered by higher authorities to withdraw, and nobody was injured.

Long after the Standoff, the FBI created a fake media company purporting to create a documentary in which the protesters were the heroes who made the oppressive government forces back down. Mr. Burleson, an alcoholic, was interviewed on camera by the agents while they served him hard liquor and encouraged him to tell the story of his heroic role in the Standoff.[3]

Mr. Burleson also called an FBI agent with whom he had cooperated as an informant in the investigation of the murder of an acquaintance of his.

In both the fake movie and the call with the FBI agent, Mr. Burleson claimed to have taken an active role in the Standoff, pointing his gun at agents, threatening to shoot them if they fired on the crowd of protesters first, and expressing violent rage and a desire for revenge at the agents for the abuses he had seen online. His unhinged boasts and rants, fueled by alcohol and what he saw online, were shocking and extreme; they need not be repeated here as they were summarized in the Ninth Circuit's ruling that is the subject of this Petition. At the same time, in both interviews he repeated that his reason for going to Nevada was to protect the Bundys and their supporters.

Crucially, the Standoff was photographed and videotaped literally thousands—if not tens of thousands--of times, by the agents on the ground and flying surveillance aircraft and drones overhead, by various news media on the ground, and by

[3] As a result of the public and political outcry over these agents posing as journalists in a criminal investigation, and a state criminal prosecution of a federal agent posing as a private investigator working for a journalist, DOJ policies were changed to make it much more difficult for this to happen in the future.

hundreds of cell phone cameras, all augmented by the testimony of numerous government witnesses, mostly BLM or other law enforcement agents. ***Of all the things that Mr. Burleson boasted about doing or wanting to do, not a single one was corroborated by the video, photographic or testimonial evidence at trial.*** This is crucial to the sufficiency of the evidence under the *corpus delecti* rule laid down by this Court which Petitioner believes was violated by the courts below. Aside from Mr. Burleson's boasts, all the evidence at trial showed was that Mr. Burleson was present during the Standoff, a member of the crowd far from where the agents were located, carrying a lawful gun in an open carry state which was at all times pointed at the ground.

The government indicted more than 20 alleged participants in the Standoff, and Mr. Burleson and several others who were considered the "least culpable" were tried first. Mr. Burleson was *not convicted* of the conspiracy counts but was convicted on a variety of counts alleging assault and extortion and deadly weapons counts against federal agents.

All of the *other* defendants, however, were either found not guilty by a jury, or had their charges dismissed with prejudice because, when the second trial of the allegedly more culpable defendants (including the Bundys and the other alleged ringleaders) was in full swing, the district court found that the government had committed *Brady* violations, prosecutorial misconduct, and lied to the jury and court, causing the district court to dismiss all the remaining charges with prejudice—a ruling that this Court upheld. The prosecutorial violations, which the

district court described as "egregious," "grossly shocking," "*intentional*," "*willful*," done in "reckless disregard for [their] Constitutional obligations," constituted "flagrant prosecutorial misconduct," and involved prosecutors making "*misrepresentations to the court*" and deliberately attempt[ing] "*to mislead [the court] and obscure the truth,*" centered around the government's withholding exculpatory evidence and misstating facts to the court and jury that would have supported the defendants' *self-defense and/or defense of others defenses.*[4] Because of that prosecutorial misconduct, the district court denied Mr. Burleson (and other defendants) their right to present evidence and argument to support their proposed self-defense/defense of others defenses to the jury, and also refused their proposed jury instructions on that issue.

Mr. Burleson's motion for a new trial based on the *exact same prosecutorial misconduct relating to the exact same refused defense* was denied, and this appeal followed.

Mr. Burleson, who is 60 years old and totally blind, is now serving a 32-year prison sentence, although the district court expressly ruled that due to his blindness and other serious medical conditions, and his minimal criminal history, he "does not

[4] The allegations of misconduct, including the use of excessive force by the BLM agents, was corroborated by two lengthy e-mail reports by the Special Agent in Charge of the internal investigation of the Standoff. Although the district court in dismissing the charges against most of the defendants stated that this would have required additional investigation if a new trial was ordered, the court denied (without explanation) counsel's request to depose the Special Agent, denied in total a discovery motion to obtain the numerous documents and electronic evidence cited in the Special Agent's memos (all of which was seized by the prosecutors who refused to turn over a single document to the defense), and the government prevented defense counsel from interviewing the Special Agent.

pose a danger to the community." Mr. Burleson is the *only one* of the over 20 defendants who is in prison.

This petition for a writ of certiorari followed the panel's upholding of his convictions and the denial of his petition for rehearing.

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

A. THE NINTH CIRCUIT'S DECISION ON THE MOTION FOR NEW TRIAL WAS CONTRARY TO ITS OWN PRECEDENT ON THE REQUIREMENTS FOR THE RIGHT TO SELF-DEFENSE AGAINST LAW ENFORCEMENT OFFICERS, AND CREATES CONFLICTING LAW REGARDING THOSE REQUIREMENTS, WHICH IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Standards of Review

The denial of a defendant's motion for a new trial based on newly discovered evidence or prosecutorial misconduct is reviewed for an abuse of discretion. *See United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011); *United States v. Moses*, 496 F.3d 984, 992–93 (9th Cir. 2007); *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (Rule 33 motion).

However, *de novo* review applies to the denial of motions for a new trial based on a *Brady* violation, *see United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Liew*, 856 F.3d 585, 595–96 (9th Cir. 2017); *United States v. Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011).

Relevant Facts, Law and Argument

As noted above, Mr. Burleson was tried first with the other allegedly least culpable ("Tier 3") defendants.

Subsequently, the alleged leaders (the "Tier 1" defendants) of the purported offenses (the "Tier 1" defendants) were tried. In the middle of trial, it was discovered that the prosecution had willfully withheld material, exculpatory evidence from the defense and had intentionally misled the defense, the jury and the court about a number of important matters that were at issue in both the Tier 3 and Tier 1 trials. A mistrial for the Tier 3 defendants was granted, and the court subsequently dismissed with prejudice the charges against all the alleged leaders of the Standoff. The prosecutors then moved to dismiss with prejudice the charges against all the Tier 2 defendants as well, and the court granted it. The only defendant convicted in Mr. Burleson's ("Tier 3") trial, a co-defendant who represented himself *pro se* at trial, had his conviction overturned by the Ninth Circuit.

The willfully withheld exculpatory evidence that led to the dismissal of all the other defendants' charges involved the fact that the government had snipers watching the Bundy family, their home, and the protesters; the surveillance of the Bundy home, including with a video camera; the fact that the government assessed the threat of violence from the Bundy's and their followers as relatively low, contrary to its position at trial; the internal affairs evidence of misconduct and unethical behavior by the Special Agent in Charge of the cattle impoundment operation; and the Special Agent in Charge of the internal investigation over the Standoff (until he was fired by the lead prosecutor in this case) knew of the repeated misconduct by both agents and the prosecutors who failed to provide exculpatory

materials to the defense.[5]

The documents show that the prosecution misrepresented these things to the defense, the jury and the district court. For example, in his opening statement the prosecutor falsely said this:

> You will hear how Bundy joined forces with others to recruit the militia -- these people who call themselves militia --and people with guns. You will hear the pitch that they made over the Internet. You will hear how they referred to the BLM officers as "the aggressors" and "the trespassers"; how they said the BLM was abusing the Bundy family members, surrounding their house, making them shelter in place, pointing guns at them, stealing their cattle…. ***It was all false; it was all fake.***

The prosecutor also misrepresented the facts to the district court in arguing this issue: "Whether Mr. Frehner or anyone else felt that there was sniper out there or whatever…***even if there was a sniper, and there wasn't.***…." (emphasis added). These and related facts are much of the information that led Mr. Burleson to go to Nevada in the first place—which would have been crucial to his self-defense/defense of others defense, *as well as* his defense to the two counts alleging that he crossed state lines *for the purpose of extortion* (helping a stranger recover his cows).

And one agent told the grand jury that no snipers were present at Dave Bundy's arrest—which the photographic evidence proved to be false. Later, the same agent admitted that snipers *were* deployed against the Bundy family and supporters.

It is also important to note that by denying those allegations up front to the

[5] And we now know that the Special agent repeatedly reported the misconduct by agents and the *Brady* violations by the prosecutors to the prosecutors themselves *before* Mr. Burleson's trial.

jury and court, and repeating them later, *the government* put those matters in issue.

A representative sample of the district court's findings of prosecutorial misconduct and the reason that the *Brady* violations were prejudicial will illustrate the seriousness of the matter, and why it applies to Mr. Burleson as well as the Tier 1 defendants:

> The Court finds the prosecution's representations that it was unaware of the materiality of the Brady evidence is grossly shocking. The prosecution was on notice after the Court's order, which is on the docket, Number 2770, that a ***self-defense theory*** may become relevant if the defense was able to provide an offer of proof, outside the presence of the jury. Moreover, in that same order, Number 2770, the Court specifically denied the government's motion to exclude all the reference to perceived government misconduct to the extent it is relevant to defenses raised by the defendants. ***So the government was well aware that theories of self-defense, provocation, and intimidation might become relevant if the defense could provide a sufficient offer of proof to the Court. However, the prosecution denied the defense its opportunity to provide favorable evidence to support their theories as a result of the government's withholding of evidence and this amounts to a Brady violation.*** For example, the government claims it failed to disclose this evidence because the FBI did not provide the documents to the prosecution team. However, the prosecutor has a duty to learn of favorable evidence known to other government agents, including the police, if those persons were involved in the investigation or prosecution of the case….

(emphasis added).[6] Functionally equivalent orders and rulings were given by this Court in Mr. Burleson's trial preventing him from offering the same defense, based on false representations by the prosecution.

[6] *See also United States v. Chapman,* 524 F.3d 1073 (9th Cir. 2008), where the Ninth Circuit upheld the dismissal of indictments because of the prosecution's failure to disclose documents to the defense. The lead prosecutor in the Burleson case was one of the prosecutors in *Chapman*.

It is important to note that if, as it turned out when the willfully withheld discovery was finally brought to light long after Mr. Burleson's trial, the information that caused Mr. Burleson and others to come to their aid were true, then the Bundy family would have had a viable *self*-defense argument to make to *their* jury, and those who came to their aid would have had a viable *defense of others*—as well as a self-defense (see below)—argument to make to *their* jury, and a non-criminal explanation for why they crossed state lines to help them. Thus, the willfully withheld *Brady* material was of critical importance to the Tier 3 defendants including Mr. Burleson both directly, and indirectly through the Tier 1 defendants.

Significantly, in Mr. Burleson's case, the district court declined to grant the government's motion in limine to exclude any evidence of government misconduct because it would lead to jury nullification.

> The Court finds that at least some of the subject matter pertaining to "perceived government misconduct" is relevant to defending against these charges. In particular, such evidence and testimony supports a defense to Count 16 and Count 12 "that [Defendants] traveled to Bunkerville because they thought that the government was basically []stealing people's personal property, killing cows, and limiting free speech by erecting a makeshift first amendment corral in the middle of the desert," not to commit a crime. (Resp. 6:10–12). Further, some of this evidence may be relevant to Defendants' excessive use of force defense to Count 5. *See United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996). To preliminarily exclude all evidence of "perceived government misconduct" at this stage would improperly prevent Defendants from fully presenting these defenses to the jury. Accordingly, the Court DENIES the Government's request to exclude all reference to "perceived government misconduct" *to the extent it is relevant to defenses raised by Defendants*.

(emphasis in original). The district court also based its granting of a mistrial and dismissal of the co-defendants' charges on a finding that those outcomes were necessary to deter future misconduct by the government.

The issues of self-defense and defense of others, of why the Tier 3 defendants went to Nevada (which the district court found relevant to their states of mind but mostly excluded and neutered through the jury instructions given based on misrepresentations by the prosecution), and the *facts* that the willfully withheld *Brady* material suppressed, were all debated repeatedly in Mr. Burleson's trial. Unfortunately, because the prosecutors misrepresented the facts and evidence to the district court, the court made many rulings that prevented the defendants, including Mr. Burleson, from making their cases as to why they went to Nevada, whether what they were told and believed was true and/or reasonable, whether BLM actually provoked the Bundy family in order to instigate a fight (and thus, among other things, whether some of the agents were the *aggressors* in this case), and most importantly, whether the Tier 3 defendants, including Mr. Burleson, could have made out a self-defense or defense of others theory. Mr. Burleson was also specifically prohibited from offering evidence of the things that he had seen online that caused him to go to Nevada to support the Bundys.

In addition to the exculpatory materials discussed above, the newly discovered evidence includes two extremely lengthy and damning emails (often referred to in this case as "memos") from Special Agent in Charge Larry Wooten, the BLM "special agent who was formally assigned to lead the investigation of the

Standoff but who was abruptly removed from the Bundy investigative team in February of 2017 allegedly at the request of [the lead prosecutor in Mr. Burleson's trial] because he complained of Special Agent in Charge Dan Love's misconduct, the investigating law enforcement officer's bias [against the Bundy family based partly on their Mormon religion], the government's [and prosecutors'] bias, and the failure to disclose exculpatory evidence." Special Agent Wooten also revealed that "[t]he investigation indicated ***excessive use of force,*** civil rights and policy violations." Wooten attributes the "excessive use of force" to Special Agent in Charge Dan Love and some members of his BLM team not once, but three times. He also confirmed the use of snipers against the Bundy family, which the prosecution at trial falsely denied. Whether the agents used excessive force was crucial to the Court's rulings denying the self-defense and defense of others defenses in Mr. Burleson's trial. It was also an excessive use of force for agents to point their assault rifles at mostly unarmed men, women and children at the wash that they would use lethal force against them under the circumstances of that day. This was part of an ongoing *pattern* of aggression, deliberate provocation and excessive force by the agents led by Dan Love, the evidence of which was crucial to the defense. And who was the aggressor is a fact question which should have been for the jury to decide, but they were not permitted to do so because of the misrepresentations by the prosecutors and the willfully withheld discovery.

Finally, Special Agent Wooten's emails also confirmed that the prosecution misrepresented the case facts to the court, filed "incorrect pleadings," discouraged

the reporting of evidence favorable to the defendants, failed to disclose to the defense exculpatory and impeachment evidence, and other unethical misconduct by the prosecutors in this case. Perhaps most damning of all, the Wooten memos—and others filed with the Ninth Circuit during the Cliven Bundy appeal--confirmed that much of the misconduct and failure to provide exculpatory materials was told to the prosecutors *before Mr. Burleson's trial*.

If Mr. Burleson's trial counsel had been aware of the newly discovered Wooten documents, he would have used them in support of a trial theory of defense of others and/or self-defense, and he would have been able to call Agents Wooten, Love, and perhaps others who were named in the Wooten memos as defense witnesses.[7]

Why the Panel's Ruling Was Wrong

The Ninth Circuit panel found that the *Brady* violations—the *existence of which was never disputed,* did not justify a new trial as follows:

> The affirmative defense of self-defense/defense of others is available "in a narrow range of circumstances" against a federal law enforcement officer who uses excessive force. *See United States v. Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012). To prevail, Burleson must show that the withheld material was either exculpatory, which here means that it would tend to show that the federal law enforcement officers used excessive force, or impeaching, meaning that it would undermine or call into question the government's evidence that federal agents had not used excessive force.
>
> Having reviewed the withheld evidence, we are satisfied that none of it contains any indication that federal officers used excessive

[7] The government fought hard and successfully to have the trial court preclude defendants from calling Agent Love, who headed the entire operation, as a witness, and it fought equally hard to prevent the defense from calling Agent Wooten once his role and importance became known to the defendants during the second trial.

> force that would justify a self-defense/defense-of-others theory. Thus, the evidence was not material under *Brady* because it was not "exculpatory or impeaching." [*United States v.*] *Bruce*, 984 F.3d [884], 894 (9th Cir. 2021).

Opinion at 7. The problem with this is that the panel applied the wrong standard and focused on only a tiny portion of the relevant evidence in summarily dismissing the "excessive force" issue—all of which was addressed at great length in the briefs and at oral argument.

The controlling authority below was *United States v. Acosta-Sierra,* 690 F.3d 1111, 1126 (9th Cir. 2012) which requires only (1) *a* ***reasonable belief*** that the use of force was necessary to defend oneself ***or another*** against the immediate use of unlawful force, and (2) the use of no more force than was reasonably necessary in the circumstances.[8] The defendant's state of mind, including *all the information that he knew* when the confrontation occurred, is the universe of facts for assessing the reasonableness of his belief in the need for self-defense. *United States v. Saenz,* 179 F.3d 686, 689 (9th Cir. 1999). In requiring that the agents *actually used* excessive force, rather than requiring that Mr. Burleson *reasonably believed* that force was necessary to defend himself or the mostly unarmed protesters from imminent use of such force, the panel gutted the only defense available to the

[8] The parties disagreed about whether the use of excessive force by law enforcement must be "immediate" or "imminent" to justify action in self-defense. In fact, the cases and model jury instructions use the two terms interchangeably, as did the district court in its orders below, and the dictionary definitions of those two words do not materially differ. *See also* Ninth Circuit Model Instruction 5.10 (holding it is necessary to *prevent* the "immediate" use of unlawful force); District Court's Order denying a self-defense/defense of others instruction at 1-ER-12 (requiring "imminent" threat of unlawful force, and citing two cases where "imminent" was the standard); *Acosta-Sierra,* 6990 F.3d at 2233 & n. 5 ("imminent"); *see also* Webster's Third Int'l Dictionary, 1130, 1132 (unabridged ed. 1993) (cited by Ninth Circuit here).

overwhelming majority of persons accused of threatening or assaulting law enforcement officers. It also effectively vitiates the longstanding defense of mere presence.

It also ignored the central, and unrebutted, evidence in this case: that prior to arriving at the wash, Mr. Burleson had seen and become incensed by viral online content that persuaded him and hundreds of other people to travel to Nevada to support what they saw as victims of government oppression and excessive force, that the specifics of snipers—both before the Standoff and at the wash itself--and a variety of aggressive and threatening tactics by the agents were supported by the intentionally withheld *Brady* material (including Special Agent Wooten's observations reported orally to the prosecutors *before* Mr. Burleson's trial), and most importantly that upon arriving at the wash Mr. Burleson saw and heard what he and other government and defense witnesses all believed was an imminent danger of a massacre by agents shooting their assault rifles into a crowd of protesters—which was *announced by the agents to the crowd over a bullhorn*. The wrongfully withheld evidence, as well as the later discovered evidence of the Wooten memos, more than met the low bar entitling Mr. Burleson to a self-defense/defense of others jury instruction and the right to present evidence in support of it—which were denied. The fact that one of Mr. Burleson's co-defendants—the only one who took the stand in his own defense and got some of what Mr. Burleson was denied in front of the jury—was *acquitted* more than meets the standard of undermining confidence in Mr. Burleson's conviction.

Here, the *Brady* violations and lies by the prosecutors to the court deprived Mr. Burleson of the evidence and jury instructions he needed to (1) support the reasonableness of his belief in the imminent or immediate use of excessive force by the agents, knowing what he knew when he arrived at the wash, (2) deprived him of evidence to rebut the government's repeated assertions that the allegations that the agents used snipers, surrounded the Bundy home, and used provocations and intimidation including physical abuse against the Bundys were false, which *the government put into issue* in its opening statement and representations to the court, (3) support the non-criminal reasons he went to Nevada contrary to the charges relating to bovine extortion in the indictment and (4) impacted the denial of his requested jury instruction on self-defense/defense of others.

Of course, as discussed more thoroughly below, Mr. Burleson did not use *any* force. He was simply present for 90 minutes with a lawful gun in an open carry state, in the rear of a group of hundreds of demonstrators, and no trial witness ever saw him at all—which negates a necessary element of "assaulting" an officer. *See* Ninth Circuit Model Instruction 8.3 (requiring that the victim have actual apprehension of immediate bodily harm) (citing *Acosta-Siera,* 690 F.3d at 1121)); *accord United States v. Skeet,* 665 F.2d 983, 986 n. 1 (9th Cir. 1982).

Because the panel (a) misstated the standard for a self-defense/defense of others defense and instruction and (b) *failed to even mention the most important trial evidence supporting Mr. Burleson's position,* and (c) because the correct standard is an important and oft-recurring issue of federal law that has not been,

but should be, settled by this Court, this Court should grant certiorari to clarify what the correct standard in cases of self-defense against law enforcement is and should be, and to do justice to Mr. Burleson's right to a new trial.

B. THE NINTH CIRCUIT'S DECISION ON THE SUFFICIENCY OF THE EVIDENCE CONFLICTS WITH THIS COURT'S RELEVANT DECISIONS ON THE *CORPUS DELECTI* RULE, WHICH IS AN IMPORTANT QUESTION OF FEDERAL LAW

The *corpus delecti* rule is a long-established safeguard against convictions based on false confessions recognized by this Court in a series of opinions including *Opper v. United States,* 348 U.S. 84 (1954). There, this Court held that a defendant's incriminating admissions, either in the form of confessions to law enforcement or admissions made to others after the fact of the alleged offense, is insufficient to constitute proof beyond a reasonable doubt on its own. Instead, to convict a person requires *corroboration* of his confession or statements—which this Court described as "*substantial independent evidence* to establish the trustworthiness of the statements." In this Court's own words:

> [W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce ***substantial independent evidence*** which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.

Opper, 348 U.S. at 93 (emphasis added). This substantial independent evidence must support *every element* of the crimes charged:

> Turning to the instant case, it is clear that there was substantial independent evidence to establish directly the truthfulness of petitioner's admission that he paid the government employee money. But this direct corroborative evidence tending to prove the truthfulness of petitioner's statements would not establish a corpus delicti of the offense charged. Rather it tends to establish only one element of the offense—payment of money. **The Government therefore had to prove the other element of the corpus delicti—rendering of services by the government employee—entirely by independent evidence.**

Opper, 348 U.S. at 93-94 (emphasis added, footnotes omitted).

The same principles outlined in *Opper* were also laid down by this Court in *Smith v. United States,* 348 U.S. 147, 152-153 (1954), which in turn indicated that the principles had been previously recognized by this Court, citing *Warszower v. United States,* 312 U.S. 342 (1941) and *Isaacs v. United States,* 159 U.S. 387 (1895). In *Smith,* this Court stated the "general rule that an accused may not be convicted on his own uncorroborated confession" because "confessions may be unreliable."

This rule exists to prevent not only coerced, false confessions, but also false confessions to crimes never committed or confessed to for *any* reason (*e.g.* a desire for fame in a high-profile case, an attempt to protect a guilty friend or family member, mental illness, etc.). *See United States v. Rodriguez-Soriano,* 931 F.3d 281, 288-289 (9th Cir. 2019).

The Ninth Circuit recognized and explained this Court's *corpus delecti* rule as follows:

> The *corpus delicti* doctrine requires that a conviction must rest

> on more than a defendant's uncorroborated confession. *See Opper v. United States*, 348 U.S. 84, 92–94, 75 S.Ct. 158, 99 L.Ed. 101 (1954). "Although the government may rely on a defendant's confession to meet its burden of proof, it has nevertheless been long established that, in order to serve as the basis for conviction, the government must also adduce some independent corroborating evidence." *Corona–Garcia*, 210 F.3d at 978 (citing *Opper*, 348 U.S. at 89, 75 S. Ct. 158). The doctrine's purpose is to protect against the risk of convictions based on false confessions alone. *See United States v. Lopez–Alvarez*, 970 F.2d 583, 592 (9th Cir. 1992) (citing *Warszower v. United States*, 312 U.S. 342, 347, 61 S.Ct. 603, 85 L.Ed. 876 (1941)); *see also Opper*, 348 U.S. at 89–90, 75 S.Ct. 158….
>
> In *Lopez–Alvarez*, we articulated a two-part test to evaluate whether the government has met its burden under the *corpus delicti* doctrine. 970 F.2d at 592. First, the government "must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable." *Id.* The two prongs guard against distinct types of false confessions. *See id.* at 590–92. The first ensures that a defendant is not convicted of a nonexistent crime—that is, a crime that was not actually committed—and the second reduces the likelihood that a defendant is convicted based upon a false confession to an actual crime. *See id.* The government must satisfy both prongs for a case to survive a motion for a judgment of acquittal based on insufficient evidence. *Id.* at 592.
>
> "[T]he *corpus deliciti* rule does not require the government to introduce evidence that would be independently sufficient to convict the defendant in the absence of the confession." *Valdez–Novoa*, 780 F.3d at 923. **Nor does it require that the government "introduce independent, tangible evidence supporting every element of the *corpus delicti*."** *Lopez–Alvarez*, 970 F.2d at 591. Instead, the government must introduce corroborating evidence "to support independently only the gravamen of the offense—the existence of the injury that forms the core of the offense and a link to a criminal actor." *Id.*

United States v. Niebla-Torres, 847 F.3d 1049, 1054-55 (9th Cir. 2017) (emphasis added).

The first thing to note is that the underlined language in *Niebla-Torres* above is directly contrary to the underlined language in this Court's *Opper* ruling,

establishing a conflict between the Ninth Circuit's *corpus delecti* standard and that laid down by this Court.

False confessions are far more common than the general public realizes. The tens of thousands of photographs and videos, and the testimony of government witnesses, showed nothing more than a man with a lawful firearm in an open carry state attending a protest with his gun pointed at the ground—which *none* of the witnesses at trial, either government or defense, testified that they saw at the time of the Standoff. Under this Court's *corpus delecti* doctrine, Mr. Burleson could not have been convicted.

The panel states that the evidence was sufficient to convict Mr. Burleson based on four things:

1. The inflammatory statements he made while enraged by what he had seen online and at the wash, most of which were given while government agents fueled his alcoholism with hard liquor and urged him to tell the camera about his heroic exploits for the sake of their movie. Opinion at 12-13 (listing Mr. Burleson's inflammatory statements). But statements cannot provide corroboration for themselves, nor for the actions described in those same statements under this Court's *corpus delecti* rule. Nor can statements of intent constitute a crime, even if genuinely meant, where, as here, they were never acted upon. Not a single trial witness testified to seeing Mr. Burleson at all, let alone to seeing him doing any of the things he bragged about, or anything else unlawful.

2. The panel also cites the "video and photographic evidence as well as the testimony of FBI Special Agent Joel Willis" showing that Mr. Burleson was present at the wash with an AR-style rifle" (as were the agents) and "taking up positions conveying he was ready to engage the BLM agents." The sentence is unclear, perhaps the panel meant Agent Willis' testimony *about* the photographs and videos. Agent Willis *was not present at the wash at all,* he merely authenticated the photos and videos, none of which showed Mr. Burleson assaulting anyone. They showed only that he was present, in the rear of the crowd, with his lawful weapon pointed at the ground.
3. The panel references a photograph "showing [Mr.] Burleson crouching down and holding his rifle in a ready to shoot position." That photograph, which is available upon request, shows Mr. Burleson *without* his eye to the gunsight, *without* his finger on the trigger, and *with the gun pointed at the ground.* No person that he might have been "ready to shoot" at is visible in the photo, which does not even indicate the direction he is facing, towards or away from any agents, or the time it was taken, all of which Agent Willis admitted at trial.
4. The testimony of "several" unnamed agents that they were frightened, thereby showing that "[Mr.] Burleson's actions did not go unperceived. But *not government witness* ever testified at trial that they were afraid of *Mr. Burleson*—indeed no witness even testified to *seeing him* among the crowd. It is an essential element of almost all of the counts relating to the alleged assault, threatening and extortion against the agents that the agents *knew* about the

assault *by Mr. Burleson.*

With all due respect, the panel based its opinion on things that were not even in the record. This is not a case where there were two reasonable but differing opinions about the facts. More importantly, if what the panel cited really meets the "independent corroboration" standard of this Court's *corpus delecti* rule, then in the Ninth Circuit, that rule has been gutted.

Because the panel's decision on the sufficiency of the evidence issue, (a) conflicts with the relevant decisions of this Court in *Opper, Smith* and the other cases cited above, and (b) the correct standard is an important and oft-recurring issue of federal law, and (c) relied on purported evidence that is demonstrably, even facially, not supportive of its decision, this Court should grant certiorari to reassert and enforce the *corpus delecti* rule it created.

C. THE NINTH CIRCUIT'S DECISION SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER, AND IS AS INEXPLICABLE AS IT IS UNEXPLAINED

With respect to the panel's ruling on the self-defense/defense of others issue, the panel not only used the wrong standard, it also declined to explain its decision, saying only that it had reviewed the evidence and was satisfied that none of it contains any indication that federal officers used excessive force—making it immaterial under *Brady*. Opinion at 7. It dismissed the damning Wooten emails as nothing more than "bald accusations." *Opinion* at 9. In the absence of any discussion of the evidence itself—including the most important evidence at the heart of the parties' dispute, the threat to fire into the crowd of mostly unarmed

men, women and children—it is impossible to tell *why* the panel ruled as it did. The most that can be said is that it proceeded from an incorrect standard—or at a minimum one that has not been, but should be, clarified by this Court—and made a conclusory ruling based on that.[9]

As for the panel's decision on the *corpus delecti* issue at the heart of the sufficiency of the evidence issue, the panel simply applied a Ninth Circuit standard that conflicts with the standard set out by this Court, and relied entirely on evidence that simply and demonstrably did not corroborate Mr. Burleson's rhetoric.

The panel's ruling on *both* issues was therefore "as inexplicable as it was unexplained," in violation of this Court's decision in *Jackson v. Felkner,* 562 U.S. 594, 598 (2011).

The panel's ruling on the *corpus delecti* issue is also based entirely on citations to purported evidence that directly conflicted with the evidence at trial, and simply do not show what the panel's decision said they did. While counsel is aware that this Court "rarely" grants certiorari based on erroneous factual findings, Supreme Court Rule 10, counsel submits that this is one of the rare cases that meets the standard of a ruling that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

VI. CONCLUSION

Mr. Burleson is a 60-year-old totally blind alcoholic with no significant criminal

[9] "Conclusory" in the sense of the dictionary definition of "a conclusion or assertion for which no supporting evidence is offered." *https://www.merriam-webster.com/dictionary/conclusory*

record who showed up at a tense demonstration between protesters and BLM agents at a critical moment, and stayed there for 90 minutes until a peaceful, non-violent resolution was reached. Nobody was injured, and none of his almost two dozen co-defendants is in prison. The prosecutors undisputedly committed heinous violations of their constitutional duties under *Brady v. Maryland* and its ethical duties not to lie to the trial court and jury, as found by the trial court and upheld by this Court in a separate appeal by the government in this case. Mr. Burleson is now serving a 32-year sentence (which for him is a life sentence) in a maximum-security prison not for what he actually did, but for what he bragged about doing. This is precisely what this Court's *corpus delecti* rule is designed to guard against.

For the foregoing reasons, Petitioner Gregory Burleson respectfully asks that this Court grant a writ of certiorari.

Dated: November 13, 2023 Respectfully submitted,

/s/ Mark D. Eibert

MARK D. EIBERT
Counsel for Petitioner GREGORY BURLESON

APPENDIX A

Order Denying Panel Rehearing and Rehearing En Banc, Ninth Circuit Court of Appeals, August 16, 2023

FILED

AUG 16 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY P. BURLESON, Defendant-Appellant.	No. 17-10319 D.C. No. 2:16-cr-00046-GMN-PAL-16 District of Nevada, Las Vegas ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY P. BURLESON, Defendant-Appellant.	No. 21-10183 D.C. No. 2:16-cr-00046-GMN-NJK-16

Before: CLIFTON, BENNETT, and DESAI, Circuit Judges.

The Memorandum Disposition filed on May 24, 2023 is amended by replacing the sentence <The jury acquitted Burleson (and his codefendants) on two conspiracy charges> in the last sentence of the penultimate paragraph on page 5 with <The jury did not reach a verdict on Counts 1 and 2 of the indictment>, and by inserting the following new footnote immediately thereafter:

> Count 1 was charged as Conspiracy to Commit an Offense Against the United States, in violation of 18 U.S.C. § 371.

> Count 2 was charged as Conspiracy to Impede or Injure a Federal Officer, in violation of 18 U.S.C. § 372.

An Amended Memorandum Disposition reflecting these amendments is being filed concurrently with this Order. With those amendments, the panel has unanimously voted to deny Appellant's petition for rehearing and rehearing en banc. Judges Bennett and Desai vote to deny the petition for rehearing and rehearing en banc, and Judge Clifton so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* FED. R. APP. P. 35(f).

Accordingly, the petition for rehearing and rehearing en banc (Docket Entry No. 127) is DENIED. No further petitions for rehearing may be filed.

APPENDIX B

Amended Unpublished Memorandum Disposition,
Ninth Circuit Court of Appeals,
August 16, 2023

NOT FOR PUBLICATION

FILED

AUG 16 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY P. BURLESON, Defendant-Appellant.	No. 17-10319 D.C. No. 2:16-cr-00046-GMN-PAL-16 AMENDED MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GREGORY P. BURLESON, Defendant-Appellant.	No. 21-10183 D.C. No. 2:16-cr-00046-GMN-NJK-16

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted March 7, 2023
Las Vegas, Nevada

Before: CLIFTON, BENNETT, and DESAI, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

This appeal arises out of Gregory Burleson's participation in the 2014 armed standoff between agents of the Bureau of Land Management (BLM), and Cliven Bundy and his supporters in Bunkerville, Nevada.

Burleson was convicted in a jury trial of assaulting a federal officer, threatening a federal law enforcement officer, obstruction of justice, interference with interstate commerce by extortion, interstate travel in aid of extortion, and three counts of using and carrying a firearm in relation to a crime of violence. The district court at first sentenced him to 819 months imprisonment but later reduced that term to 387 months, influenced by a change in the sentencing law.

Burleson raises four grounds on appeal. He argues that: (1) the district court erred in denying his motion for a new trial, (2) the district court erred by declining to give a self-defense/defense-of-others instruction to the jury, (3) that the evidence was insufficient to support his convictions, and (4) that his sentence was substantively unreasonable. Because none of his contentions have merit, we affirm the judgment of the district court.

I. Background

A. Factual history

Cliven Bundy is a cattle rancher who lives near Bunkerville, Nevada.[1] For

[1] This court's opinion in *United States v. Bundy*, 968 F.3d 1019 (9th Cir. 2020) provides a useful overview of the facts regarding the standoff.

decades, Bundy and his family grazed their cattle on federal lands surrounding his property. *United States v. Bundy*, 968 F.3d 1019, 1023 (9th Cir. 2020). Bundy refused to obtain required grazing permits and ignored several federal district court orders over the years to pay grazing fees and fines and to remove his cattle from federal lands. *Id*.

In July 2013, BLM obtained a court order to "seize and remove to impound any of Bundy's cattle for any future trespasses." *Id*. (citation omitted). In early 2014, BLM began preparations for "Operation Gold Butte Impound" which entailed using contractors to round up the cattle trespassing on federal land and selling them at auction. *Id*.

The operation began in April 2014. On April 6, Dave Bundy, one of Bundy's sons, blocked a BLM convoy and was arrested. *Id*. at 1024. The Bundys launched a social media campaign calling for people to travel to Bunkerville and prevent BLM from carrying out the court order. "Hundreds of Bundy supporters, many heavily armed, poured into the area." *Id.*

Burleson was among these supporters. He drove from his home in Phoenix, Arizona to Bunkerville, arriving on April 12. He brought with him an AK-47, an AR-15, a shotgun, two sidearms, and more than 5,000 rounds of ammunition.

By this point, BLM had seized roughly 400 animals and was holding them at an impoundment site. *Bundy*, 968 F.3d at 1024. Bundy and his supporters,

estimated to be more than 200 people, assembled to reclaim the cattle. *Id.* The group moved to the impoundment site and "took up threatening and tactically advantageous positions, pointing guns at BLM officers." *Id*. Outnumbered and outgunned, the federal agents then decided to evacuate the impoundment site and "left the cattle for the Bundys to reclaim." *Id*.

In the months following the standoff, the FBI investigated the events surrounding that day. Among other things, the FBI created a fictitious film production company to gather evidence under the guise of producing a documentary film about the standoff. The FBI interviewed Burleson and he described his involvement at the standoff. As described below, some of his statements were presented as evidence at his trial.

In January 2015, Burleson called and left a message for FBI Special Agent Michael Caputo, for whom he had worked as a paid informant. Agent Caputo returned Burleson's call and recorded their conversation. Burleson described his involvement in the standoff and made a series of incriminating statements that were also admitted as evidence at his trial.

B. Procedural history

In March 2016, a federal grand jury returned an indictment against nineteen defendants for several federal crimes stemming from the standoff. The district court divided the defendants into three tiers for trial. Burleson was placed in Tier 3,

the group of defendants that the government viewed as the "least culpable." The district court scheduled the trial of the Tier 3 defendants to go first, to be followed by trials of defendants in Tier 1 and Tier 2. *Bundy*, 968 F.3d at 1024.

Burleson was found guilty by the jury on eight counts: assault on a federal officer, threatening a federal law enforcement officer, obstruction of justice, interference with interstate commerce by extortion, interstate travel in aid of extortion, and three counts of use and carry of a firearm in relation to a crime of violence. The jury did not reach a verdict on Counts 1 and 2 of the indictment.[2]

The trial of the Tier 1 defendants, those identified as most involved, including Cliven Bundy and two of his sons, began several months later. *Bundy*, 968 F.3d at 1025. While the trial was underway, "the government began disclosing information in its possession that, under *Brady v. Maryland*, 373 U.S. 83 (1963), "was arguably useful to the defense and should have been produced to the defendants well before trial." *Bundy*, 968 F.3d at 1023. The district court determined that "the *Brady* violations were so egregious and prejudicial that the indictment needed to be dismissed with prejudice." *Id.* at 1029. Ultimately, charges were dismissed against all defendants identified in Tiers 1 and 2.

[2] Count 1 was charged as Conspiracy to Commit an Offense Against the United States, in violation of 18 U.S.C. § 371. Count 2 was charged as Conspiracy to Impede or Injure a Federal Officer, in violation of 18 U.S.C. § 372.

Burleson filed a motion for a new trial in January 2019. He argued that the government violated its obligation under *Brady* to produce exculpatory evidence just as it did for the Tier 1 defendants. Burleson also argued that he was entitled to a new trial on the basis of newly discovered evidence, two emails written by a former BLM Special Agent detailing alleged misconduct he uncovered as part of BLM's internal investigation of the April 2014 standoff.

The district court denied the motion for a new trial, concluding that Burleson failed to make the required showing that the alleged *Brady* material was favorable to him and material to his case. The district court also concluded that the newly discovered evidence was similarly not material and did not entitle Burleson to relief.

II. Discussion

A. Motion for new trial

Burleson argues that the district court erred in denying his motion for new trial because the government withheld material, exculpatory evidence from the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, prosecutors must disclose to the defense "evidence favorable to an accused . . . [that] is material either to guilt or to punishment" prior to trial. *Id.* at 87. We review de novo. *United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021).

To succeed on a new trial motion based on a *Brady* claim, Burleson must show: "(1) the evidence at issue was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) that he was prejudiced." *Id.* at 894–95.

Burleson argued that the withheld evidence was favorable to him because it would have supported a self-defense/defense-of-others theory at trial and provided "a non-criminal explanation" as to why he crossed state lines.

The affirmative defense of self-defense/defense of others is available "in a narrow range of circumstances" against a federal law enforcement officer who uses excessive force. *See United States v. Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012). To prevail, Burleson must show that the withheld material was either exculpatory, which here means that it would tend to show that the federal law enforcement officers used excessive force, or impeaching, meaning that it would undermine or call into question the government's evidence that federal agents had not used excessive force.

Having reviewed the withheld evidence, we are satisfied that none of it contains any indication that federal officers used excessive force that would justify a self-defense/defense-of-others theory. Thus, the evidence was not material under *Brady* because it was not "exculpatory or impeaching." *Bruce*, 984 F.3d at 894.

The district court did not err in denying the motion for a new trial based on the withholding of the challenged material.

Burleson also argues that the district court erred in denying his motion for a new trial based on newly discovered evidence. This evidence consisted of two lengthy emails written by a former BLM Special Agent detailing alleged misconduct he uncovered as part of BLM's internal investigation of the April 2014 confrontation. We review the denial of a motion for a new trial based on newly discovered evidence under an abuse of discretion standard. *United States v. Brugnara*, 856 F.3d 1198, 1206 (9th Cir. 2017). This involves a two-step analysis: first, we must determine whether the district court identified the correct legal standard; second, we must determine whether the district court's application of that rule was illogical, implausible, or unsupported by the record. *Id*.

Burleson does not dispute that the district court identified the correct legal standard as stated in *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003):

> A defendant who seeks a new trial based on new or newly discovered evidence must show that (1) the evidence is newly discovered; (2) the failure to discover the evidence is not attributable to a lack of diligence by the defendant; (3) the evidence is material to the issues at trial; (4) the evidence is neither cumulative nor impeaching; and (5) the evidence indicates that a new trial would probably result in an acquittal.

Applying the *Waggoner* factors, the district court concluded that the emails were not material "because they discuss alleged incidents of misconduct unrelated

to [Burleson's] personal involvement in the April 12, 2014, confrontation," and that "besides bald accusations, the [emails] provide no evidence that excessive force was used by BLM officers on April 12, 2014." The district court also determined that "the extensive evidence stacked against [Burleson] does not indicate that a new trial would likely result in an acquittal."

The district court identified the correct legal rule, and its application was not illogical, implausible, or unsupported by the evidence. The court did not abuse its discretion.

B. Jury instructions

Burleson next argues that the district court erred by declining to give a self-defense/defense-of-others jury instruction. "A criminal defendant has a constitutional right to have the jury instructed according to his theory of the case," *United States v. Johnson*, 459 F.3d 990, 993 (9th Cir. 2006), provided that the requested instruction "is supported by law and has some foundation in the evidence," *United States v. Bello-Bahena*, 411 F.3d 1083, 1088 (9th Cir. 2005) (quoting *United States v. Fejes*, 232 F.3d 696, 702 (9th Cir. 2000)). We review de novo whether an instruction is supported by law. *United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010). Whether an instruction "has some foundation in the evidence" is reviewed for an abuse of discretion. *Bello-Bahena*, 411 F.3d at 1089 (quoting *Fejes*, 232 F.3d at 702).

The affirmative defense of self-defense/defense of others is available against a federal law enforcement officer "who uses excessive force in a narrow range of circumstances." *Acosta-Sierra*, 690 F.3d at 1126. A defendant must show "(1) a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force and (2) the use of no more force than was reasonably necessary in the circumstances." *Id*. (quoting *United States v. Urena*, 659 F.3d 903, 907 (9th Cir. 2011)).

The district court concluded that Burleson was not entitled to the instruction because "the record belie[d] the defendants' contention that the agents used excessive force" and noted that the defendants did not "clearly state their argument for how the agents used excessive force." Instead, the court held, the defendants appeared to be arguing that the federal agents' "militarization of Bunkerville; their war-like garb; their weapons; and primarily their raising of guns at the individuals" at the site sufficed to establish excessive force. The court concluded that "no reasonable jury could conclude that the agents' actions constituted excessive force." The court also found that the defendants could not show that their actions were objectively reasonable.

We are satisfied that the district court properly denied the requested instruction was because it was not "supported by the law," and the district court did

not abuse its discretion by finding it did not have "some foundation in the evidence." *Bello-Bahena*, 411 F.3d at 1088–89 (quoting *Fejes*, 232 F.3d at 702).

C. Sufficiency of the evidence

Burleson next argues that the evidence was insufficient to support all of his convictions. As for his incriminating statements to the FBI, Burleson maintains that the other evidence at trial contradicted what he argued were his "extreme, inflammatory—and inherently unbelievable—alcohol fueled statements." He contends that he was merely present at the standoff for 90 minutes and carrying a legal firearm pointed at the ground. Relatedly, Burleson argues that his convictions cannot stand under the *corpus delicti* doctrine,[3] which requires that a conviction must rest on more than an uncorroborated confession.

In reviewing the sufficiency of the evidence, this court determines "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

[3] We apply a two-part test to determine whether the government met its burden under the *corpus delicti* doctrine: first, the government must "introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred"; and second, "it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable." *United States v. Lopez-Alvarez*, 970 F.2d 583, 592 (9th Cir. 1992).

reasonable doubt." *United States v. Hong*, 938 F.3d 1040, 1047 (9th Cir. 2019) (internal quotation marks and citation omitted).

Viewed in the light most favorable to the prosecution, the pertinent evidence at trial was as follows. Burleson stated that he travelled to Bunkerville and brought "half the weapons in [his] arsenal" including an AK-47, an AR-15, a shotgun, two sidearms, and a thousand rounds of ammunition for each weapon, as well as body armor. Burleson stated that he went there "for the purpose of engaging rogue federal agents that were breaking the law." When Burleson arrived in Bunkerville, he heard that "the situation had escalated" and that "the BLM is pointing their weapons at the unarmed protestors." Burleson then told "everybody that [he] could see" to "mount up, gear up, it's go time, weapons, body armor, let's go." He added, "I literally went there to put them six feet under, I was hell bent on killing federal agents," and "I went down there fully expecting to die."

Burleson said he organized people with weapons "to box these guys in" and that they successfully managed to do so. He added that he "got into my position," "sighted in the people that I was targeting," "I know where I'm gonna shoot; I know where it's gonna go," and that he was "at low-ready the whole time."

Burleson also said he told the federal agents to "cease and desist now or suffer consequences that you won't survive" and that "I know a couple of them heard it because they were looking at me and pointing at me." Burleson said they

waited until the federal agents left "before we gave our positions up." He added that he was disappointed that the confrontation was not "bloody" because "I really wanted to take them out . . . because they are federal employees . . . they have taken an oath to defend and protect the Constitution of the United States, which they broke in a big way."

Burleson also reveled in the agents' withdrawal from the site: "They knew that they would have died, why do you think they backed off? They were outnumbered, they were out-positioned, they were boxed in, the only way that they had to go out was backwards away from everybody else" and in doing so "they had to give up their positions so we could go and retrieve Mr. Bundy's cattle for him."

Burleson did not testify at trial, but his incriminating statements were consistent with, and corroborated by, video and photographic evidence as well as the testimony of FBI Special Agent Joel Willis. This evidence shows that Burleson was present at the cattle impoundment site with an "AR-style rifle" and was taking up positions conveying he was ready to engage the BLM agents guarding the site. This evidence also shows that he was not merely holding a weapon "pointed at the ground" while walking around. For example, the government introduced a photograph showing Burleson crouching down and holding his rifle in a ready to shoot position, consistent with his inculpatory statements.

Several agents also testified to their fear and belief that they would have been shot during the confrontation—showing that Burleson's actions did not go unperceived. One agent testified, "I was pretty certain at some point in this situation I was probably going to get shot" and that he was "possibly going to die that day." Another agent testified that he feared for his safety, and that "parts of [his] body would shake uncontrollably."

We are satisfied that the evidence was sufficient such that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Hong*, 938 F.3d at 1047 (internal quotation marks and citation omitted). Burleson's argument on appeal that he was "intemperate[ly] boasting," calls for a credibility determination that is the province of the jury. *See United States v. Magallon-Jimenez*, 219 F.3d 1109, 1114 (9th Cir. 2000). The jury was well positioned to assess his credibility in the government's videos, and Burleson offers no persuasive argument to the contrary. Burleson's *corpus delicti* argument is also unpersuasive. The government established that the "criminal conduct at the core of the offense has occurred" and introduced "independent evidence tending to establish the trustworthiness of [Burleson's] admissions." *Lopez-Alvarez*, 970 F.2d at 592.

D. Sentence

Burleson argues that his 387-month sentence is substantively unreasonable. In 2017, the district court sentenced him to 819 months. At the time, a defendant's first conviction for brandishing a firearm during a crime of violence came with a mandatory minimum sentence of 7 years, and a mandatory minimum sentence of 25 years "in the case of a second or subsequent" conviction, all of which were to run consecutively. *See* 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(C)–(D) (2017). Accordingly, 684 months of Burleson's original 819-month sentence was because of the three firearm convictions. In 2021, Burleson moved for a sentence reduction, citing the First Step Act of 2018 which amended § 924(c) such that the 25-year mandatory minimum would no longer apply to multiple 924(c) convictions obtained in a single prosecution. Noting that Burleson would receive a much lower sentence had he been sentenced after the First Step Act, the district court reduced his sentence by "unstacking" and reducing his sentences for his second and third 924(c) convictions.

We review the reasonableness of a sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). As for the non-firearm offenses, the record shows that the district court imposed a reasonable sentence consistent with the goals of 18 U.S.C. § 3553(a)(2). The court declined to take three applicable upward departures relating to the offenses. The district court also reached the adjusted guidelines range of 135 to 168 months by a downward

departure of ten levels from a base offense level of 42 considering Burleson's "vulnerability, physical impairment, alcoholism, and past cooperation." In imposing the 135-month sentence for the non-firearm offenses, the district court highlighted the seriousness of the conduct and the resulting effect on federal law enforcement officers who were seeking to enforce a court order.

We recognize that Burleson, identified prior to trial as within the group of defendants who appeared least involved in the episode, is now the only person incarcerated as the result of the April 2014 standoff. That does not make his sentence substantively unreasonable, however. We conclude that the district court did not abuse its discretion.

AFFIRMED.