C.A. No. 15-10223

D. Ct. No. CR-13-8093-PCT-NVW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CALVERT LES WOODY,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT

JOHN S. LEONARDO
United States Attorney
District of Arizona

KRISSA M. LANHAM
Deputy Appellate Chief

TRACY VAN BUSKIRK
BILL C. SOLOMON
Assistant U.S. Attorneys
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Appellant

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A. District Court Jurisdiction

The district court has subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant-appellee, Calvert Les Woody ("defendant"), is charged with a federal crime. (CR 19; ER 52-54.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 18 U.S.C. § 3731 based on the entry of an order by the district court on April 6, 2015, suppressing defendant's statements. (CR 130; ER 3-26.)

C. Timeliness of Appeal

Following the entry of the suppression order on April 6, 2015, the United States filed its Notice of Interlocutory Appeal on April 30, 2015. (CR 137; ER 1-2.) The notice was timely pursuant to Fed. R. App. P. 4(b)(1)(B)(i).

D. Bail Status

Defendant is currently in custody, pending trial.

[1] "CR" refers to the Clerk's Record, followed by the document number(s). "RT" refers to the Reporter's Transcript, followed by a date and page number(s). "ER" refers to the Excerpts of Record, followed by the page number(s).

IV. ISSUE PRESENTED

A confession is coerced only if it is extracted by threats or violence, obtained by direct or implied promises, or acquired by the exertion of improper influence. Absent any finding of coercive police conduct, the district court suppressed defendant's statements based on his low average intelligence, generalizations regarding historical trauma and cultural differences among Native Americans, and lack of recording of the statements. The record shows that no threats or promises were made, and no improper influence was exerted, to obtain defendant's statements. Did the United States prove the voluntariness of the statements by a preponderance of the evidence?

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

On April 30, 2013, defendant was indicted on one count of abusive sexual contact, and two counts of aggravated sexual abuse of a child, in violation of Title 18, United States Code, Sections 2244(a)(5) and 2241(c), respectively. (CR 1; ER 55-56.) A superseding indictment returned on June 25, 2013, charged defendant with an additional count of abusive sexual contact with a second child victim. (CR 19; ER 52-54.) On November 7, 2014, defendant filed his Request for Voluntariness Hearing/Motion to Suppress Statements (CR 98; ER 46-51), to which the United States responded on November 21, 2014. (CR 103; ER 29-45.) The district court held a suppression hearing on March 5 and 9, 2015 (CR 124-125; ER 27-28), and entered an order suppressing defendant's statements on April 6, 2015. (CR 130; ER 3-26.) The United States filed its Notice of Interlocutory Appeal on April 30, 2015. (CR 137; ER 1-2.)

B. Statement of Facts

The district court held a suppression hearing on March 5 and 9, 2015. (CR 124-125; ER 27-28.) Federal Bureau of Investigation ("FBI") Special Agents Cheryn Priestino ("Agent Priestino") and Brian Fuller ("Agent Fuller") testified for the United States. (CR 124; ER 28.) Dr. David J. McIntyre, a licensed psychologist, testified for defendant. (CR 124-125; ER 27-28.)

1. FBI Contact with Defendant

In December, 2011, the Navajo Police Department referred to Agent Priestino an alleged sexual abuse of a six-year-old child ("Jane Doe 1"), in which defendant was the potential subject. (RT 3/5/15 8; ER 64.) A short time later, a second child ("Jane Doe 2"), who was ten years old, disclosed that defendant sexually abused her. (RT 3/5/15 9; CR 130; ER 4, 65.)

Agents first met with defendant in Window Rock, Arizona, on June 26, 2012, to introduce themselves, apprise him of the investigation, and let him know they needed to investigate the allegations. (RT 3/5/15 10-12; ER 66-68.) Defendant's girlfriend selected the parking lot of a Shop 'n Save business as the location of the forty minute audio-recorded meeting. (RT 3/5/15 11-13; ER 67-69.) FBI Agents Priestino and Matthew Shelly, the defendant, his girlfriend, and their infant son were at the meeting. (RT 3/5/15 11; ER 67.)

Defendant told the agents he was charged with assault with a dangerous weapon in a 2010 New Mexico federal case, in which the charge was dropped down to a misdemeanor, for which he served six months federal time. (RT 3/5/15 14; ER 70.) He also said he knew Jane Doe 1. (RT 3/5/15 15; ER 71.)

Agent Priestino discussed with defendant the topic of taking a polygraph examination. (RT 3/5/15 19; ER 75.) When defendant asked what a polygraph test was, his girlfriend explained that it was a lie detector test. (RT 3/5/15 20; ER 76.)

Agent Priestino told him the test typically lasts two to three hours, mentioned the equipment involved in the test, and told him that the test basically comes down to a couple of questions. (RT 3/5/15 20; ER 76.) Defendant said he wanted to think about taking the polygraph examination. (RT 3/5/15 21; ER 77.) At the conclusion of the meeting, defendant's girlfriend told Agent Priestino she would get back to her in two to three weeks to schedule the polygraph examination. (RT 3/5/15 21-22; ER 77-78.) Agent Priestino called defendant's girlfriend a few weeks later to schedule the examination. (RT 3/5/15 23-24; ER 79-80.)

Roughly six months later, on December 20, 2012, defendant's girlfriend dropped him off at the FBI Gallup (New Mexico) Resident Agency around 10:30 a.m. to take the polygraph examination. (RT 3/5/15 23-24, 63; ER 79-80, 119.) After meeting defendant in the lobby, Agent Priestino escorted him to a conference room where she introduced him to Agent Fuller, the polygrapher. (RT 3/5/15 24; ER 80.) The agents gave defendant a bottle of water. (RT 3/5/15 79; ER 135.)

Agent Fuller serves in the Flagstaff Resident Agency as the western region's supervisory special agent polygraph manager. (RT 3/5/15 58-59; ER 114-115.) He conducts polygraph examinations, trains other polygraph examiners, and reviews for quality control every FBI polygraph examination conducted in the western region. (RT 3/5/15 59-60; ER 115-116.) Approximately 300 of Agent Fuller's

1,100 polygraph examinations have involved Native Americans. (RT 3/5/15 59-61; ER 115-117.)

On the day of the interview, agents were dressed in plain clothes; their guns and badges were concealed from view. (RT 3/5/15 36, 64-65; ER 92, 120-121.) After introductions, Agent Fuller gave defendant an overview of the polygraph in Agent Priestino's presence; defendant said he was willing to take the examination. (RT 3/5/15 26, 65-67; ER 82, 121-123.) Defendant told Agent Fuller that he reads and writes English, which is his primary language, and that he had gone to tenth grade. (RT 3/5/15 67, 120; ER 123, 176.)

Also in Agent Priestino's presence, Agent Fuller told defendant that the polygraph test related to sexual abuse, and read aloud to him the entire Advice of Rights Form and the entire Consent to Interview with Polygraph Form. (RT 3/5/15 26-27, 67-70; ER 82-83, 123-126.) Among other rights, Agent Fuller advised defendant that he had a right to remain silent and to refuse to take the polygraph test, and that anything he said could be used against him in court. (ER 41, 43.) Defendant was also told that if he decided to answer questions without a lawyer present, he had a right to stop answering at any time. (ER 41.) Further, if defendant agreed to take the polygraph test, he had a right to stop the test at any time, and to refuse to answer any individual question. (ER 43.) Defendant had no questions about either form, and indicated that he understood his rights. (RT 3/5/15 28, 68,

70-71; ER 84, 124, 126-127.) He signed both forms electronically. (RT 3/5/15 27, 30, 68; ER 83, 86, 124.)

After defendant signed both consent forms, Agent Priestino made sure he was comfortable and asked him if he had any questions before she left the room; she left when he said he had no questions. (RT 3/5/15 30-31; ER 86-87.) Thereafter, Agent Priestino stayed in her office upstairs in the same building, and did not hear yelling or anything unusual coming from the conference room. (RT 3/5/15 30-31; ER 86-87.)

After Agent Priestino left, Agent Fuller began a pretest interview. (RT 3/5/15 71; ER 127.) He told defendant there would be questions on the test about whether he had any sexual contact with either of the victims, as well as other general questions. (RT 3/5/15 74; ER 130.) Defendant said he dropped out of Ganado High School around the 10th grade, and that he had pled a 2010 federal assault charge down to a misdemeanor. (RT 3/5/15 76, 78; ER 132, 134.) To assure defendant was fit to take the test, Agent Fuller learned that he was not on medications, felt rested after sleeping about 7 hours the previous night, was physically okay to take the test, and was not under the influence of drugs or alcohol. (RT 3/5/15 77-78; ER 133-134.)

Agent Fuller took simultaneous notes during the interview. (RT 3/5/15 79-80, 144; ER 135-136, 200.) Although he did not record the interview because FBI

policy did not permit recording, he wrote a report to document the interview. (RT 3/5/15 113-114; ER 169-170.) He had no problems communicating with defendant; he felt they communicated effectively because he did not spend much time discussing or defining things for defendant to understand them. (RT 3/5/15 79, 144; ER 135, 200.) When he asked defendant questions, defendant understood and was able to answer them. (RT 3/5/15 135; ER 191.)

When Agent Fuller discussed the allegations regarding six-year-old Jane Doe 1 with defendant, defendant said he was aware of them. (RT 3/5/15 79-80; ER 135-136.) He said when he was play fighting or wrestling on the floor with Jane Doe 1, he grabbed her under her armpits, and may have touched her breast. (RT 3/5/15 80-81; ER 136-137.) He said they moved to the table where he put Jane Doe 1 on his lap, but moved her off of his lap when she began moving around on his penis. (RT 3/5/15 82-83; ER 138-139.) Defendant did not think he touched her butt or vaginal area. (RT 3/5/15 83; ER 139.)

Defendant said the zipper on the shorts he was wearing on the day he and Jane Doe 1 were wrestling was not working, or was broken, and that his penis fell out of his shorts as they wrestled. (RT 3/5/15 84-85; ER 140-141.) He could not remember whether Jane Doe 1 touched his penis or tried to put it in her mouth. (RT 3/5/15 85; ER 141.) He said he did not touch her vagina under her clothing. (RT 3/5/15 86; ER 142.)

Defendant said he had also wrestled and played around with Jane Doe 2. (RT 3/5/15 87; ER 143.) He said he touched her vaginal area as they wrestled. (RT 3/5/15 87; ER 143.) He described an incident with Jane Doe 2 when he threw her onto a trampoline and may have touched her vagina and breasts. (RT 3/5/15 87-88; ER 143-144.) He said that both girls touched his penis when it accidentally fell out of his shorts while wrestling with them on separate occasions. (RT 3/5/15 88-89; ER 144-145.) He denied touching either victim under her clothing. (RT 3/5/15 90-91; ER 146-147.)

Agent Fuller explained to defendant how the polygraph equipment measures and records responses to questions, analogizing the instrument to an X-ray machine because it monitors and records when somebody is being dishonest. (RT 3/5/15 75-76; ER 131-132.) Agent Fuller discussed the difference between telling the truth and a lie, attached the polygraph components to defendant, and conducted a practice test to determine defendant was able to follow directions. (RT 3/5/15 94-95; ER 150-151.) Agent Fuller told defendant what questions would be on the polygraph test, administered the test, and told defendant he did not pass. (RT 3/5/15 95-97; ER 151-153.)

When Agent Fuller asked defendant what was bothering him, defendant said that during the incident with Jane Doe 1 in which his penis fell out of his shorts, he accidentally slipped the tip of his middle finger into her vagina when they were

wrestling. (RT 3/5/15 97-98; ER 153-154.) Upon Agent Fuller's request, defendant drew a diagram of his hand, drawing a line across the tip of his middle finger to show how far he thought his finger accidentally went into Jane Doe 1's vagina. (RT 3/5/15 101-103; ER 157-159.) Just above where he signed the diagram, defendant wrote, "This is how far i [sic] think my middle finger went in her vagina on accident." (ER 45.)

Agent Fuller then brought Agent Priestino back into the conference room to summarize defendant's interview and review the diagram. (RT 3/5/15 32, 103; ER 88, 159.) Defendant did not object to, or protest, the interview summary, but instead confirmed the summary's accuracy. (RT 3/5/15 34-35, 37-38, 104; ER 90-91, 93-94, 160.)

Defendant was at the FBI office for approximately two hours, about 40 minutes of which he spent alone with Agent Fuller. (RT 3/5/15 37, 111; ER 93, 167.) Agent Fuller never yelled at defendant or even elevated his voice at him; he never told defendant, "I know you did this." (RT 3/5/15 112; ER 168.) Agent Fuller did not threaten defendant in any way because, in his experience, being friendly with people makes them more willing to speak with him, while yelling at them makes them shut down. (RT 3/5/15 112, 143; ER 168, 199.) Agent Fuller did not make defendant any promises of leniency. (RT 3/5/15 112-113; ER 168-169.) Defendant said Agent Fuller treated him professionally. (RT 3/5/15 90; ER 146.)

After the interview, defendant told the agents his family was stuck at the McDonald's on the east side of Gallup, and asked if the agents could give him a ride there. (RT 3/5/15 38, 121; ER 94, 177.) Defendant sat in the front passenger seat as Agent Fuller drove him to his vehicle, with Agent Priestino and another agent also in the vehicle. (RT 3/5/15 38-39, 121; ER 94-95, 177.) When they arrived at defendant's vehicle, the agents jump-started the battery to start defendant's truck. (RT 3/5/15 38-39; ER 94-95.)

2. Psychologist's Testimony

Dr. McIntyre found defendant competent to stand trial during an August, 2014, competency evaluation. (RT 3/5/15 153; ER 209.) Through his meetings with defendant, in which they experienced no communication problems, Dr. McIntyre found that defendant demonstrated a rational factual understanding of the proceedings as well as sufficient reasoning and appreciation skills. (RT 3/9/15 6-7, 19-20; ER 235-236, 248-249.) In fact, cognitive functioning tests revealed that defendant does not suffer from organic brain dysfunction and is free from any cognitive impairment. (RT 3/5/15 167-168; ER 223-224; RT 3/9/15 5-6, 8; ER 234-235, 237.) Dr. McIntyre assessed defendant's full-scale IQ to be 82, which places him in the low average range of intelligence. (RT 3/5/15 153; ER 209.)

Defendant completed tenth grade in school; he did not report attending special education classes. (RT 3/5/15 168; ER 224; RT 3/9/15 21; ER 250.) He did

tell Dr. McIntyre about being arrested over ten times for public intoxication on the reservation, but said nothing about his previous federal criminal justice system experience, which included having been interviewed by a law enforcement officer and being read his rights. (RT 3/9/15 26-27; ER 255-256.)

In December, 2014, Dr. McIntyre met with defendant again to evaluate "how susceptible he may be to being questioned." (RT 3/5/15 154; ER 210.) Although Dr. McIntyre focused primarily on the theory of historical trauma and cultural differences among Native Americans, he also considered defendant's low average intellectual functioning. (RT 3/5/15 155, 168; ER 211, 224.) Dr. McIntyre concluded that "[m]atters of low average intelligence, cognitive impairment, historical trauma, and the Native American cultural differences apply to Mr. Woody and *may* have contributed to Mr. Woody's will being overborne." (Emphasis added). (RT 3/9/15 38; ER 267.)

Dr. McIntyre agreed that IQ testing of minorities is controversial, and recognized that defendant performed consistently with the Native American pattern of performance on IQ tests by scoring lower on verbal sections of the test and doing "well" to "above average" on the test's performance skills. (RT 3/9/15 11-13; ER 240-242.) He agreed that a person of low average intelligence is not mentally ill, does not have a serious intellectual disability, and is not considered mentally retarded, as only persons with an IQ of 69 or below are in that category.

(RT 3/9/15 16; ER 245.) He also agreed that there is a vast difference in intellectual functioning between an 18-year-old individual with an IQ of 65, and a 32-year-old individual with an IQ of 82. (RT 3/9/15 16; ER 245.)

Dr. McIntyre opined that cultural differences could lead to Native Americans being more susceptible to giving coerced confessions, despite having reviewed no research on that topic. (RT 3/5/15 164-166; ER 220-222; RT 3/9/15 8-9; ER 237-238.) Although he did not say all Native Americans are susceptible to giving false confessions, he said that a person who spends his or her formative years on the reservation, being raised by his or her blood family, would be more apt to hold differing cultural views. (RT 3/9/15 8, 10; ER 237, 239.)

Dr. McIntyre agreed that defendant did not spend his formative years on the reservation; he attended boarding school from grades K-5. (RT 3/9/15 10; ER 239.) He also agreed that defendant lived off the reservation, in Albuquerque, New Mexico, from 2006 to 2010. (RT 3/9/15 21; ER 250.) Significantly, Dr. McIntyre could not say defendant holds any of the broadly generalized Native American cultural views that Dr. McIntyre believes may lead to coerced confessions. (RT 3/9/15 9; ER 238.)

Dr. McIntyre rendered his first opinion in this case that historical trauma leads to coerced confessions, despite not holding himself out as an expert in historical trauma leading to coerced confessions, having no background in coerced

confessions, and having given no presentations or previous testimony regarding how historical trauma may lead to coerced confessions.[2] (RT 3/9/15 31-33; ER 260-262.) Importantly, Dr. McIntyre did not diagnose defendant as suffering from historical trauma because there is no such diagnosis. (RT 3/9/15 28; ER 257.) In fact, historical trauma is just a theory that relates to major social problems, not to individual behavior, among Native Americans. (RT 3/9/15 28-30; ER 257-259.) Neither the theory's founder, nor anyone else, has linked historical trauma to the giving of coerced confessions. (RT 3/9/15 28, 30; ER 257, 259.)

Although defendant did not testify at the suppression hearing, Dr. McIntyre relayed his out-of-court statements about the interview, saying defendant found the encounter "upsetting, scary, and difficult." (RT 3/5/15 160-162; ER 216-218.) According to Dr. McIntyre, defendant said Agent Fuller raised his voice at a time that made him feel uncomfortable and pressured. (RT 3/5/15 161; ER 217.) He said at the beginning of the interview he was denying things, but at some point he became upset with Agent Fuller and yelled back at him. (RT 3/5/15 162; ER 218.)

[2] Dr. McIntyre's understanding of the theory of historical trauma is "that there are times where people, native people, may choose or may feel like they are not in control, that they are willing to not, you know, to give up information just to get an interrogation over with or to get something over with." (RT 3/5/15 157; ER 213.) He further described historical trauma as the "cumulative emotional psychological wounding over a life span of a person across generation[s]," and said "basically that there have been numerous traumas within the American Indian community over the years, things such as colonization, relocation, boarding schools, and those factors that contribute to the development of this idea of historical trauma." (RT 3/5/15 158; ER 214.)

When he got angry, he just gave in and gave Agent Fuller what he wanted to hear. (RT 3/5/15 162-163; ER 218-219.) He said Agent Fuller's demeanor went from quiet to loud, and from nice to mean; he said Agent Fuller stared at him. (RT 3/5/15 163; ER 219.)

Without specifying what interrogation techniques were used, and based only on defendant's statements, Dr. McIntyre opined that "to a reasonable degree of psychological certainty interrogation techniques employed by the FBI agent *may* have affected the voluntariness of Mr. Woody's admission." (Emphasis added). (RT 3/9/15 33-34, 38; ER 262-263, 267.)

3. The District Court's Order

The district court found no *Miranda* violation in the case because defendant "was not in custody when the interrogation began." (CR 130; ER 14.) The court found that defendant "arrived at the FBI office in Gallup of his own accord," and that "[t]he FBI did not bring him there against his will." (CR 130; ER 14.)

Despite finding no *Miranda* violation, the district court was "not persuaded by a preponderance of the evidence that Woody's statements were voluntary." (CR 130; ER 26.) The court was persuaded, however, by Dr. McIntyre's testimony, though it put "minor weight on his reliance on Native American historical trauma," and "limited weight on Woody's hearsay statements to Dr. McIntyre about what happened during the interrogation." (CR 130; ER 18-19.)

The court's finding that the United States did not prove voluntariness by a preponderance of the evidence was heavily influenced by the lack of a recorded interview: "The Government's conscious choice not to preserve crucial evidence has thwarted the court's analysis of whether Woody's statements were voluntary." (CR 130; ER 4.); "Absent a recording of Woody's statements, the court is left to reconstruct the December 2012 interview from Special Agent Fuller's account." (CR 130; ER 21.); "Taking Special Agent Fuller at his word that he views his techniques as non-coercive, the court still lacks an objective basis to determine that the interrogation was not perceived as coercive by Woody…." (CR 130; ER 21-22.); "Special Agent Fuller's assessment and memory alone fail to persuade this trier of fact, given the crucial evidence the Government intentionally left behind that would make this task easier." (CR 130; ER 22.); "The court must take account of such characteristics of the accused, but cannot do so if the Government fails to provide the evidence of actual words, actions, and context necessary to determine Woody's perception and experience." (CR 130; ER 23.) (Quotation marks and citation omitted).

The district court went a step further by finding that "[t]he lack of potentially dispositive evidence for which the Government is responsible undermines the weight of the limited evidence the Government does present." (CR 130; ER 26.) The court further stated that "[t]he evidence the Government does present must be

evaluated in light of the evidence it chooses to make unavailable." (CR 130; ER 4.) Curiously, the district court discounted Agent Fuller's sworn testimony despite not "imputing bad faith to Special Agent Fuller," and despite "not find[ing] that Special Agent Fuller offered any knowingly false testimony." (CR 130; ER 22-24.)

VI. SUMMARY OF ARGUMENT

The district court did not properly consider the totality of the circumstances to weigh unconstitutional pressure exerted by agents against the individual power of defendant to resist. Instead, it relied on broad generalizations regarding historical trauma and cultural differences among Native Americans, defendant's low average intelligence, and the lack of a recording to justify suppression of defendant's statements.

Although coercive police activity is a necessary predicate to finding a confession involuntary, the district court did not find that agents engaged in coercive police activity here. Instead, despite the lack of any constitutional requirement that confessions be recorded, the district court discounted agent testimony because defendant's statements were not recorded.

Agents conducted the questioning in this case fairly, reasonably, and with full regard for defendant's rights, just as the Constitution requires. Defendant was fully advised of his rights and knowingly waived them. The questioning agent never yelled at defendant or raised his voice at him. Nor did he threaten defendant or make him any promises of leniency. Defendant even said the agent treated him professionally. Because the United States proved by at least a preponderance of the evidence that defendant's statements were voluntary, this Court should reverse the order of suppression.

VII. ARGUMENT

Suppression Was Not Warranted Because the Record Shows by at Least a Preponderance of the Evidence That Defendant's Statements Were Voluntary, Not the Product of Coercive Interrogation Techniques.

A. Standard of Review

This Court reviews a district court's conclusion regarding the voluntariness of a confession *de novo*. *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003). The district court's underlying factual findings are reviewed for clear error. *Id*.

B. Argument

1. Determining Voluntariness

"Questioning suspects is indispensable in law enforcement." *Culombe v. Connecticut*, 367 U.S. 568, 578 (1961) (internal quotation marks and citations omitted). The Supreme Court has recognized the "need for police questioning as a tool for the effective enforcement of criminal laws," without which "those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). "[T]he public interest requires that interrogation . . . not completely be forbidden, so long as it is conducted fairly, reasonably, within proper limits and with full regard to the rights of those being

questioned." *Columbe*, 367 U.S. at 578-579 (internal quotation marks and citations omitted).

The constitution demands that confessions be made voluntarily. *Haswood*, 350 F.3d at 1027. An involuntary or coerced confession is inadmissible, *United States v. Frank*, 956 F.2d 872, 876 (9th Cir. 1991), because its admission would be a violation of a defendant's right to due process. *Brown v. Horrell*, 644 F.3d 969, 979 (9th Cir. 2011). There is no single litmus-paper test for constitutionally impermissible interrogation. *Columbe*, 367 U.S. at 601.

To determine the voluntariness of a confession, "the due process test takes into consideration the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Doody v. Ryan*, 649 F.3d 986, 1015-16 (9th Cir. 2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). "Ultimately, the voluntariness determination depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (internal punctuation marks and citations omitted). Courts often consider the youth of the accused, his intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food and sleep. *Haswood*, 350 F.3d at 1028.

The factfinder at a suppression hearing need not "judge voluntariness with reference to an especially severe standard of proof." *Lego v. Twomey*, 404 U.S. 477, 478 (1972). Instead, the prosecution need only prove by a preponderance of the evidence that the confession was voluntary. *Id.* "The standard for voluntariness is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Coutchavlis*, 260 F.3d 1149, 1158 (9th Cir. 2001). "The test is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)) (internal quotation marks omitted).

2. Application to This Interrogation and This Defendant

a. Agents Did Not Use Coercive Interrogation Techniques

"[A] confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will." *Pollard v. Galaza*, 290 F.3d 1030, 1033 (9th Cir. 2002). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). Thus, "a necessary predicate to finding a confession involuntary is that

it was produced through coercive police activity," which can be "the result of either physical intimidation or psychological pressure." *Brown*, 644 F.3d at 979 (quotation marks and citations omitted). Indeed, "[d]ue process does not bar the use of a confession as evidence unless government officials employed coercive interrogation tactics which rendered the defendant's confession 'involuntary' as a matter of law." *United States v. Wolf*, 813 F.2d 970, 974 (9th Cir. 1987).

All record evidence before the district court shows that the agents did not engage in coercive interrogation techniques here. After being given several months to decide whether he wanted to participate in a polygraph examination, defendant voluntarily appeared at the FBI office to take the examination. (RT 3/5/15 23-24, 63; ER 79-80, 119.) The interrogation was not lengthy; defendant was at the office for a total of two hours, forty minutes of which he spent alone with Agent Fuller. (RT 3/5/15 37, 111; ER 93, 167.) "[C]oercion typically involves far more outrageous conduct." *Haswood*, 350 F.3d at 1028; s*ee also United States v. Gamez*, 301 F.3d 1138 (9th Cir. 2002) (confession voluntary where defendant was in custody for thirty-one hours, was interrogated on three separate occasions, and was fed only one meal).

Nothing about the environment in which the interrogation took place was coercive. Defendant was not in a custodial setting. (CR 130; ER 14.) The agents did not otherwise create an uncomfortable setting. In fact, they were dressed in

plain clothes with their firearms and badges hidden from defendant's view. (RT 3/5/15 36, 64-65; ER 92, 120-121.) In addition, they gave defendant a bottle of water. (RT 3/5/15 79; ER 135.) Agent Priestino made sure defendant was comfortable before she left the conference room. (RT 3/5/15 30; ER 86.)

Agent Fuller also fully advised defendant of his rights, and obtained signed waivers before asking defendant any questions. (RT 3/5/15 26-30, 67-70; ER 82-86, 123-126.) The evidence shows that defendant knowingly and intelligently waived his *Miranda* rights and voluntarily offered his statements. *See United States v. Heredia-Fernandez*, 756 F.2d 1412, 1415 (9th Cir. 1985). "[T]his is, of course, a circumstance quite relevant to a finding of voluntariness." *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); s*ee also Beckwith v. United States*, 425 U.S. 341, 348 (1976) (proof that some kind of warnings were given is relevant evidence on the issue of whether questioning was in fact coercive).

The fact that a defendant receives explanations of his rights, and consistently states that he understands those rights, leads to the conclusion that his confession is voluntary. *Villafuerte v. Stewart*, 111 F.3d 616 (9th Cir. 1997). Indeed, "the fact that warnings were given is an important factor tending in the direction of a voluntariness finding." 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c) (3d ed. 2014). "It bears on the coerciveness of the circumstances, for it reveals that the police were aware of the suspect's rights and presumably prepared to honor them."

2 LaFave, *supra* at § 6.2(c). In addition, "it bears upon the defendant's susceptibility, for it shows that the defendant was aware he had a right not to talk to the police." *Id*.

Defendant had sufficient composure following the polygraph test, and its accompanying interviews, to draw a diagram showing how his finger penetrated Jane Doe 1's vagina. (RT 3/5/15 101-103; ER 157-159.) Moreover, following the interview, on defendant's request, Agent Fuller even gave defendant a ride to his disabled vehicle, where Agent Fuller and the other two agents jump-started it for him. (RT 3/5/15 38-39; ER 94-95.)

Even without Agent Fuller's testimony, the evidence shows that it is more likely than not that defendant's statements were not unconstitutionally coerced. Agent Fuller's testimony pushes the proof further beyond the preponderance line. Agent Fuller did not yell or raise his voice at defendant. (RT 3/5/15 112; ER 168.) He never told defendant, "I know you did this." (RT 3/5/15 112; ER 168.) He never threatened defendant in any way or made him any promises of leniency. (RT 3/5/15 112-113; ER 168-169.) In fact, defendant told Agent Fuller he was treated professionally. (RT 3/5/15 90; ER 146.)

Agent Priestino's testimony corroborates Agent Fuller's testimony. When she returned to the conference room, defendant "seemed fine." (RT 3/5/15 35; ER 91.) His face was not flushed and he exhibited no indicators that he had yelled

or been yelled at. (RT 3/5/15 35; ER 91.) Similarly, Agent Fuller's face was not flushed and he displayed no indicators of being angry or upset. (RT 3/5/15 35; ER 91.)

Agent Fuller's testimony is controverted only by defendant's hearsay statements to Dr. McIntyre. Although the district court said it did not consider those statements for their truth, and placed limited weight on them, the order states, "Raised in a traditional Navajo family, Woody well could have taken Special Agent Fuller's demeanor as 'very difficult, upsetting, and scary' and perceived him as 'increasingly angry'…." (CR 130; ER 19-20.) Although broad cultural generalizations, such as "attitude toward authority," are sometimes informative, they are "inherently unverifiable and unquantifiable." *United States v. Zapata*, 997 F.2d 751, 759 (10th Cir. 1993) (reversing suppression order where defendant got scared and very nervous upon police contact because his upbringing in Mexico caused him to believe he must acquiesce to all police requests or face dire consequences); *see also United States v. Iribe*, 11 F.3d 1553, 1557 (10th Cir. 1993) (reversing suppression order where district court relied on the defendant's subjective characteristics, including her attitude toward authority).

The district court evidently placed significant weight on defendant's cultural background: "In this case, as in many in Indian country, the Government's chief witness is a college-educated, professionally trained interviewer from the dominant

culture who–out of sight of others–interrogated a lower functioning traditional Navajo….” (CR 130; ER 22.) Although the court’s sensitivity to cultural factors is understandable, the court excessively relied on this consideration. Not only is the court’s link between Native American culture and defendant’s possible perceptions of Agent Fuller a “questionable stereotype,” *LaDuke v. Nelson*, 762 F.2d 1318, 1329 n.16 (9th Cir. 1985), but Dr. McIntyre could cite no support for his cultural assessments beyond his own experience as a psychologist with Indian Health Services–a position he has held only since 2006. (RT 3/5/15 151; ER 207; RT 3/9/15 8-9; ER 237-238.) Moreover, Dr. McIntyre could not say defendant holds any of the generalized Native American cultural beliefs on which his opinion rested. (RT 3/9/15 9; ER 238.)

Even if all of defendant’s hearsay statements were accepted as true, the record still lacks any evidence of coercion. *See Haswood*, 350 F.3d at 1029. The district court was concerned about whether Agent Fuller “resisted Woody’s denials,” or “embedded details of the alleged abuses in questions.” (CR 130; ER 19.) It was also concerned about “the exact language by which he minimized Woody’s alleged conduct . . . .” (CR 130; ER 19.) But even if these factors were present here, none of them is indicative of coercive conduct.

Confronting a suspect with polygraph results is a reasonable means of police questioning. *Haswood*, 350 F.3d at 1029; *see also Jenner v. Smith*, 982 F.2d 329,

334 (8th Cir. 1993) (noting that "[n]umerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne."). Even had Agent Fuller accused defendant of lying, which he did not do (RT 3/5/15 112; ER 168), the fact that an agent accuses a suspect of lying "does not automatically render the questioning coercive, as an interrogator can legitimately express his disbelief at a defendant's story in order to elicit further comments or explanation." *Wolf*, 813 F.2d at 975; *see also United States v. Sanchez*, 676 F.3d 627, 631 (8th Cir. 2012) (a raised voice and assertion that a subject is lying are not coercive interview methods).

"The Supreme Court has observed that the test of voluntariness is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." *Preston*, 751 F.3d at 1026 (quotation marks and citation omitted). Unlike *Preston*, where agents used tactics such as "repetitive questioning and threats that it would continue without end," "pressure to adopt certain responses," the use of "alternative questions that assumed [the defendant's] culpability," "multiple deceptions about how the statement would be used," and "suggestive

questioning that provided the details of the alleged crime," *Preston*, 751 F.3d at 1012, 1027-28, there is no evidence agents engaged in any such conduct here.

Agent Fuller's training in the Reid technique, and his limited use of minimization, are less concerning here than in *Preston* because those techniques "may be unduly coercive when used for suspects of seriously impaired mental ability," a category into which defendant does not fall. *Preston*, 751 F.3d at 1024. Similarly, embedding details in questions, or influencing the word choices in a defendant's statements are not necessarily evidence of coercion. *Haswood*, 350 F.3d at 1028.

Even had agents engaged in *Preston*-like conduct here, this Court has recognized that not even trickery, deceit, or impersonation render a confession inadmissible, certainly not in noncustodial situations, unless government agents make threats or promises. *United States v. Crawford*, 372 F.3d 1048, 1060-61 (9th Cir. 2004). Again unlike *Preston*, where agents made "false promises of leniency and confidentiality," *Preston*, 751 F.3d at 1028, the agents here made no promises or threats. (RT 3/5/15 112-113; ER 168-169.) Put plainly, there is no evidence of coercive conduct in the record here.

b. The Lack of a Recording Does Not Warrant Suppression

While "[i]t may be better procedure for police to electronically record all conversations with criminal suspects," *United States v. Short*, 947 F.2d 1445, 1451

(10th Cir. 1991), this Court has rejected the notion that the constitutional validity of a confession hangs on whether or not that confession was recorded. *See United States v. Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977) (stating that Congress, not the courts, should determine whether a confession should be suppressed because the interrogation was not recorded); *see also United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005) (finding post-arrest statements properly admitted even though not recorded by available recording equipment, and recognizing that this Court has declined to mandate electronic recording of such statements). There simply is "no constitutional requirement that confessions be recorded by any particular means." *United States v. Yunis*, 859 F.2d 953, 961 (D.C. Cir. 1988).

The district court expressed concern that without a recording of the polygraph examination it "lacks an objective basis to determine that the interrogation was not perceived as coercive by Woody," and that it could not take into account defendant's characteristics "if the Government fails to provide evidence of the actual words, actions, and context necessary to determine Woody's perception and experience." (CR 130; ER 22-23.) But even if a recording would have shown defendant's perceptions of the interview, which is unlikely, subjective perceptions of an interrogation have no place in the constitutional determination of voluntariness.

The district court also discounted Agent Fuller's sworn testimony despite not "imputing bad faith to Special Agent Fuller," and despite "not find[ing] that Special Agent Fuller offered any knowingly false testimony."[3] (CR 130; ER 22-24.) The court explained that it discounted Agent Fuller's testimony because "[w]hatever the reason, the FBI has made a deliberate choice in this case to deprive the court of superior evidence for assessing voluntariness, hoping the court will rely instead on secondary evidence filtered through the FBI."[4] (CR 130; ER 23.)

[3] The district court's order suggests that a law enforcement officer's account of an interrogation he personally conducts is, by some measure, inherently unreliable. (CR 130; ER 21.) In fact, the court was distressed because it was "left with the conclusions and memory of Special Agent Fuller" to determine voluntariness. (CR 130; ER 22.) The conclusory nature of Agent Fuller's testimony is unsurprising, however, given the absence of a detailed counter-narrative or any specific allegations of coercive conduct. And the record here does not demonstrate that Agent Fuller had memory problems. In fact, Agent Fuller not only took detailed simultaneous notes during the interview, but he also memorialized the interview in a written report. (RT 3/5/15 79-80, 113, 144; ER 135-136, 169, 200.)

[4] At the district court's behest, agents declined to guess why FBI policy forbids the recording of polygraph interviews. (RT 3/5/15 49-50, 115; ER 105-106, 171.) In a separate case before the district court, however, the chief of the FBI's Polygraph Unit, who referred to the polygraph examination as a "a protected investigative tool that enhances the FBI's ability to exonerate the innocent, identify subjects, and verify statements provided by sources," explained the FBI's justifications for safeguarding polygraph information. *See United States v. Dahkoshay*, CR-13-08011-PCT-NVW, ECF No. 33. Although that proceeding related to the disclosure of charts and other data underlying a polygraph examination, the court recognized "the Government's asserted interest in protecting the methodology of the polygraph examinations," and seeking not to "provide future suspects with insight into the investigative process, thereby frustrating law enforcement efforts and compromising national security." *See United States v. Dahkoshay*, CR-13-08011-

The court reasoned that "[t]he lack of potentially dispositive evidence for which the Government is responsible undermines the weight of the limited evidence the Government does present." (CR 130; ER 26.) The court further stated, "The evidence the Government does present must be evaluated in light of the evidence it chooses to make unavailable." (CR 130; ER 4.) Such adverse inference is not warranted here, however, primarily because no evidence was lost or destroyed. *See United States v. Fries*, 781 F.3d 1137, 1152-53 (9th Cir. 2015). Evidence that would otherwise be sufficient to carry the government's burden should not be deemed insufficient simply because the government failed to obtain even better evidence. Even if the failure to record constituted lost or destroyed evidence, the record does not demonstrate bad faith to warrant an inference that the recording "would have yielded evidence harmful to the government." *United States v. Romo-Chavez*, 681 F.3d 955, 961 (9th Cir. 2010).

While it is true that "the failure by the FBI to use equipment at its disposal might support a larger inference that the agents' testimony did not accurately portray the circumstances surrounding [defendant's] confession," it is equally true that there are limits "to a judge's prerogative to arrive at factual findings by simply discounting the testimony before him." *Yunis*, 859 F.2d at 960-61. "[A] trial judge's ability to find facts solely by discrediting contrary testimony is limited."

PCT-NVW, ECF No. 40. These same interests undoubtedly underlie the FBI's polygraph recording policy.

Yunis, 859 F.2d at 961. It should be limited here because, "[n]othing in the record … suggests that [Agent Fuller's] failure to record the interview influenced [Woody's] admission." *Haswood*, 350 F.3d at 1028-29.

c. Defendant's Mental Capacity Does Not Justify Suppression

"[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Connelly*, 479 U.S. at 164. This does not mean, however, "that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'" *Id*. *See also Jenner*, 982 F.2d at 333 (a defendant's mental condition alone cannot render a confession involuntary).

"Courts must weigh, rather than simply list, the relevant circumstances, and weigh them not in the abstract but against the power of resistance of the person confessing." *Preston*, 751 F.3d at 1017 (quoting *Doody*, 649 F.3d at 1015-16) (quotation marks omitted). Here, however, instead of weighing defendant's power of resistance, the district court weighed the potential power of resistance of Native Americans in general, based on broad generalizations about historical trauma and cultural differences. For example, the court wrote, "Dr. McIntyre testified that many Native Americans avoid conflict at all costs, and when conflict becomes too great, they may submit or walk away rather than push back. The result is that

Native Americans may be more susceptible to interrogation pressures." (CR 130; ER 13.)

To support its assertion that Dr. McIntyre made an individualized determination of defendant's susceptibility, the district court noted that "he did not say every Native American lacks the cognitive wherewithal to withstand interrogation," and quoted from his report: "Matters of low average intelligence, cognitive impairment, historical trauma, and the Native American cultural differences apply to Mr. Woody and may have contributed to Mr. Woody's will being overborne." (CR 130; ER 13, 25.) But the court ignored Dr. McIntyre's testimony that he can only say low average intelligence applies here.

Dr. McIntyre agreed that cognitive impairment does not apply to defendant. (RT 3/5/15 167-168; ER 223-224; RT 3/9/15 5-6, 8; ER 234-235, 237.) He also could not say defendant holds any of the broadly generalized cultural views that the district court cites to support suppression. (RT 3/9/15 9; ER 238.) Finally, he did not diagnose defendant as suffering from historical trauma, as there is no such diagnosis, primarily because historical trauma is just a theory that relates to major social problems, not to individual behavior, among Native Americans. (RT 3/9/15 28-30; ER 257-259.) That the court overlooked this testimony is especially critical because Dr. McIntyre focused "primarily on the theory of historical trauma and

also cultural differences" as "[t]he main issue" in his analysis. (RT 3/5/15 155, 167-168; ER 211, 223-224.)

Dr. McIntyre's testimony leaves only defendant's low average intelligence on the susceptibility side of the voluntariness scale, which alone cannot render his statements involuntary. *See Frank*, 956 F.2d at 875-78 (upholding admission of confession of Navajo defendant with low average intelligence). In fact, the scale has tipped to the side of voluntariness where defendants with IQs much lower than defendant's have given confessions. *See Murphy v. Ohio*, 551 F.3d 485 (6th Cir. 2009) (confession of borderline mentally defective defendant, with IQ of 74, voluntary absent coercive questioning); *Clark v. Mitchell*, 425 F.3d 270 (6th Cir. 2005) (confession of defendant with IQ of 75 who suffered from acute brain damage and chronic impairment of his mental function voluntary absent police overreaching); *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1995) (confession of defendant with IQ of 68 voluntary absent coercive interrogation methods); and *United States v. Winn*, 969 F.2d 642 (8th Cir. 1992) (confession of borderline mentally retarded defendant, with IQ of 71, voluntary absent impermissible police conduct).

The suppression order relies on this Court's *Preston* decision, which involved the confession of "an intellectually disabled 18-year-old" with an IQ of 65. *Preston*, 751 F.3d at 1010. But even Dr. McIntyre acknowledged the vast

difference in intellectual functioning between an 18-year-old with an IQ of 65, and a 32-year-old with an IQ of 82. (RT 3/9/15 16; ER 245.) Preston also "attended special education classes," had "exceptionally limited linguistic ability," and "significant problems with verbal communication and comprehension." *Preston*, 751 F.3d at 1010. Defendant, on the other hand, did not attend such classes, and exhibited no communication or comprehension problems during his meetings with Dr. McIntyre, his first meeting with FBI agents, or his interview with Agent Fuller. (RT 3/5/15 22-23, 79, 135, 144; ER 78-79, 135, 191, 200; RT 3/9/15 19-21; ER 248-250.) Also unlike Preston, defendant's age does not suggest that he would be more susceptible to the pressures of interrogation.

Preston also "had never been convicted of any offense or adjudicated delinquent." *Preston*, 751 F.3d at 1010. Defendant, in contrast, was not only arrested over ten times for public intoxication, but he was also convicted of a federal offense and appreciated the significance of having the felony charge reduced to a misdemeanor. (RT 3/5/15 14, 78; ER 70, 134; RT 3/9/15 26; ER 255.) Defendant's experience with the criminal justice system, and his familiarity with police interrogation, enhance his ability to understand his rights and give a voluntary confession. *See Murphy*, 551 F.3d at 514; *Correll*, 63 F.3d at 1288; and *Winn*, 969 F.2d at 644.

Absent here are this Court's well-documented concerns in *Preston* regarding the inability of one with a serious intellectual disability and unusually low intelligence to withstand coercive interrogation techniques. Defendant not only has a rational factual understanding of the proceedings against him, but he also has sufficient reasoning and appreciation skills. (RT 3/9/15 6-7; ER 235-236.) Unlike Preston, defendant has no serious intellectual disability and is not mentally retarded. (RT 3/9/15 16; ER 245.)

Again unlike *Preston*, the record here does not show that agents engaged in coercive interrogation techniques. Just as it failed to consider defendant's individual power of resistance, the district court also failed to weigh that power of resistance against actual coercive interrogation tactics. Instead, the court stated, "Expert testimony suggests that, as a result of low average intelligence and cultural differences, Woody may lack the psychological fortitude necessary to withstand *potentially* coercive interrogation techniques." (Emphasis added). (CR 130; ER 3.) Further, the court wrote, "In Dr. McIntyre's opinion, Woody's low average intelligence makes it difficult for him to resist the kinds of stresses and pressures a subject *might experience* during his police interrogation." (Emphasis added). (CR 130; ER 13.) The district court did not weigh defendant's individual power of resistance against actual coercion because there was no evidence of coercion against which to weigh it.

VIII. CONCLUSION

The record shows by at least a preponderance of the evidence that defendant's statements were voluntary. No threats or promises were made, and no improper influence was exerted, to obtain the statements. Defendant's low average intelligence, generalizations regarding historical trauma and cultural differences among Native Americans, and the lack of a recording do not justify suppression of defendant's statements, absent evidence of coercive interrogation techniques.

The use of coerced confessions is forbidden because the method employed to extract them offends constitutional principles; exclusionary rules are aimed at deterring lawless conduct by law enforcement officials. *Lego*, 404 U.S. at 485, 489. Courts condemn police activity that "wrings a confession out of an accused against his will." *Connelly*, 479 U.S. at 164 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960)) (internal quotation marks omitted).

Suppression of defendant's statements will not deter lawless conduct by law enforcement officials because there is no evidence that agents engaged in any form

of constitutionally impermissible conduct to wring a confession out of defendant against his will. For these reasons, this Court should reverse the order suppressing defendant's statements.

JOHN S. LEONARDO
United States Attorney
District of Arizona

KRISSA M. LANHAM
Deputy Appellate Chief

s/ Bill C. Solomon
BILL C. SOLOMON
TRACY VAN BUSKIRK
Assistant U.S. Attorneys

IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 15-10223

I certify that: (check appropriate option(s))

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 8,407 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated __ and is

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August 31, 2015
Date

s/ Bill C. Solomon
BILL C. SOLOMON
Assistant U.S. Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2015, I caused to be electronically filed the Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Bill C. Solomon
BILL C. SOLOMON
Assistant U.S. Attorney