No. 22-6025

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

JOSEPH MALDONADO-PASSAGE,
Defendant - Appellant.

On appeal from the United States District Court
for the Western District of Oklahoma
Honorable Scott L. Palk - No. 5:18-cr-00227-SLP

OPENING BRIEF OF APPELLANT JOSEPH MALDONADO-PASSAGE

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STATEMENT OF PRIOR APPEALS

Appellant previously appealed his conviction and sentence following a federal jury trial. Maldonado-Passage v. United States, No. 20-6010. (filed Sept. 11, 2020). This Court vacated his sentence and remanded his case back to the district court for further proceedings.

STATEMENT OF JURISDICTION

This is an appeal from an amended judgment from resentencing entered on January 31, 2022. (dkt. 209). The district court had jurisdiction under 18 U.S.C. § 3231. A timely notice of appeal was filed on February 11, 2022. (dkt. 217). This Court has jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether consecutive sentences for two counts of 18 U.S.C. § 1958(a) that involve a single overarching plot, the same course of conduct, and a common criminal objective to murder a single person violate the Due Process Clause, when the victim was never harmed, and it is unlikely that Congress intended such a harsh result.

Whether the district court's decision to run sentences consecutively was unreasonable, when the court failed to consider sentencing factors including the need to avoid unwarranted sentence disparities.

STATEMENT OF THE CASE

Joseph Maldonado-Passage, AKA Joe Exotic, is no stranger to this Court, nor to the public at large. A self-described "gay, gun-toting cowboy with a mullet[1]," he was once a charming local legend in Oklahoma but now resides at Federal Medical Center Butner, a prison in North Carolina that houses inmates with special health needs[2]. Maldonado-Passage is serving a 256-month sentence, following his conviction on a series of wildlife violations[3] and two counts of 18 U.S.C. § 1958(a), which allege he caused the use of interstate communication devices with the intent to facilitate the murder of Carole Baskin. It is undisputed Baskin was never harmed.

Counts 1 and 2 of the superseding indictment against Maldonado-Passage describe two attempts to coordinate the killing of Baskin. The first

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[1] Maldonado-Passage called himself such in the popular Netflix docuseries, "Tiger King: Murder, Mayhem, and Madness" (Eric Goode dir., 2020).

[2] Maldonado-Passage is receiving radiation treatment for a recent diagnosis of prostate cancer. (App. Vol. 2, p. 402).

[3] Maldonado-Passage was also convicted of nine misdemeanor counts for violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544, and eight counts of violations of the Lacey Act, 16 U.S.C. §§ 3371–3378.

involves his alleged hiring of Allen Glover[4]. The second involves an undercover Federal Bureau of Investigation (FBI) agent named "Mark" who was introduced to Maldonado-Passage by confidential informant James Garretson. Both counts involve the same overarching plan to kill Baskin, both are described as having the same intent, and both occurred during an overlapping time frame.

Maldonado-Passage filed a pretrial motion to dismiss either Count 1 or Count 2, alleging the counts were multiplicitous. The district court denied the motion, finding the counts involved separate courses of conduct. Maldonado-Passage proceeded to trial.

Following his conviction at trial, the district court sentenced Maldonado-Passage to serve a total of 264 months in prison, with 108 months to serve in custody on Count 1 to run consecutively to 108 months to serve in custody on Count 2. The district court did not group Counts 1 and 2 under the United States Sentencing Guidelines, again reasoning the

[4] Allen Glover has since recanted his testimony and signed an affidavit, which was included in Maldonado-Passage's sentencing memorandum, stating he committed perjury as a witness for the prosecution. (App. Vol. 2, p. 96). He denies being hired as a hit man by Maldonado-Passage. Id.

counts involved separate courses of conduct. Maldonado-Passage appealed, arguing in part that Counts 1 and 2 were closely related and the district court erred in failing to group them.

The Tenth Circuit agreed, finding Counts 1 and 2 involved a common criminal objective and—given the degree of similarity of the offenses, the repetition of the offenses, and the time interval between them—the counts were part of the same course of conduct. Maldonado-Passage's sentence was vacated and his case was remanded to the district court.

Prior to his resentencing, Maldonado-Passage filed a motion to reconsider the district court's order on the pretrial motion to dismiss. He argued the district court should reexamine the multiplicity issue given the Tenth Circuit's analysis of the interplay of the counts. Because the Tenth Circuit found the conduct alleged in the counts similar, contemporaneous, and part of the same course of conduct, Maldonado-Passage asserted he should be sentenced concurrently for those charges. The district court denied the motion.

At sentencing, Maldonado-Passage argued for a variance or departure give the facts and circumstances of his case, his history and characteristics, and the government's role in the creation of his crimes. The defense admitted

an exhibit detailing sentences for defendants found guilty of similar conduct and argued that consecutive sentences in his case would create an unwarranted sentencing disparity. The district court did not depart nor vary from the guidelines. Maldonado-Passage was again sentenced to consecutive terms on Counts 1 and 2, with 102 months to serve on each.

Under section 1958(a), if there is no harm to the victim, the defendant can be sentenced up to ten years. If bodily injury occurs, the defendant can be sentenced up to twenty years. If death occurs, the defendant can be sentenced to death or life in prison. Despite Baskin suffering no physical injury whatsoever, the district court resentenced Maldonado-Passage to a total of seventeen years for his failed, unsuccessful plot.

This timely appeal follows.

STATEMENT OF THE FACTS

A federal jury convicted Maldonado-Passage on two counts concerning his alleged scheme to have Carole Baskin murdered. They were:

> Count 1 - "Joseph Maldonado-Passage caused another person to travel in interstate commerce, used and caused another person to use the mail, and used and caused another person to use any facility of interstate commerce, with the intent that the murder of C.B. be committed in violation of the laws of the state of Oklahoma and the state of Florida as consideration for the receipt of, and as

> consideration for a promise and agreement to pay, anything of pecuniary value."
>
> Count 2 – "Joseph Maldonado-Passage used and caused another person to use the mail, with the intent that the murder of C.B. be committed in violation of the laws of the state of Oklahoma and the state of Florida as consideration for the receipt of, and as consideration for a promise and agreement to pay, anything of pecuniary value."

(App. Vol. 1, p. 43).

The counts had a common scheme and plan: both involved Maldonado-Passage's alleged desire to have someone travel to Florida and murder Baskin; both would be paid for by money generated from the sale of tiger cubs; both were allegedly motivated by a 2013 money judgement. (App. Vol. 1, p. 87). Additionally, the conduct described in the counts occurred during overlapping time periods, between July 16, 2016 and March of 2018. App. Vol. 1, p. 43).

Before trial, Maldonado-Passage filed a motion to dismiss, arguing the two counts charged a single violation of 18 U.S.C. § 1958(a). (App. Vol. 1, p. 54). The district court denied the motion, finding that although the counts "grew out of a single investigation by law enforcement officials and had the same intended victim," that did not alter the "individual nature" of the counts. (App. Vol. 1, p. 61). The court cited *United States v. McCullough,* 457

F.3d 1150 (10th Cir. 2006) for the proposition that if individual acts alleged in the indictment are part of the same prohibited course of conduct, there can only be one penalty.

The district court ruled Counts 1 and 2 alleged distinct courses of conduct, however. (App. Vol. 1, p. 61). In denying the motion, the court noted that while the unit of prosecution for a §1958(a) offense is one plan to murder one individual, the government had pleaded two plots in the superseding indictment. The plots were distinct, the court explained, because they "involve[d] different 'hit men,' [the] use of different interstate commerce facilities, and different time periods." Id. As to the latter point, the court acknowledged the conduct alleged in Counts 1 and 2 occurred during an overlapping time frame. Id. at n.3. Still, the court held, these were distinct periods because the use of interstate facilities did not occur at the same time. Id. Maldonado-Passage proceeded to trial.

At trial, Agent Andrew Farabow testified that in September of 2017 the FBI had information that Maldonado-Passage asked confidential informant James Garretson to find someone to kill Baskin for money. (App. Vol. 1, p. 87). The plan was to have Garretson introduce an undercover agent posing

as a hitman to Maldonado-Passage. Id. Agent Farabow testified this would give the FBI more control over the investigation. Id.

Before the introduction could be accomplished, Agent Farabow testified that in November of 2017, the FBI learned that Maldonado-Passage allegedly hired Allen Glover to travel to Florida and murder Baskin. (App. Vol. 1, p. 87). The FBI asked Garretson to intervene and persuade Maldonado-Passage to use an undercover agent instead of Glover. Id.

In that effort, on December 8, 2017, Garretson brought "Mark", an undercover agent working at the direction of the FBI, to meet Maldonado-Passage at his zoo. (App. Vol. 1, p. 87). Garretson testified that the purpose of the visit was to try "to stop the Glover plan and introduce Mark" into the murder-for-hire plot. Id. Agent Matthew Bryant from United States Fish and Wildlife Service confirmed this when he testified, saying, "[w]e were trying to encourage Mr. Passage not to use Mr. Glover but to use our undercover, so that we could gain control over the plan." Id. The decision to introduce "Mark" into the scheme was exclusively the government's.

A jury convicted Maldonado-Passage of both counts of 18 U.S.C. § 1958(a). The district court sentenced him to 108 months to serve in custody on Count 1 to run consecutively to 108 months to serve in custody on Count

2. (App. Vol. 1, p. 78). Maldonado-Passage appealed his conviction and sentence and argued, in part, that two counts of 18 U.S.C. § 1958(a) involving the same victim under should be treated as one group under the United States Sentencing Guidelines[5].

The Tenth Circuit agreed, and Maldonado-Passage's sentence was vacated. This Court found "the charged uses of interstate-commerce facilities shared the same criminal objective" and explained that the lower court had incorrectly focused on the means, not the ends, in deciding the counts were separate courses of conduct. United States v. Maldonado-Passage, 4 F.4th 1097, 1100 (10th Cir. 2021). Further, the district court focused

[5] Maldonado-Passage's guidelines for Counts 1 and 2 were calculated using a cross-reference to U.S.S.G. §2A1.5, rather than §2E1.4, the single guideline provision specified in the Statutory Index in Appendix A to the United States Sentencing Guidelines. Using §2A1.5 as the offense level for 18 U.S.C. § 1958(a) makes §2E1.4 superfluous and results in no correlation between the guideline and the statutory penalty. For example, a conviction for a single count of 18 U.S.C. § 1958(a), even for someone eligible for the full 3-level reduction for acceptance of responsibility and with a Criminal History Category of I, results in a guideline range in excess of the 10-year statutory maximum. Thus, Maldonado-Passage's advisory guideline imprisonment range without grouping Counts 1 and 2 was 262 months to 327 months; with grouping it was 210 months to 262 months. The probation officer noted in Maldonado-Passage's initial Presentence Report that this cross-reference anomaly could be grounds for a departure.

on whether the counts were part of the same course of conduct, as contemplated in the application notes of Section 3D1.2(b), rather than whether the counts shared a common criminal objective. Id. Nonetheless, the Tenth Circuit also found that the two counts *were* part of the same course of conduct under the factors in U.S.S.G. §1B1.3 cmt. n.5(B)(ii)[6]. Maldonado-Passage's case was remanded to the district court for further proceedings.

Maldonado-Passage filed a motion to reconsider the district court's order denying his pretrial motion to dismiss. (App. Vol. 2, p. 367). He argued consecutive sentences on Counts 1 and 2 would violate the Double Jeopardy Clause given the Tenth Circuit's analysis of the counts. Id. He pointed to *United States v. McCullough*—the same case cited by the district court in the order denying his motion to dismiss—for the proposition that if the course of conduct alleged in the two counts is prohibited, rather than the individual acts, there can only be one penalty. Given the appellate court's finding that the two murder-for-hire counts were part of the same course of conduct with the same criminal objective, Maldonado-Passage reasoned, the multiplicity issue should be reviewed. The district court denied the motion, holding it

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[6] The Tenth Circuit did not decide whether § 1B1.3(a)(2)'s "course of conduct" meaning transports to § 3D1.2(b).

was an improper challenge to Maldonado-Passage's conviction[7] and noting the court had no misapprehension of the law regarding multiplicity. (App. Vol. 2, p. 385).

Maldonado-Passage filed a sentencing memorandum with attachments and argued, among other points, that Agent Bryant was excessively involved in creating the crimes with which Mr. Maldonado-Passage had been convicted, and that he showed significant government coercion to induce Mr. Maldonado-Passage to commit them. (App. Vol. 2, p. 96). The memorandum explained how the government participated in his crimes in a way designed solely to increase the severity of his criminal sentence. Id. Maldonado-Passage argued that he was entitled to either a departure or a variance from the advisory sentencing range because of these circumstances, and because of the discrepancy inherent in applying a cross-reference from U.S.S.G. §2E1.4 to §2A1.5.

[7] Maldonado-Passage argued in his motion for reconsideration that multiplicity is not fatal to an indictment and while a defendant may be convicted on two multiplicitous counts, the court must merge those convictions post-trial to avoid double jeopardy concerns. (App. Vol. 2, p. 367).

Additionally, Maldonado-Passage admitted an exhibit at his sentencing with details regarding other defendants convicted of 18 U.S.C. § 1958(a). (App. Vol. 2, p. 402 (Attachment 2)). He argued that to avoid unwanted disparities among similarly situated defendants—many of who were granted a departure because of the cross-reference issue—he should receive a sentence significantly below the guideline range. (App. Vol. 2, p. 402). Without weighing the required sentencing factors, the district court resentenced Maldonado-Passage to consecutive terms. Maldonado-Passage is currently serving over 21 years, 17 of which are for the two counts of 18 U.S.C. § 1958(a).

STANDARD OF REVIEW

Claims of multiplicity are reviewed de novo. United States v. Benoit, 713 F.3d 1 (10th Cir. 2013).

A defendant's sentence is reviewed "for reasonableness under an abuse-of-discretion standard," which applies whether the sentence falls inside or outside of the guideline range. United States v. Henson, 9 F.4th 1258, 1284 (10th Cir. 2021) (quoting Peugh v. United States, 569 U.S. 530, 537 (2013)). A reasonableness review "encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated." United States v. Kristl, 437 F.3d 1050, 1055 (10th Cir. 2006) (emphasis in original).

SUMMARY OF THE ARGUMENT

Two counts of 18 U.S.C. § 1958(a) that involve a single overarching plot to murder a single person who suffered no bodily injury are multiplicitous. Multiplicity refers to multiple counts of an indictment which cover the same criminal behavior. Though the government may submit multiplicitous counts to the jury, multiplicitous sentences violate the Double Jeopardy Clause.

Congress intended 18 U.S.C. § 1958(a) (known colloquially as the "murder-for-hire" statute) to criminalize a course of conduct rather than individual acts involved in a scheme to kill. The graduated punishment scheme in 18 U.S.C. § 1958(a)—which proscribes a maximum of 10 years' imprisonment for a violation that does not result in personal injury, a maximum of 20 years' imprisonment for a violation that does result in personal injury, and a maximum of death or life imprisonment if a murder is committed—conveys a clear indication of Congress' apparent belief that the greater the harm to the victim, the harsher the punishment should be for the offender. The appropriate unit of prosecution under 18 U.S.C. § 1958(a) is therefore each overarching plot to murder an individual. This is consistent with the victim-centric sentencing scheme formulated by Congress.

Using another unit of prosecution, such as each use of an interstate communication device or each person employed to carry out a killing, creates an irrational result considering the statute's sentencing scheme. For example, by using multiple undercover agents who agree to facilitate the defendant's plot to kill and make multiple telephone calls in furtherance of the scheme, the government could create a situation wherein a defendant faces 50 years in prison, even if the victim is never harmed. If the same defendant engages with one undercover agent who makes one phone call and ultimately shoots the victim, he faces a maximum of 20 years.

Congress clearly fixed the punishment under 18 U.S.C. § 1958(a) by tying it to the harm imposed by the violation. But if congressional intent behind the unit of prosecution for the statute remains unclear, this Court should employ the rule of lenity, which provides that ambiguities in criminal laws should be resolved against imposition of a harsher punishment. Maldonado-Passage's two counts of 18 U.S.C. § 1958(a) should be merged into one, and he should be resentenced accordingly.

Ordering Maldonado-Passage to serve consecutive sentences on Counts 1 and 2 violates his constitutional right to due process. No reasonable defendant could have fair warning that a murder-for-hire plot that causes

no harm to the victim would result in a sentence 70% higher than over the 10-year maximum provided in 18 U.S.C. § 1958(a). The district court failed to consider sentencing factors in 18 U.S.C. § 3553(a), including the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct. Other defendants convicted of 18 U.S.C. § 1958(a)—most with criminal histories far more extensive than Maldonado-Passage, who has no criminal history whatsoever—received sentences significantly below the advisory guideline range, in part because the range is calculated using a cross-reference to U.S.S.G. §2A1.5, rather than §2E1.4. The district court's sentence was more than necessary to accomplish federal sentencing aims and is unreasonable.

ARGUMENT AND CITATION OF AUTHORITY

I. The district court erroneously sentenced Maldonado-Passage to consecutive terms on two multiplicitous counts of 18 U.S.C. § 1958(a).

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy." U.S. Const. amend. V. It provides three constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, (1989) (footnotes omitted).

A prosecution is multiplicitous when a defendant is punished twice for what is essentially a single crime. With double punishment as the test, multiplicity is not fatal to an indictment. Indeed, "[t]he government may submit multiplicitous charges to the jury." United States v. Nickl, 427 F.3d 1286, 1301 (10th Cir. 2005). But multiplicitous sentences violate the Double Jeopardy Clause, so "if a defendant is convicted of both charges, the district court must vacate one of the convictions." Id. In the alternative, a court may merge multiplicitous convictions into one count for sentencing purposes. *See*

United States v. Danforth, 471 F.Supp.3d 1079, 1082 (D. Idaho 2020) (granting the defense's motion to merge counts of 18 U.S.C. § 1958(a)); *See also* United States v. Gordon, 875 F.3d 26, 38 (1st Cir. 2017).

When an indictment includes multiple counts charging a violation of the same statutory provision and a claim of multiplicity is raised, an inquiring court must determine whether the facts underlying each count can be treated as a distinct unit of prosecution. A unit of prosecution is "the minimum amount of activity a defendant must undertake, what he must do, to commit each new and independent violation of a criminal statute." United States v. Elliott, 937 F.3d 1310 (10th Cir. 2019) quoting United States v. Rentz, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc). The multiplicity analysis turns on the total punishment authorized by the legislature. Illinois v. Vitale, 447 U.S. 410, 415 (1980); Jones v. Thomas, 491 U.S. 376, 381 (1989). The critical inquiry is whether Congress intended to punish each statutory violation separately. Jeffers v. United States, 432 U.S. 137, 155 (1977).

In ascertaining congressional intent, courts employ the traditional tools of statutory construction, including a consideration of the language, structure, purpose, and history of the statute. With the analytical starting

point being the language, Section 1958(a) of Title 18, United States Code, in pertinent part, provides:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

Statutory interpretation begins "with the assumption that the ordinary meaning of the statutory language accurately expresses the legislative purpose." United States v. Eves, 932 F.2d 856 (10th Cir. 1991). In their ordinary and natural meaning, the words of 18 U.S.C. § 1958(a) describe a plot to kill an individual person. The statute references "the intended victim" and the intent that "a murder" be committed. The core example of conduct the statute was designed to reach is a scheme to murder a single victim, who may suffer a single death.

The statute lays out three elements of the crime: (1) the use of the mail or interstate or foreign commerce facilities (2) accompanied by an intent that

a murder be committed (3) as consideration for the receipt of or promise to pay anything of pecuniary value. *See* United States v. Ritter, 989 F.2d 313, 321 (9th Cir. 1993). It focuses on the plan to kill and its consequences: the more successful the plan is in execution, the greater the penalty imposed. This graduated punishment scheme "conveys a clear indication of Congress' apparent belief that the greater the harm to the victim, the harsher the punishment should be for the offender." Gordon, 875 F.3d at 33.

Other circuits have concluded the unit of prosecution for 18 U.S.C. 1958(a) is an overarching scheme to murder an individual. In *United States v. Gordon*, 875 F.3d 26, 38 (1st Cir. 2017), the First Circuit vacated the defendant's consecutive murder-for-hire sentences and remanded the case back to the district court. The district court was instructed to merge the defendant's multiple counts of 18 U.S.C. §1958(a) and resentence using a plot-centric unit of prosecution. Gordon, 875 F.3d at 38.

Gordon, already in jail and facing criminal charges for soliciting a hitman to kill his wife, decided to deal with his situation by hiring a hitman to kill two of the key witnesses in his forthcoming trial. Id. at 28. He solicited the help of a fellow inmate, who connected him to a second individual who would carry out the killings. Id. This individual was an undercover agent,

however, coordinated by law enforcement to gather evidence of Gordon's scheme. Id. at 29. Gordon and the undercover agent, often through intermediaries, communicated by mail and telephone to plan the murders. Id. There were multiple interstate facilities used and multiple people engaged in Gordon's plot to kill.

The government charged Gordon with five counts of section 1958(a), one for each time an instrument of interstate commerce was employed in furtherance of his plan. Id. at 29. Notably, Gordon conceded that the government could have charged him twice—because his plan involved killing two people—and that would not violate the Double Jeopardy Clause. Id. at 38 n.3. But because the government opted to charge both attempted murders in each of the five counts, the First Circuit found the indictment multiplicitous. Id. at 37.

Adopting a unit of prosecution that allows the government to easily manipulate the number of chargeable counts is problematic, the First Circuit noted. Id. at 38 n.6. If the unit of prosecution is anything other than an overarching plot to kill, the government can introduce an undercover agent to pose as a hitman as part of a federal investigation—as they did in *Gordon* and as they did with Maldonado-Passage—and direct their operative to

make multiple calls and take as many interstate trips as possible. Without knowledge or awareness of those calls and excursions[8], despite not initiating the involvement with the undercover agent, the defendant could be charged with dozens of counts of 18 U.S.C. § 1958(a). This is contrary to reason, rationality, and common sense, and gives the government limitless power to manipulate sentences.

Here, Maldonado-Passage was charged in two counts with one overarching plan to murder one individual. His alleged intent was the same for both counts: to kill Baskin. (App. Vol. 1, p. 43). His alleged motive was the same for both counts: a 2013 money judgment. (App. Vol. 1, p. 87). The counts occurred during overlapping time periods: between 2016 and 2018. (App. Vol. 1, p. 43).

The Tenth Circuit found the conduct alleged in Counts 1 and 2 to be "similar, regular, and almost contemporaneous." Maldonado-Passage, 4

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[8] The government is not required to prove that a defendant intended or knew that the facility of interstate commerce would be used or that interstate travel would occur. United States v. Edelman, 873 F.2d 791, 794-95 (5th Cir. 1989). It is sufficient under the statute that a defendant cause another to use such a facility with the intent that a murder be committed, and this use of facility can occur without the defendant's knowledge. *See* United States v. Winter, 33 F.3d 720, 721 (6th Cir. 1994).

F.4th at 1100. The only argument that the counts constitute distinct plots stems from the government's introduction of an undercover agent into the plan. At trial, federal agents testified that inviting another person to facilitate Maldonado-Passage's scheme was their decision. Government strategy alone should not double Maldonado-Passage's sentencing exposure.

In reaching the conclusion that the correct unit of prosecution is plot-centric, the *Gordon* court echoed another published circuit court decision. The Sixth Circuit held in *United States v. Wynn*, 987 F.2d 354, 359 (6th Cir. 1993) that the appropriate unit of prosecution under section 1958(a) is each plot to murder a single victim[9]. In *Wynn*, the government argued that each telephone call made by the defendant in support of his scheme "was a separate offense." Id. at 358-59. The court rejected this argument, explaining that "separate phone calls which relate to one plan to murder one individual constitute only one violation of 18 U.S.C. § 1958." Id. at 359.

Specifically, the Sixth Circuit noted that grouping counts under the United States Sentencing Guidelines involves a similar analysis as does

[9] There is an unpublished Sixth Circuit opinion that takes a different view. *See* United States v. Ng, 26 Fed.Appx. 452 (6th Cir. 2001) (per curiam). That opinion, however, is bereft of precedential value. *See* 6th Cir. R. 32.1(b).

determining the unit of prosecution. Id. Just as "separate phone calls which are violations of 18 U.S.C. § 1958 must be grouped together under the sentencing guidelines if they are connected with the murder of one individual," the court said, "separate phone calls which relate to one plan to murder one individual constitute only one violation of 18 U.S.C. § 1958." Id. (citing United States v. Wilson, 920 F.2d 1290, 1294 (6th Cir. 1990)).

Statutory history and legislative context furnish additional insight into congressional purpose behind 18 U.S.C. § 1958. The genesis of the statute occurred in 1961 under the Interstate Travel in Aid of Racketeering Act ("Travel Act"). 18 U.S.C. § 1952 (Supp. III 1958). With the Travel Act, Congress aimed to curb organized crime and racketeering at a time when murder prosecutions were the almost exclusive responsibilities of state and local authorities. *See* Craig M. Bradley, Racketeering and the Federalization of Crime, 22 AM. CRIM. L. Rev. 213, 242-43 (1984).

Congress added 18 U.S.C. § 1958(a) to the Travel Act in 1984 as part of the Comprehensive Crime Control Act. S.REP. No. 98-225, at 304-05 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3483-84. A 1983 Senate Judiciary Committee report describes the offense punishable under 18 U.S.C. § 1958(a) as "the travel in interstate or foreign commerce or the use of the facilities of

interstate or foreign commerce or of the mails, as consideration for the receipt of anything of pecuniary value, with the intent that a murder be committed." Id. The report explains that "[t]he gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent and the offense is complete whether or not the murder is carried out or even attempted." Id. at 3485. The crime is an overarching plot to murder a single person in exchange for something of value. Travel and facilities of interstate commerce, which create federal jurisdiction, are means and ways to further the plot. Similarly, hitmen are also means and ways.

Congress also added a companion crime to section 1958 in the Comprehensive Crime Control Act: violent crimes in aid of racketeering, 18 U.S.C. § 1959. Section 1959 criminalizes contract murders and other crimes of violence by organized crime figures and shares common definitions with section 1958. Section 1959, like section 1958, focuses on the impact on the victim for determining the maximum penalty. Both provisions were added as part of a congressional effort to "proscribe[ ] murder and other violent crimes committed for money or other valuable consideration or as an integral aspect of membership in an enterprise engaged in racketeering." S.

Rep. No. 98-225, at 304. The unit of prosecution intended by Congress in both statutes, as evidenced by their penalty provisions, is the underlying real crime, not the way it was executed. A single plot may have many means and ways of execution, but a person can only be murdered once.

Using a different unit of prosecution—such as the number of interstate facilities used in furtherance of the scheme, the number of times an individual traveled in furtherance of the scheme, or the number of hitmen employed by the defendant—would frustrate this congressional aim. For example, it would expose a person who used multiple interstate commerce facilities and multiple hitmen in furtherance of a failed plot that caused no injury to anyone to a much longer maximum sentence than a person who, because of one telephone call, caused severe bodily injury to multiple people. This is an irrational result given the purpose of the statute's sentencing scheme, but exactly what the government will advance in their argument.

Other principles of federal sentencing mitigate against government manipulation of charges to create longer sentences. The United States Sentencing Guidelines attempt to prevent "the possibility that an arbitrary casting of a single transaction into several counts will produce a longer

sentence." U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A.4 (2018). Also, the grouping rules have "[a]n important objective . . . to limit the significance of the prosecutor's charging decision to prevent multiple punishment where there is one victim and two or more acts in furtherance of a common criminal objective." Wilson, 920 F.2d at 1294.

There is no rule that the exclusive remedy for multiplicitous counts is election between them. *See* Ball v. United States, 470 U.S. 856, 864 (1985). Requiring election before trial is one option, but not the only one. The remedy Maldonado-Passage seeks on appeal is a remand so that the trial court can merge Counts 1 and 2 and resentence him on the one remaining count. Because Maldonado-Passage has been punished twice for what is a single crime, his sentence violates double jeopardy, and he must be resentenced accordingly.

II. In the alternative, the congressional intent behind 18 U.S.C. § 1958 is ambiguous, and therefore, the rule of lenity applies.

Determining the unit of prosecution is a matter of statutory interpretation. *See* United States v. Rentz at 1109 n.4. But when a disputed statute employs vague language that reasonable readers can interpret in different ways, judges must turn elsewhere to arrive at a rule of decision. If

this Court is left with ambiguity or uncertainty concerning 18 U.S.C. § 1958(a), it should employ the rule of lenity. Muscarello v. United States, 524 U.S. 125, 139 (1998) (quotation omitted); United States v. Elliott, 937 F.3d 1310 (10th Cir. 2019); Wooden v. United States, 595 U.S. __ at 29 (2022) (Gorsuch, J., concurring in judgment) (noting that where the traditional tools of statutory interpretation yield no clear answer, the judge's next step is to lenity).

The rule of lenity requires a court to resolve statutory ambiguity in favor of a criminal defendant, or to strictly construe the statute against the government. It is "a means for upholding the Constitution's commitments to due process and the separation of powers." Wooden at p. 29 (Gorsuch, J. concurring in judgment). Lenity preserves the constitutional right of fair warning. The rule ensures we do not have to guess as to the breadth and meaning of a penal statute, the application of which could seriously impact our life or liberty. *See* Id. It also limits the scope of statutory language in penal statutes. The legislature and not the courts ought to establish the contours of a crime and its punishment. *See* Id. (quoting United States v. Wiltberger, 5 Wheat. 76, 95 (1820)).

Recently, another court faced with a motion to merge two counts of 18 U.S.C. § 1958(a) found the statute ambiguous and employed the rule of lenity in favor of the defendant. In *United States v. Danforth*, 471 F. Supp.3d 1079 (D. Idaho 2020), the defendant moved the court to dismiss her multiple counts of section 1958(a) or merge them into one. Danforth argued that the proper unit of prosecution under the statute is an overarching plot to murder. The government proposed the proper unit of prosecution as every use of the mail or telephone with the intent that a murder-for-hire be committed, regardless of whether each phone call and letter related to a single plot to murder a single victim. The district court found statutory interpretation of 18 U.S.C. § 1958(a) failed to establish that the government's position was unambiguously correct and applied the rule of lenity to resolve the ambiguity in Danforth's favor. Danforth's motion was granted and her multiple counts of section 1958(a) were merged into one.

As the Supreme Court instructed in *Bell v. United States*, 349 U.S. 81, 84 (1955), if "Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." Congress fixed the punishment for 18 U.S.C. § 1958(a) through its graduated sentencing scheme, wherein a

defendant faces a maximum penalty based on the harm to the victim. If this Court finds the statute ambiguous, however, Maldonado-Passage must still be sentenced to concurrent terms.

Fair punishment requires that constitutional values of equality, liberty, and due process are met in interpretive questions of criminal law. Lenity lies at the heart of these interpretive questions, and statutory ambiguities must be resolved in favor of a criminal defendant. If the unit of prosecution under 18 U.S.C. § 1958(a) is unclear, still, Maldonado-Passage's counts must merge. This Court should again vacate his sentence and remand his case to the district court for further proceedings.

III. **The district court's sentence of consecutive terms on Counts 1 and 2 is unreasonable.**

Section 3553(a) sets forth the following factors that the district court must weigh in determining whether the terms imposed should run concurrently or consecutively:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;

> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; [and]
> (3) the kinds of sentences available….

18 U.S.C. § 3553(a).

Procedural reasonableness addresses, among other issues, whether the district court failed to weigh the § 3553(a) factors. Gall v. United States, 552 U.S. 38, 51 (2007). Nothing in the record suggests the court considered these factors before deciding to run Counts 1 and 2 consecutively. Rather, the court focused exclusively on the stacking rules under U.S.S.G. §5G1.2. (Resentencing transcript, pg. 22-23). The court declined to consider information presented in Maldonado-Passage's sentencing memorandum which related to the nature and circumstances of the offense[10]. The court failed to weigh policy statements issued by the Sentencing Commission as required by section 3553(a)(5) and did not consider the need to avoid unwarranted sentence disparities as required by section 3553(a)(6). Nothing

[10] "Even if the scope of this sentencing was to include consideration of the defendant's newly submitted arguments and attachments to his sentencing memorandum, the Court would, nonetheless, find . . . those arguments would not alter the Court's findings in regards to the 3553 factors." (App. Vol. 2, p. 402).

in the record, besides a conclusory, general statement that the factors had been considered, indicates that the court conducted an individualized analysis of Maldonado-Passage's case before imposing consecutive sentences.

Without consideration of the sentencing disparities presented in Def. Ex. 1, the court's sentence was neither well-reasoned nor reasonable. *See* United States v. McBride, 633 F.3d 1229, 1232 (10th Cir. 2011) (for a sentence to be "reasoned" it must be procedurally reasonable). Reasonableness should imply a rational and meaningful consideration of the factors enumerated in § 3553(a). Specifically, the sentence imposed should be based on reasons that are logical and consistent with the factors set forth in that section. Here, the court failed to mention any of Maldonado-Passage's disparity arguments when imposing sentence and ordered consecutive terms for Counts 1 and 2 without any analysis of why.

Each case is unique, and the Supreme Court requires an individualized assessment of sentencing factors. Gall, 552 U.S. at 50. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify,

the crime and the punishment to ensue." Koon v. United States, 518 U.S. 81, 113 (1996). Because the district court failed to do so here, Maldonado-Passage's sentence is procedurally unreasonable.

In reviewing a sentence on appeal, this Court is also required to consider the substantive reasonableness of the prison sentence imposed. Gall, 552 U.S. 38 (2007). "Review for substantive reasonableness focuses on whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." United States v. Friedman, 554 F.3d 1301, 1307 (10th Cir. 2009) (quotation omitted). Maldonado-Passage's sentence is longer than any of the other sentences presented in Def. Ex. 1. Yet the facts of his case are far more benign: no one was shot, like the victim in United States v. Lisyanski, 806 F.3d 706 (2nd Cir 2015); his murder-for-hire plot was not motivated by obstruction of justice, like the defendant's in United States v. Vasco, 564 F.3d 12 (1st Cir 2009); and Maldonado-Passage did not already have an extensive criminal history, like the perpetrator in United States v. Temkin, 797 F.3d 682 (9th Cir 2015).

In fact, Maldonado-Passage has no criminal history. (App. Vol. 2, p. 402). He is a former police officer. Id. He suffers from an immunodeficiency disease and is currently undergoing radiation treatment for prostate cancer.

Id. at 29. Witnesses who testified against him have come forward and recanted. Id. at 31. He has presented evidence showing government coercion in his crimes. Id. at 20. Baskin suffered no physical injury from his alleged scheme. Yet Maldonado-Passage is serving over 21 years in prison, a longer sentence than any of the murder-for-hire cases discussed *supra*. His sentence is far greater than necessary—by a significant magnitude—to comply with the purposes of federal sentencing. Due to this substantive error, his case should be remanded, and the district court should be instructed to run Counts 1 and 2 run concurrently.

CONCLUSION

Based on the foregoing, Maldonado-Passage's amended sentence should be vacated and the case remanded to the district court.

STATEMENT REGARDING ORAL ARGUMENT

Joseph Maldonado-Passage requests oral argument to more fully develop the issues raised and to offer this Court the opportunity to question counsel so as to clarify those issues and the accompanying facts.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

As required by Fed. R. App. P. 32(g), I certify that this brief is proportionally spaced and contains 6,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I relief on my word processor to obtain the county and it is Microsoft Word 2016.

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

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Molly Hiland Parmer
MOLLY HILAND PARMER
Counsel for Mr. Maldonado-Passage
Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH CERTIFICATION OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made, and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk.

I also certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, Trend Micro Apex One Security Agent, Version 14.0.9663, which is updated daily. I further certify that according to the commercial virus-scanning program, these digital submissions are free of viruses.

/s/ Molly Hiland Parmer
MOLLY HILAND PARMER
Counsel for Mr. Maldonado-Passage
Defendant-Appellant

CERTIFICATE OF ELECTRONIC SERVICE

This is to certify that on April 12th, 2022, I electronically transmitted that attached brief to the Clerk of Court using the NextGen PACER System for filing and transmittal of a Notice of Docket Activity to the counsel of record in this matter.

/s/ Molly Hiland Parmer
MOLLY HILAND PARMER
Counsel for Mr. Maldonado-Passage
Defendant-Appellant

AO 245C (Rev. 09/19) Amended Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA

v.

JOSEPH MALDONADO-PASSAGE
a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel,
a/k/a Joe Exotic

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: CR-18-00227-001-SLP

USM Number: 26154-017

Molly Hiland Parmer, Amy M. Hanna, John M. Phillips, and J. Blake Patton
Defendant's Attorney

Date of Original Judgment: January 22, 2020
(Or Date of Last Amended Judgment)

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, and 21 of the Superseding Indictment.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1952(a) and 18 U.S.C. § 2	Use of interstate commerce facilities in the commission of a murder for hire	Nov. 2017	1
18 U.S.C. § 1952(a) and 18 U.S.C. § 2.	Use of interstate commerce facilities in the commission of a murder for hire	March 2018	2

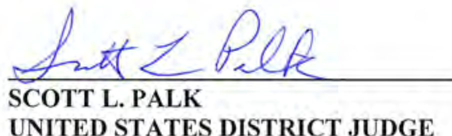
The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 13 and 14 of the Superseding Indictment were previously dismissed on motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 28, 2022
Date of Imposition of Judgment



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

January 31, 2022
Date Signed

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	3
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	4
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	5
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	6
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	7
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	10/30/2017	8
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	11/16/2016	9
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	02/03/2018	10
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	03/06/2018	11
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A)(ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	11/16/2016	12
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A)(ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/11/2017	15

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	02/03/2018	16
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	03/06/2018	17
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/12/2018	18
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/13/2018	19
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/18/2018	20
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	09/29/2017	21

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
252 months. This consists of 102 months on Ct. 1; 102 months on Ct. 2, to run consecutively to Ct. 1; 12 months on each of Cts. 3-11, to run concurrently with each other and with Ct. 1; and 48 months on each of Cts. 12 and 15-21, to run concurrently with each other but consecutively to Cts. 1 and 2.

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

It is recommended that the defendant, if eligible, be designated to FMC Butner for medical treatment, and to FMC Ft. Worth upon completion of treatment at FMC Butner.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ____ on ______________________ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on ______________________ .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ______________________ to ______________________

______________________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ______________________
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
3 years on each of Cts. 1, 2, 12, and 15-21, and 1 year on each of Cts. 3-11.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature ______________________________ Date ______________

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing; and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of controlled substances, firearms or other prohibited weapons, animals protected by the Endangered Species Act, prohibited wildlife species as defined by the Lacey Act, and/or evidence of contact with or threats toward Carole Baskin or any other representative of Big Cat Rescue, at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall have no contact with Carole Baskin. The defendant is prohibited from making any threats regarding the person or property of Carole Baskin.

The defendant shall not possess any species of animal listed as endangered or threatened under the Endangered Species Act or any prohibited wildlife species as defined by the Lacey Act. In addition to this prohibition on possession, the defendant shall not engage in the sale, transport, or other transfer of such animals or their hides or other body parts.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 1,225.00	$	$	$	$

☐ The determination of restitution is deferred until ___________ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ ____________	$ ____________	

☐ Restitution amount ordered pursuant to plea agreement $ ____________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $ 1,225.00 due immediately, balance due

☐ not later than __________, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal __________ (e.g., weekly, monthly, quarterly) installments of __________ over a period of __________ (e.g., months or years), to commence __________ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal __________ (e.g., weekly, monthly, quarterly) installments of __________ over a period of __________ (e.g., months or years), to commence __________ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within __________(e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of $ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
All right, title and interest in the assets listed in the Preliminary Order of Forfeiture dated __________ (Doc. No. ____).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP
DISTRICT: Western District of Oklahoma

REASON FOR AMENDMENT

(Not for Public Disclosure)

REASON FOR AMENDMENT:

- ☒ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R.Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R.Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s)to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

Cases and Sentences for Violations of 18 U.S.C. 1958(a) – *Use of interstate commerce facilities in the commission of a murder for hire*

Case	Sentence	Facts
United States v. Vasco 564 F.3d 12 (1st Cir 2009)	**240** months imprisonment	5 counts; 2 intended victims (wife and daughter); defendant already in custody for pending state charge of raping wife in presence of daughter; motive of was obstruction of justice for state court proceedings.
United States v. Lisyanski 806 F.3d 706 (2nd Cir 2015)	**120** months imprisonment	2 intended victims (father and son, owners of a rival restaurant); hitman, at the direction of the defendant, brandished a gun in a restaurant; shot son in leg.
United States v. Smith 755 F.3d 645 (8th Cir 2014)	**96** months imprisonment	Intended victim was wife. Defendant was told by the hitman that wife was successfully killed. Defendant then went to the police station to report her missing.
United States v. Temkin 797 F.3d 682 (9th Cir 2015)	**72** months imprisonment originally **144** months after resentencing following appeal Also charged with Hobbs Act extortion	Defendant was a known drug trafficker. Defendant involved three associates in the scheme and had multiple different plots to kill rival drug trafficker. Defendant suggested to one hitman that he rape the wife and daughter of intended victim in front of intended victim and his son.
United States v. Gordon 875 F.3d 26 (1st Cir 2017)	**120** months imprisonment 5 counts merged for sentencing	Defendant was already in state custody on charges related to his plot to have his wife murdered. Federal case arose when defendant solicited her murder a second time, while in state correctional facility.
United States v. Wynn 987 F.2d 354 (6th Cir 1993)	**130** months imprisonment originally **120** months after resentencing following appeal; USCA ruled all 5 counts should merge for sentencing	Defendant had a history of violence against wife and was previously tried for attempting to murder her. Tried to smother her at hospital, forced her at gunpoint into a hotel, and showed her a bomb while threatening to blow her up.
United States v. Danforth 471 F.Supp.3d 1079 (District of Idaho 2020)	**120** months imprisonment 5 counts merged for sentencing	Adult film actress who hired a hitman to kill the father of one of her children. Gave hitman instructions that she did not care if others who lived with intended victim were harmed during commission of the crime.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-18-227-SLP
	)	
JOSEPH MALDONADO-PASSAGE,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Motion for Reconsideration of Order filed by Defendant Joseph Maldonado-Passage [Doc. No. 204]. It is at issue. *See* United States' Resp. [Doc. No. 205]; Reply [Doc. No. 206].

Defendant's Motion arises in a unique posture. On July 14, 2021, the Tenth Circuit affirmed Defendant's conviction but vacated the sentence and remanded the matter for resentencing. *See United States v. Maldonado-Passage*, 4 F.4th 1097 (10th Cir. 2021). Defendant's resentencing is set for January 28, 2022.

On January 23, 2022, just five days before Defendant's resentencing, Defendant filed the pending Motion. He belatedly seeks reconsideration of a *pretrial* Order [Doc. No. 53] denying Defendant's Motion to Dismiss Counts as Multiplicitous [Doc. No. 39].

Counts 1 and 2 of the Superseding Indictment charged Defendant with using interstate facilities in the commission of a murder-for-hire plot, in violation of 18 U.S.C. § 1958(a). The Court previously found these counts were not multiplicitous. *See* Order [Doc. No. 53] at 9-10.

These same counts are the subject of the Tenth Circuit's sentencing remand. Specifically, the Tenth Circuit found a remand was necessitated by this Court's failure to group the two counts under § 3D1.2(b) of the Sentencing Guidelines. *Maldonado-Passage*, 4 F.4th at 1108.

Defendant asserts that the Tenth Circuit's sentencing remand compels reconsideration of the Court's pretrial ruling denying dismissal of these counts as multiplicitous. Defendant argues that his "two murder-for-hire convictions should be merged before he is re-sentenced[.]" Mot. 3. According to Defendant, failing to merge these counts "would violate Double Jeopardy." *Id*. at 4.

As an initial matter, the Court questions the timeliness of Defendant's Motion—challenging an order entered more than three years ago. *See, e.g., United States v. Fish*, No. 21-7044, 2022 WL 54432, at *1 (10th Cir. Jan. 6, 2022) (recognizing "serious problems that would inhere in allowing an unlimited time period" for filing motions to reconsider).[1] Moreover, Defendant has not demonstrated the propriety of addressing a challenge to his conviction on resentencing. *See United States v. Gama-Bastidas*, 222 F.3d 779, 784 (10th Cir. 2000) (discussing the law of the case doctrine and mandate rule); *see also United States v. Frierson*, 698 F.3d 1267, 1269-70 (10th Cir. 2012) (remedy for conviction on multiplicitous charges is vacation of the *conviction*); *United States v. Burke*, 281 F. App'x 556, 557 (7th Cir. 2008) (rejecting the defendant's double jeopardy argument

[1] In this regard, more than six months have elapsed since the Tenth Circuit remanded this matter for resentencing. Defendant offers no reason why he waited until the week of his sentencing to raise this issue.

as outside of the scope of the court's previous mandate remanding the case for resentencing).[2]

Even if it were proper to entertain Defendant's Motion, Defendant has not shown grounds for reconsideration. A district court may grant a motion to reconsider when it has "misapprehended the facts, a party's position, or the law." *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014) (citing *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Specific grounds for reconsideration include: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete*, 204 F.3d at 1012. Motions to reconsider "should not be used to revisit issues already addressed or advance arguments that could have been raised earlier." *Christy*, 739 F.3d at 539.

Defendant's Motion argues that this Court's January 9, 2019 Order reflects a "misapprehension of the applicable law," further "clarified" by the Tenth Circuit's subsequent decision in this case. *See* Reply 3. As set forth, however, the Tenth Circuit did not address multiplicity, but rather a sentencing error under § 3D1.2(b) of the Guidelines. Defendant fails to establish that the Court misapprehended the law regarding multiplicity. Nor has Defendant demonstrated an intervening change in the applicable law or any other grounds to warrant reconsideration. Accordingly, the Court declines to reconsider its January 9, 2019 Order.

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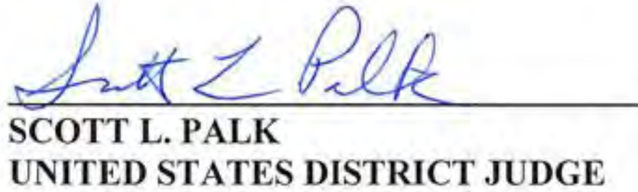
[2] While "[n]either law of the case nor the mandate rule is jurisdictional," *Gama-Bastidas*, 222 F.3d at 784, they are "discretion-guiding rules." *United States v. Tisdale*, 59 F. App'x 295, 296 (10th Cir. 2003).

IT IS THEREFORE ORDERED that Defendant's Motion for Reconsideration of Order [Doc. No. 204] is DENIED.

IT IS SO ORDERED this 27th day of January, 2022.



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Western District of Oklahoma

UNITED STATES OF AMERICA
v.
JOSEPH MALDONADO-PASSAGE,
a/k/a Joseph Allen Maldonado
a/k/a Joseph Allen Schreibvogel
a/k/a "Joe Exotic"

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-18-00227-001-SLP

USM Number: 26154-017

William P. Earley and Kyle E. Wackenheim
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) ________

☐ pleaded nolo contendere to count(s) ________
which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, and 21 of the Superseding Indictment.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1958(a) and 18 U.S.C. § 2	Use of interstate commerce facilities in the commission of a murder for hire, aiding and abetting.	Nov. 2017	1
18 U.S.C. § 1958(a) and 18 U.S.C. § 2	Use of interstate commerce facilities in the commission of a murder for hire, aiding and abetting	March 2018	2

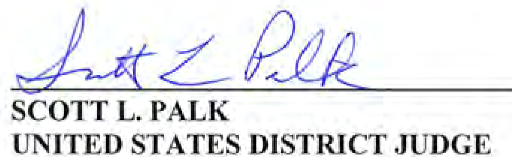
The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ________

☒ Count(s) 13 and 14 of the Superseding Indictment were previously dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 22, 2020
Date of Imposition of Judgment



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

January 23, 2020
Date Signed

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	3
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	4
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	5
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	6
16 U.S.C § 1538(a)(1)(B), 16 U.S.C. § 1540(b)(1), and 18 U.S.C. § 2	Violation of the Endangered Species Act, aiding and abetting	Oct. 2017	7
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	10/30/2017	8
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	11/16/2016	9
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	02/03/2018	10
16 U.S.C. §1538(a)(1)(F) and 16 U.S.C. § 1540(b)(1)	Violation of the Endangered Species Act, aiding and abetting	03/06/2018	11
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	11/16/2016	12
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/11/2017	15

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	02/03/2018	16
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	03/06/2018	17
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/12/2018	18
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/13/2018	19
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	06/18/2018	20
16 U.S.C. § 3372(d)(2), 16 U.S.C. § 3373(d)(3)(A) (ii) and 18 U.S.C. § 2	Violation of the Lacey Act: False labeling of wildlife	09/29/2017	21

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
264 months. This consists of 108 months on Ct. 1; 108 months on Ct. 2, to run consecutively to Ct. 1; 12 months on each of Cts. 3-11, to run concurrently with each other and with Ct. 1; and 48 months on each of Cts. 12 and 15-21, to run concurrently with each other but consecutively to Cts. 1 and 2.

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

It is recommended that the defendant, if eligible, be designated to FMC Fort Worth or FPC Pensacola.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ______________ ☐ a.m. ☐ p.m. on ______________ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ By 2 p.m. on ______________

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ______________ to ______________

at ______________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ______________
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
3 years on each of Cts. 1, 2, 12, and 15-21, and 1 year on each of Cts. 3-11.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. Stricken.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature ______________________ Date ______________

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing; and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of controlled substances, firearms or other prohibited weapons, animals protected by the Endangered Species Act, prohibited wildlife species as defined by the Lacey Act, and/or evidence of contact with or threats toward Carole Baskin or any other representative of Big Cat Rescue, at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall have no contact with Carole Baskin. The defendant is prohibited from making any threats regarding the person or property of Carole Baskin.

The defendant shall not possess any species of animal listed as endangered or threatened under the Endangered Species Act or any prohibited wildlife species as defined by the Lacey Act. In addition to this prohibition on possession, the defendant shall not engage in the sale, transport, or other transfer of such animals or their hides or other body parts.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 1,225.00	$	$	$	$

☐ The determination of restitution is deferred until __________ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ ____________	$ ____________	

☐ Restitution amount ordered pursuant to plea agreement $ ____________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Joseph Maldonado-Passage, a/k/a Joseph Allen Maldonado, a/k/a Joseph Allen Schreibvogel, a/k/a Joe Exotic
CASE NUMBER: CR-18-00227-001-SLP

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 1,225.00 due immediately, balance due

☐ not later than ______________, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ____________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ____________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of $______ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Oklahoma City, Oklahoma 73102.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated _______ (doc. no. ___).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-18-227-SLP
	)	
JOSEPH MALDONADO-PASSAGE,	)	
	)	
Defendant.	)	

ORDER

Before the Court are two motions filed by Defendant. Defendant filed a Motion to Dismiss Count 2 of the [Superseding] Indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). *See* Mot., Doc. No. 40. This motion is at issue. *See* Resp., Doc. No. 47. Defendant also filed a Motion to Dismiss Counts as Multiplicitous [Doc. No. 39], seeking the dismissal of either the first or second count of the Superseding Indictment [Doc. No. 24]. It is at issue as well. *See* Resp., Doc. No. 46.

I. Background

The Superseding Indictment [Doc. No. 24] charges Defendant with 21 offenses. The first two counts allege the use of interstate commerce facilities for purposes of murder-for-hire in violation of 18 U.S.C. § 1958(a).[1] Roughly summarized, the Government contends that Defendant and a Florida resident, C.B., had a years-long dispute regarding

[1] The Court's references to these counts as "murder-for-hire counts" herein instead of the wordier "use of interstate commerce facilities for purposes of murder-for-hire counts" is not meant to diminish the Government's requirement of proving the use of an interstate commerce facility in relation to the alleged offenses, as well as each count's other elements.

care, exhibition, and breeding of tigers and lions that, in February 2013, resulted in a civil judgment against Defendant of more than $1 million. C.B. and related business entities have attempted to collect the judgment from Defendant and his related business entities ever since.

In the first murder-for-hire count, the Government alleges that Defendant inquired of Individual 1 in November 2017 whether Individual 1 would travel to Florida to murder C.B. for a sum of money and that Defendant mailed a cell phone to another State to conceal Individual 1's involvement in their plot. The Government also alleges that Defendant gave $3,000 to Individual 1 in November 2017 in exchange for his agreement to travel to Florida and kill C.B.

In the second murder-for-hire count, the Government alleges that from July 2016 to March 2018, Defendant asked Individual 2 if he could locate somebody to kill C.B. for payment. The Government further alleges that, in December 2017, Individual 2 offered to introduce and then introduced Defendant to an undercover FBI agent (posing as a "hit man") who discussed with Defendant the murder of C.B. for payment. The Superseding Indictment continues: from December 2017 to March 2018, Defendant allegedly spoke with Individual 2 by cellular phone regarding the murder of C.B. But the Government does not allege that Defendant interacted with the undercover FBI agent directly after a single face-to-face meeting in December 2017 (which was recorded by the Government); all of Defendant's remaining interactions are alleged to have been with Individual 2. Nor did Defendant supply money or anything of pecuniary value to the undercover FBI agent.

The remaining counts—alleged violations of the Endangered Species Act and of the Lacey Act—are not at issue in Defendant's instant motions.

II. Proposed facts outside the Superseding Indictment Defendant asks the Court to consider

That Defendant did not meet face-to-face with or otherwise communicate directly with the undercover FBI agent except for the single meeting in December 2017 is not disputed, and this fact—though not expressly alleged by the Superseding Indictment—may be considered by the Court. *See United States v. Pope*, 613 F.3d 1255, 1260 (10th Cir. 2010) ("[C]ourts may entertain even motions to dismiss that require resort to facts outside the indictment and bearing on the general issue in the limited circumstances where [1] the operative facts are undisputed and [2] the government fails to object to the district court's consideration of those undisputed facts, and [3] the district court can determine from them that, as a matter of law, the government is incapable of proving its case beyond a reasonable doubt." (numerical alterations in original) (quotation marks and emphasis omitted)). So too for the fact that Defendant did not provide money or another object of pecuniary value to the undercover FBI agent. *See id.*

Defendant also asks the Court to consider an additional proposed fact that is not included within the Superseding Indictment—that "[n]o agreement to kill C.B. was reached with the undercover agent." Mot. 2, Doc. No. 40. The Court may not consider such a proposed fact because it is disputed by the Government. *See Pope*, 613 F.3d at 1260. The Government proffers that the evidence at trial will show that "Defendant promised to pay the undercover [agent] in the future in exchange for his commission of C.B.'s murder."

Resp. 5, Doc. No. 47 (emphasis omitted). The Court agrees with the Government that, at a minimum, the Superseding Indictment's allegations and the summary of expected evidence provided by the Government in response to Defendant's motion are enough to move Defendant's proposed fact from the realm of undisputed and into the category of a question to be left for trial. *See Pope*, 613 F.3d at 1260-61.

III. Discussion and analysis

A. Defendant's motion to dismiss Count 2 because no offense has been stated by the Superseding Indictment

Defendant argues that Count 2 of the Superseding Indictment, even if all allegations therein are proved true, does not state a criminal offense when considered with the undisputed facts described *supra*. *See* Mot., Doc. No. 40. "[A] court may always ask whether the allegations in the indictment, if true, are sufficient to establish a violation of the charged offense and dismiss the indictment if its allegations fail that standard." *Id.* (quotation marks and citation omitted). "An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." *United States v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003). The latter two concerns—notice and double jeopardy—are not at issue in Defendant's first motion.

Dismissals for failure to state a criminal offense based, in part, on facts outside the face of the governing indictment are a "rare exception" to the general rule that the Government need not "come forward with evidence to support its case in the face of a defendant who has presented his own proof." *Pope*, 613 F.3d at 1260; *see also id.* at 1260-

61 ("[Motions to dismiss] are not [to be] made on account of a lack of evidence to support the government's case . . . . because . . . the parties to a criminal proceeding have comparatively few obligations to present their evidence to their adversaries prior to trial [when compared to a civil proceeding] . . . ." (quotation marks and citation omitted)). Indeed, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States v. Akers*, 215 F.3d 1089, 1101 (10th Cir. 2000) (quotation marks and citation omitted).

In this case, Defendant is charged in Count 2 with a violation of 18 U.S.C. § 1958(a):

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both . . . .

Said simply, "§ 1958(a) requires the government to prove that the defendant: (1) used or caused another to use any facility of interstate or foreign commerce; (2) with the intent that a murder be committed; (3) as consideration for a promise or agreement to pay anything of pecuniary value." *United States v. Robertson*, 473 F.3d 1289, 1292 (10th Cir. 2007).

Defendant first argues that Count 2 fails as a matter of law because "a plain reading of the statute and the essential elements of the offense show that the 'another' referenced in the interstate facilities element is the same person to whom the pecuniary value

referenced in the consideration element is directed." Mot. 3, Doc. No. 40. That is, Defendant argues that the individual involved in the "use [of] the mail or any facility of interstate or foreign commerce" must be the same individual who receives, makes an agreement for, or is given a promise of either payment or pecuniary value. 18 U.S.C. § 1958(a). And the Superseding Indictment alleges the use of an interstate commerce facility (communications by cellular phone) with Individual 2, but that payment was to be paid to the undercover FBI agent posing as a "hit man." *See* Superseding Indictment ¶¶ 28-33, Doc. No. 24.

The Court disagrees with Defendant's assessment of § 1958(a)'s requirements. Defendant cites no authority for his proposed interpretation. The statute's language does not support his approach or create an ambiguity. Nothing in § 1958(a) indicates that the "another" referenced in relation to the use of an interstate commerce facility must be the same "another" referenced regarding payment. 18 U.S.C. § 1958(a). When "the terms of the statute are clear and unambiguous"—as here—the Court's "inquiry ends and [the Court] simply give[s] effect to the plain language of the statute." *United States v. Sprenger*, 625 F.3d 1305, 1307 (10th Cir. 2010) (quotation marks and citation omitted). The Court does so in this case by rejecting Defendant's proposed interpretation of § 1958(a).

Further, Defendant's proposed interpretation of § 1958(a) necessarily fails when the statute's text is evaluated in toto. The "another" referenced in relation to the use of an interstate commerce facility can be—per the statute—the intended victim. Applying Defendant's approach to a situation where the "another" is the intended victim, a person could only be guilty of violating § 1958(a) if he or she caused an intended victim to use a

facility of interstate commerce with the intent of murdering himself or herself in exchange for payment to the same intended victim. Such a fact pattern is nonsensical. Unless the Court deletes "(including the intended victim)" from the statute—which the Court will not do—Defendant's interpretation cannot prevail without creating an absurdity within the statute. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, NA*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quotation marks and citation omitted)).

Second, relying on *United States v. Wicklund*, 114 F.3d 151 (10th Cir. 1997), Defendant argues for dismissal of Count 2 because "there was no agreement entered into between [Defendant] and the undercover agent." Mot. 4, Doc. No. 40. *Wicklund* held that "'in consideration for,' as used in both prongs of § 1958(a) means consideration in the traditional sense of bargained for exchange. The two uses of 'as consideration for' in the statute cover the two murder-for-hire situations: payment now or a promise or agreement to pay in the future." 114 F.3d at 154.

But *Wicklund* addressed a post-conviction evaluation of the evidence, not the pre-trial assessment that Defendant requests here. Defendant eventually may be correct that no agreement for future payment was made or cannot be proved beyond a reasonable doubt. But based on the allegations in the Superseding Indictment and the limited factual assertions made by Defendant outside of the Superseding Indictment that the Court may consider, the Court cannot say that is the case at this point.

The transcript of a discussion between Defendant and the undercover FBI agent excerpted in the Government's response (to which Defendant raises no objection) creates at least a dispute about whether this evidence (and any other evidence presented at trial) will show a violation of § 1958(a) as alleged in Count 2 occurred.[2] At the face-to-face meeting, Defendant apparently asked about the price of a murder and how much would need to be paid up-front; said "We'll get game with the money" and "[W]e can get 5 [thousand dollars] easy;" and affirmed that he could come up with an up-front payment of $5,000. Resp. 6, Doc. No. 47. Per the Government's transcript excerpts, Defendant also replied "Okay" to the undercover FBI agent's suggestion that he meet him again once Defendant "g[ot] those two phones, and the money together." *Id.*

Moreover, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Akers*, 215 F.3d at 1101 (quotation marks and citation omitted); *see also Welch*, 327 F.3d at 1090 ("An indictment is sufficient if it sets forth the elements of the offense charged . . . ."). Here, the Government has set forth the elements of a § 1958(a) violation in the Superseding Indictment—alleging Defendant's use of an interstate commerce facility, his intent that a murder be committed, and a promise to pay something of pecuniary value. *Compare* Superseding Indictment ¶¶ 1-6, 27-33, *with Robertson*, 473 F.3d at 1292 (identifying the elements of a § 1958(a) offense).

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[2] The Court does not pre-judge the admissibility at trial of this recording or any other evidence referred to by the parties in their briefs.

Defendant's request that the Court dismiss Count 2 for failing to state an offense is DENIED.

B. Defendant's motion to dismiss either Count 1 or Count 2 as multiplicitous

Defendant also argues that Count 1 and Count 2 of the Superseding Indictment are multiplicitous and, therefore, one of the counts should be dismissed. *See* Mot., Doc. No. 39. "Multiplicity refers to multiple counts of an indictment which cover the same criminal behavior." *United States v. Johnson*, 130 F.3d 1420, 1424 (10th Cir. 1997). The assertion of multiple counts "poses the threat of multiple sentences for the same offense," which "raises double jeopardy implications" and "may improperly suggest to the jury that the defendant has committed more than one crime" when that is not the case. *Id.* (quotation marks and citations omitted).

"The test for multiplicity is whether the individual acts alleged in the counts at issue are prohibited, or the course of conduct which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty." *United States v. McCullough*, 457 F.3d 1150, 1162 (10th Cir. 2006) (quotation marks and citations omitted). This is largely determined by the unit of prosecution for the alleged crime. *See United States v. Jackson*, 736 F.3d 953, 956 (10th Cir. 2013). The unit of prosecution for a § 1958(a) offense is "one plan to murder one individual." *United States v. Wynn*, 987 F.2d 354, 359 (6th Cir. 1993); *accord United States v. Gordon*, 875 F.3d 26, 28 (1st Cir. 2017) (rejecting the argument that the unit of prosecution for a § 1958(a) offense is each use of a facility of interstate commerce).

Here, accepting the allegations in the Superseding Indictment as true, the Government has pleaded two plans or plots to use interstate facilities in the paid-for murder of a single individual. Applying the "plot-centric" unit of prosecution for § 1958(a) offenses, the schemes alleged by the Government involve different "hit men," use of different interstate commerce facilities, and different time periods (November 2017 only versus principally December 2017 through March 2018).[3] *Gordon*, 875 F.3d at 35. There is no indication in the Superseding Indictment that Individual 1 (from the first alleged plot) and Individual 2 or the undercover FBI agent (both from the second alleged plot) interacted at all. Each of these individual plots (as opposed to their combined course of conduct), if proved at trial, is sufficient for punishment under § 1958(a). *See McCullough*, 457 F.3d at 1162. That the two alleged plots grew out of a single investigation by law enforcement officials and had the same intended victim does not alter the alleged plots' individual natures. *Cf. United States v. Wall*, 37 F.3d 1443, 1447 (10th Cir. 1994).

Defendant's request that the Court dismiss either Count 1 or Count 2 because the two counts are multiplicitous is DENIED.

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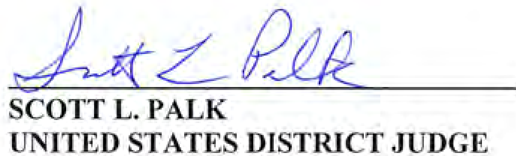
[3] The Government also alleges that, from July 2016 through March 2018, "[Defendant] repeatedly asked Individual 2 whether Individual 2 could find someone to murder C.B. in exchange for a sum of money." Superseding Indictment ¶ 28, Doc. No. 24. However, the Government does not allege the use of interstate commerce facilities or the mail during this time frame, so the period of time applicable to the alleged violation of § 1958(a) in Count 2 appears to be limited to December 2017 through March 2018—i.e., after the conclusion of the scheme alleged in Count 1—absent evidence indicating otherwise at trial.

IV. Conclusion

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Counts as Multiplicitous [Doc. No. 39] and Defendant's Motion to Dismiss Count 2 of the [Superseding] Indictment [Doc. No. 40] are DENIED as indicated herein without prejudice to Defendant re-raising these issues based on evidence adduced during trial.

IT IS SO ORDERED this 8th day of January, 2019.



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE