
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JESUS EDER MORENO ORNELAS, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

January 23, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JESUS EDER MORENO ORNELAS, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Compulsory Process Clause of the Sixth Amendment precludes exclusion of an undisclosed defense witness to enforce a discovery order if the non-disclosure was not willful or motivated by a desire to obtain a tactical advantage.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

CASES

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

STATUTES

TABLE OF AUTHORITIES (cont'd)

STATUTES (cont'd)

PAGE

AUTHORITIES

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

Jesus Moreno-Ornelas petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is published at 906 F.3d 1138, is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included in the appendix as Appendix 2. The transcript of the district court's oral ruling excluding the defense expert testimony which is at issue in this petition is attached as Appendix 3.

* * *

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 25, 2018, *see* App. A001-034, and a timely petition for rehearing en banc was denied on November 30, 2018, *see* App. A035-36. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISION INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor . . . .

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. The Charges and the Evidence.

On August 23, 2014, Petitioner was arrested after a struggle with a United States Forest Service officer during which several shots were discharged from the officer's gun. App. A004-07. Petitioner was indicted for assault on a federal officer, in violation of 18 U.S.C. § 111(b); attempted murder of a federal officer, in violation of 18 U.S.C. §§ 1111, 1113, and 1114; discharge of a firearm during the assault and attempted murder, in violation of 18 U.S.C. § 924(c); attempted robbery of the officer's firearm, in violation of 18 U.S.C. § 2112; attempted robbery of the officer's vehicle, in violation of 18 U.S.C. § 2112; being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5)(A); and being found in the country illegally after having been deported, in violation of 8 U.S.C. § 1326. App. A008, A108-09. The testimony at trial presented two starkly different versions of what Petitioner had done and intended.

a. The officer's version.

The officer encountered Petitioner and a companion after receiving a report of suspicious people in the area and being asked to respond by the Border Patrol. App. A005. The officer drew his gun when Petitioner did not

comply with an order to put his hands on the hood of the officer's vehicle. *See* App. A005. The officer told Petitioner to turn away and put his hands on his head and this time Petitioner complied. *See* App. A005. The officer kept his pistol out until he was "a few feet away," but claimed he holstered it before starting to handcuff Petitioner. App. A005-06.

The officer testified he did not remember exactly what happened next, but recalled being yanked forward and then going blank. App. A006. The next thing he knew he and Petitioner were fighting. App. A006. Petitioner went for the officer's gun, and the officer threw his hands down to his holster, covering the handle of the gun with one hand and fending Petitioner off with the other. App. A006. Petitioner threw the officer to the ground, the two men rolled toward the side of the road, and Petitioner started pummeling the officer in the face. App. A006.

The officer blacked out briefly before feeling his gun being pulled out of his holster and hearing two shots ring out. App. A006. He flailed his arms around, searching for the gun, and located the gun just before Petitioner could aim at his chest. App. A006. The officer pushed Petitioner's hand away and rolled to his side just as another shot discharged near his head. App. A006. The officer grabbed Petitioner's wrist to try to keep the gun pointed away. App. A006. Petitioner nearly broke free, but the officer grabbed him by the neck, wrapped his legs around Petitioner's throat, and squeezed. App. A006. Petitioner fired several shots skyward before dropping the gun. App. A006.

The officer then grabbed the gun and tried to shoot Petitioner, but the gun would not fire, so the officer rolled away. App. A006. Petitioner cried, "no, no, no, no," the officer reloaded, and Petitioner ran toward the officer's

truck. App. A006. The officer realized the gun was jammed and quickly cleared the jam, but did not fire because his truck contained no weapons and had a security system that would prevent Petitioner from driving away. App. A006-07. Instead, the officer went to the truck, aimed the gun at Petitioner's chest, and threatened to kill Petitioner if he moved. App. A007.

b. Petitioner's version.

Petitioner presented a very different version of events, in a recorded interview which was introduced into evidence. App. A007. He admitted he initially refused to comply with the officer's commands but stated he sat down as the officer approached him with handcuffs. App. A007. He stated the officer never holstered the gun but instead kept his finger on the trigger and kept the gun pointed at him. App. A007. Because Petitioner feared for his life, he tried to grab the gun, and a shot went off. App. A007. Petitioner tackled the officer and two more shots rang out as the men struggled on the ground. App. A007.

Petitioner could have beaten the officer unconscious at that point, but instead slammed the officer's hand into the ground to force the officer to release the gun. App. A007. Petitioner grabbed the gun, fired the remaining rounds into the air, and tossed the gun aside. App. A007. Petitioner then ran for the truck, thinking he would drive to the border and leave the truck there. App. A007. Once he got behind the wheel, he realized he was acting stupidly and should not drive away, so he got out of the truck and gave himself up voluntarily. App. A007.

2. Excluded Defense Evidence.

A district court order filed February 3, 2015 included several directives regarding discovery. Among those were directives that (1) all requests for disclosure of summaries of expert testimony under Rule 16(a)(1)(G) and Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure be filed within 14 days and (2) disclosures be provided within 7 days of the request. *See* App. A055-56. The government filed a general request for Rule 16 material on February 13, 2015 which included a request for disclosure of expert testimony. *See* App. A058-59.

The defense did not have any expert testimony to disclose at that time, but did retain a law enforcement expert to investigate issues regarding the struggle and the discharge of the gun. The defense told the government about the expert at a status conference on April 16, 2015, and subsequently made arrangements for the defense expert to examine the gun, the officer's equipment, and other evidence. App. A068-69, A078. On June 1, 2015, the defense filed a notice it intended to call the expert as a witness but could not yet provide a summary of his testimony because he was still reviewing the evidence. *See* App. A060-62. A week later, the defense filed a motion to continue the trial, which was set to commence on June 23, 2015. The motion explained:

> Expert witness Weaver Barkman has not finished viewing the evidence. The final day to view the evidence is Thursday, June 11th. It is expected that Mr. Barkman will take possession of the weapon in this case on June 11th to test fire it and view it in coordination with the tactical holster. After this review, Mr. Barkman will need a reasonable time to finish his report and findings.

App. A063.

The government opposed a continuance. The reasons it gave were that it had gone to "great lengths" to parole Petitioner's companion into the country as a witness[1] and "the position of the victim." App. A075. The defense explained why the expert had needed more time, which included the fact that the agent and the evidence were in different cities, *see* App. A068, A079; the fact that multiple examinations of the evidence were necessary, in part because the government initially assumed two hours would be enough time, *see* App. A069, A079; *see also* App. A041-42 (further explanation supplied at hearing on government motion to exclude); the fact that the expert was tied up in other cases, *see* App. A078; *see also* App. A041 (further explanation supplied at hearing on government motion to exclude); and the fact that the expert was very meticulous, App. A078.

The district court denied a continuance despite this explanation. *See* App. A078-80. The defense expert did manage to complete his review and prepare a report, which the defense disclosed to the government several days before trial, but the government moved to exclude the expert's testimony. *See* App. A081-95. The court granted the motion on the ground of untimeliness. *See* App. A052-53.

Among the opinions the report reflected the expert could have given were the following:

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[1] The government had deposed the companion before releasing him, so it had alternative evidence in the form of the deposition. *See* App. A115 n.4. This is what it eventually used even without a change in the trial date. *See* App. A115 n.4.

> The first round, fired into the roadway, was an unintentional discharge (UID), fired by Officer Linde. The UID was caused by Sympathetic Squeeze Response (SSR) and/or Loss of Balance Response (LBR), or combination of both. Any rounds fired while the men were grappling on the ground may well have been the result of, and are consistent with SSR. After the men fell to the ground, either or both of the grasping/grappling men may have applied pressure to the trigger causing one or more UID's.
>
> Sympathetic Squeeze Response and Loss of Balance Response are two (2) of the well-established causes of Unintentional discharge (UID). Their existence and effect are undisputed in the scientific, law enforcement and firearms community. *(Enoka, et al)* In any shooting wherein a participant, while holding a firearm, particularly a handgun, is forcibly grasping, grappling or falling in any manner, UID must be considered. Not only is UID a consideration in a factual reconstruction, it goes directly to the legal issue of intent. The instant case provides an excellent opportunity for UID.

App. A086-87.

> Officer Linde states the weapon was "very close" to his head when one or more rounds were fired. He has no gunshot wounds or patent gunshot residue on his head. He neither reported, nor did any responding law enforcement agents mention any complaints of hearing loss.
>
> During examinations of Officer Linde's clothing, I saw no evidence of gunshot residue or defects.
>
> . . .
>
> If Officer Linde's person was in close proximity to an unobstructed blast/residue cone angle toward him, it is highly likely that gunfire damage would be visible.

App. A087-88.

> Based on the evidence, it appears Officer Linde was on his right side during the time Mr. Moreno-Ornelas was on top of him. The position, weight and violent movement of the men were sufficient to create the substantial defects in the holster. Had the weapon been holstered as Officer Linde claims, it would bear companion defects to the holster. Had Officer Linde been trying to retain the weapon while on his right side on the ground, significant abrasions would

have been present on his right hand.

App. A090.

3. The Verdict and the Appeal.

The jury could not reach a verdict on the most serious count of attempted murder, but did convict Petitioner of the remaining counts. App. A008. Petitioner thereafter filed an appeal in which he raised multiple claims, some applicable to individual counts of conviction and some applicable to all but the illegal reentry count.[2] *See* App. A106-08. The court of appeals held there was an instructional error on the attempted robbery counts and vacated the convictions on those counts, but rejected Petitioner's broader challenges and affirmed the other convictions. *See* App. A004, A008, A027.

Among the broader challenges was an argument that the district court had erred in excluding the defense expert's testimony. *See* App. A119-27. Petitioner argued that this Court's opinion in *Taylor v. Illinois*, 484 U.S. 400 (1988), and subsequent Ninth Circuit opinions applying *Taylor* allowed exclusion of defense evidence for failure to comply with a discovery order "only where 'the *omission* was willful and motivated by a desire to obtain a tactical advantage.'" App. A124 (quoting *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002), and *Taylor*, 484 U.S. at 415 (emphasis added in *Finley*)). Petitioner pointed out the district court had made no finding of this state of mind and argued that made exclusion improper under *Taylor* and its

[2] Petitioner did not challenge the illegal reentry conviction. *See* A008, A128.

Ninth Circuit progeny. *See* App. A125. The government responded by citing a later Ninth Circuit en banc opinion – *United States v. W.R. Grace*, 526 F.3d 499, 516 (9th Cir. 2008) (en banc) – for the proposition that the district court order was proper because "[w]hen a district court issues an order setting a deadline for the pretrial disclosure of expert witnesses, and a party violates such order, the district court may exclude evidence as a sanction." App. A130.

A majority of the Ninth Circuit panel assigned to the case agreed that *W.R. Grace* was controlling.[3] It sought to reconcile *W.R. Grace* with its other precedent by characterizing the district court's order as not a "sanction," but merely an "enforcement order." App. A024. It then held such an "enforcement order" was permissible even without a finding of willful violation because, as in *W.R. Grace*, it "simply enforce[d] the [district court's] earlier pretrial order." App. A024 (quoting *W.R. Grace*, 526 F.3d at 514). It also distinguished the prior Ninth Circuit opinions relied on by Petitioner on various other grounds. *See* App. A025-26 n.15. It gave no apparent weight to the reasons for Petitioner's untimely disclosure and Petitioner's underlying Sixth Amendment interest.

* * *

[3] Judge Zilly, sitting by designation, disagreed and argued the exclusion of the defense expert was improper under *Taylor* and its Ninth Circuit progeny. *See* App. A031-34.

IV.

ARGUMENT

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER FEDERAL COURTS AND THE STATE COURTS ARE SPLIT OVER THE QUESTION OF WHEN A DEFENSE WITNESS MAY BE EXCLUDED FOR DISCOVERY NONCOMPLIANCE, AND THE QUESTION IS AN IMPORTANT ONE BECAUSE IT IMPLICATES A FUNDAMENTAL CONSTITUTIONAL RIGHT.

1. The *Taylor* Opinion.

The Court's opinion in *Taylor* took a limited first step in addressing the restrictions the Compulsory Process Clause places on exclusion of a defense witness to enforce a discovery requirement and/or to sanction noncompliance. The Court began by recognizing such action does implicate a Sixth Amendment interest. It noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.*, 484 U.S. at 408. It went on to hold this necessarily places limits on the sanctions which can be imposed for noncompliance with a discovery requirement.

> The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights we have previously held applicable to the States." [*Washington v. Texas*, 388 U.S. 14,] 18 [(1967)]. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

Taylor, 484 U.S. at 409.

The Court rejected an opposing defense argument as equally extreme, however.

> Petitioner's claim that the Sixth Amendment creates an absolute bar to the preclusion of the testimony of a surprise witness is just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.

Id. at 410. The Court then extended this reasoning to exclusion of evidence for failure to comply with a discovery requirement.

> A trial judge may certainly insist on an explanation for a party's failure to comply with the request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause to exclude the witness' testimony. (Footnote and citation omitted.)

Id. at 415.

What the court did not decide in *Taylor* was whether exclusion would be permissible when the omission was not "willful and motivated by a desire to obtain a tactical advantage." And the Court did acknowledge that "a less drastic sanction is always available." *Id.* at 413. The Court also acknowledged that "[i]t may well be true that alternative sanctions are adequate and appropriate in most cases." *Id.*

This has left one treatise opining that "[t]he *Taylor* opinion arguably

raises as many questions as it answers." 5 Wayne R. LaFave, et al., *Criminal Procedure* 608 (4th ed. 2015). The Fifth Circuit has opined similarly, stating that "[t]he Supreme Court's decision in *Taylor* gives us little guidance for determining when the preclusion sanction is permissible." *United States v. Alexander*, 869 F.2d 808, 812 (5th Cir. 1989). *See also United States v. Vitek Supply Corp.*, 144 F.3d 476, 484 (7th Cir. 1998) (discussing *Taylor* and concluding "it is not certain whether sanctions are permissible if the violation is not egregious"); *State v. Killean*, 915 P.2d 1225, 1226 (Ariz. 1996) (agreeing with lower court that "it is not yet clear whether preclusion of defense evidence is constitutionally permitted absent a finding of bad faith or willful misconduct").

2. The Division in the Lower Federal Courts and State Courts.

Without this Court's guidance, the lower courts are divided. Judge Posner of the Seventh Circuit has noted, "Although some courts believe . . . that the exclusion of a witness or witnesses who would be helpful to the defendant is permissible only if the violation of the discovery order was deliberate, as it was in *Taylor* itself, other courts disagree." *Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995) (citations omitted).

On the first side of the disagreement, the Sixth Circuit has stated:

> [T]he Supreme Court has given special consideration to the nature of the exclusion-triggering discovery violation at issue, noting that only egregious violations involving, for example, "willful misconduct," on the part of the defendant or his counsel will justify the exclusion of material evidence. *See* [*Michigan v.*] *Lucas*, 500 U.S. [145,]

> 152 [(1991)] (quotation marks omitted) (emphasizing the trial court's conclusion in *Taylor* that the "discovery violation amounted to willful misconduct and was designed to obtain a tactical advantage," and that the Supreme Court's decision to uphold the exclusion of an undisclosed witness in that case was explicitly "[b]ased on these findings"). Alternative, less severe sanctions than exclusion will thus be "adequate and appropriate in most cases." *Id.* (quoting *Taylor*, 484 U.S. at 413). Stated differently, the exclusion of a defendant's evidence should be reserved for only those circumstances where "a less severe penalty 'would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.'" *Lucas*, 500 U.S. at 152 (quoting *Taylor*, 484 U.S. at 413).

Ferensic v. Birkett, 501 F.3d 469, 476 (6th Cir. 2007). The First Circuit and Second Circuit appear to have taken a similar view, in reversing or remanding for further findings where there was no finding that noncompliance was willful and motivated by a desire to obtain a tactical advantage. *See Noble v. Kelly*, 246 F.3d 93, 100 (2d Cir. 2001) (noting that trial court could have used less onerous sanctions to minimize prejudice to prosecution and holding "a finding of willfulness was therefore required to justify the exclusion of [the witness's] testimony"); *Bowling v. Vose*, 3 F.3d 559, 561-62 (1st Cir. 1983) (noting "most circuit court cases affirming exclusion in response to discovery violations involve willful conduct" and reversing because "[i]n this case, there was no such misconduct"); *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (remanding for further findings because "[i]t is not possible for us to determine whether the failure of [the defendant's] attorney to comply with the alibi notice provision was 'willful and motivated by a desire to obtain a

tactical advantage'" (quoting *Taylor*, 484 U.S. at 415)).[4]

On the other side are the D.C. Circuit and the Tenth Circuit. The D.C. Circuit stated in *United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992), that "we do not read *Taylor* as establishing 'bad faith' as an absolute condition for exclusion." *Johnson*, 970 F.2d at 911.[5] The Tenth Circuit agrees bad faith is "not a prerequisite to exclusion." *Short v. Sirmons*, 472 F.3d 1177, 1188 (10th Cir. 2006) (quoting *Johnson*, 970 F.2d at 911). On the other hand, bad faith is "an important factor," *Short*, 472 F.3d at 1188 (quoting *Johnson*, 970 F.2d at

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[4] The *Noble* opinion does suggest the Second Circuit position may be slightly qualified. It pointed to "the circumstances of this case [where] the state trial court could have used less onerous sanctions (such as an adjournment) to minimize any prejudice to the prosecution," *id.*, 246 F.3d at 100, and then explained in a footnote:

> We therefore need not decide whether, and to what extent, a finding of willfulness is required in every case. (Citations omitted.) For purposes of the present case, we need only conclude that where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony must be supported by a finding of some degree of willfulness in defense counsel's violation of the applicable discovery rules.

Id. at 100 n.3.

[5] *Johnson* also suggested the Second Circuit's position is ambiguous, asserting that the Second Circuit opinion in *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990), took a different view than the Second Circuit's earlier *Escalera* opinion. But there was an implicit, if not explicit, finding of willfulness in *Cervone*, for the opinion noted the defense attorney "was seeking to introduce testimony of which he had been aware since 1987" and did not "explain, much less excuse, the six-month delay in sending [a disclosure letter]." *Id.* at 346. And the later *Noble* opinion clearly states that "a finding of willfulness was therefore required to justify the exclusion of [the witness's] testimony." *Id.*, 246 F.3d at 100.

911), and "[i]t would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings," *Short*, 472 F.3d at 1188 (quoting *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002)).[6]

The state courts are similarly divided. The courts in Illinois, from which the *Taylor* case emanated, have interpreted *Taylor* as holding that "in Illinois, the sanction of preclusion is reserved for only the most extreme cases where the uncooperative party demonstrates a deliberate contumacious or unwarranted disregard for the trial court's authority." *People v. Flores*, 522 N.E.2d 708, 714 (Ill. App. 1988) (quoting *Taylor*, 484 U.S. at 417 n.23, and *People v. Rayford*, 356 N.E.2d 1274, 1277 (Ill. App. 1976)). The Mississippi Supreme Court also interprets *Taylor* as requiring willfulness:

> Exclusion of the evidence is an extreme sanction and is only appropriate where the defendant's discovery violation was "willful and motivated by a desire to obtain a tactical advantage." *Darghty v. State*, 530 So. 2d 27, 32 (Miss. 1988) (citing *Taylor v. Illinois*, 484 U.S. 400, 415, 108 S. Ct. 646, 655, 98 L. Ed. 2d 798, 814 (1988)). Relying on *Taylor*, we have held that exclusion "ought to be reserved for cases in

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[6] The position of the Ninth Circuit is not entirely clear after the majority opinion in the present case. The earlier Ninth Circuit cases cited by Petitioner at least suggest – rather strongly – the view that willful bad faith is required. *See* App. A123-24 (opening brief). *Accord* A032-33 (dissenting opinion of Judge Zilly). The issue in each of those cases is arguably muddied by other circumstances, however, as suggested by the lengthy footnote in the majority opinion which distinguishes them. *See* App. A025-26 n.15. And the *W.R. Grace* opinion is an en banc opinion which would override the prior panel opinions in any event. The opinion in the present case does additionally distinguish between a "sanction" and "simply enforc[ing] the discovery order," *supra* p. 10, but there is no reason the labeling of the exclusion should affect the Sixth Amendment analysis.

> which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage." *Houston v. State*, 531 So. 2d 598, 612 (Miss. 1988).

Ross v. State, 954 So. 2d 968, 1000 (Miss. 2007).

Other state courts have reasoned similarly. California courts of appeals have interpreted *Taylor* "to instruct that preclusion sanctions may be imposed against a criminal defendant only for the most egregious discovery abuse. Specifically, such sanctions should be reserved to those cases in which the record demonstrates a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage such as the plan to present fabricated testimony in *Taylor*." *People v. Edwards*, 22 Cal. Rptr. 2d 3, 12 (Cal. App. 1993). *See also People v. Gonzales*, 28 Cal. Rptr. 2d 325, 333 (Cal. App. 1994) (requiring either willful conduct or "prejudice that would be substantial and irremediable"). The Oklahoma Court of Criminal Appeals has held that "[e]xcluding a material defense witness is appropriate only where the discovery violation is 'willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence.'" *White v. State*, 973 P.2d 306, 311 (Okla. Crim. App. 1998) (quoting *Allen v. State*, 944 P.2d 934, 937 (Okla. Crim. App. 1997), and *Taylor*, 484 U.S. at 415). Finally, the Rhode Island Supreme Court appears to take this view. *See State v. Ramos*, 553 A.2d 1059, 1068 (R.I. 1989) (noting "no evidence of an intentional and deliberate nondisclosure of information in order to gain a tactical advantage over the state at trial" and citing *Taylor* in support of rule that "exclusionary sanctions are properly reserved for the most blatant and flagrant transgressions").

Other states employ a balancing test, however. The New Mexico Supreme Court has adopted a balancing test based on *Taylor*'s citation of the pre-*Taylor* case of *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983), which considers (1) "the effectiveness of less severe sanctions," (2) "the impact of preclusion on the evidence at trial and the outcome of the case," (3) "the extent of prosecutorial surprise or prejudice," and (4) "whether the violation was willful." *McCarty v. State*, 763 P.2d 360, 362 (N.M. 1988). The Colorado Supreme Court has adopted a similar balancing test, using the factors of (1) "the reason for and the degree of culpability associated with the failure to timely respond to the prosecution's specification of time and place"; (2) "whether and to what extent the nondisclosure prejudiced the prosecution's opportunity to effectively prepare for trial"; (3) "whether events occurring subsequent to the defendant's noncompliance mitigate the prejudice to the prosecution"; (4) "whether there is a reasonable and less drastic alternative to the preclusion of [the defense] evidence"; and (5) "any other relevant factors arising out of the circumstances of the case." *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989) (quoting *People v. Hampton*, 696 P.2d 765, 778 (Colo. 1985)).

Both the lower federal courts and the state courts are thus badly divided. And they are actually divided in two ways. First, there is the more readily apparent division over whether exclusion of a witness for noncompliance with discovery requirements is ever permissible when the noncompliance is not willful and motivated by a desire to obtain a tactical advantage. Second, there is a less readily apparent, but still real, division over whether bad faith is just one factor to be considered, as suggested by the New Mexico and Colorado

opinions, or whether it is a far more important factor without which there may be exclusion in only "a rare case," as suggested by the Tenth Circuit opinion in *Short*, *see supra* p. 16.

B. THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE SPLIT IN THE LOWER FEDERAL COURTS AND STATE COURTS.

The present case is an excellent vehicle for resolving both of the divisions just described. To begin, it is an excellent vehicle for resolving the fundamental preliminary question of whether the "willful" violation found in *Taylor* is a prerequisite to exclusion. There was no finding of such bad faith here and absolutely no basis for such a finding. There was at most defense attorney and/or expert negligence, aggravated by difficulty in coordinating with government representatives who had to give the expert access to evidence in the government's possession. The attorney verbally told the government about the possibility of the expert in April, two months before trial, and filed formal written notice three weeks before trial. He did not provide the expert's report and actual opinions only because he did not have them yet. And the failure to have the report and opinions by then was largely a product of logistical problems, arising because the agent and the evidence were in different cities, multiple examinations of the evidence were necessary, the expert was tied up in other cases, and the expert was very meticulous. *See supra* p. 7. In sum, there was not only an absence of *bad* faith, there were multiple indicators of *good* faith.

This makes the case an equally good vehicle for resolving and illustrating the relative importance of the bad faith/good faith factor if bad faith is not an absolute requirement. One view, taken in the Tenth Circuit *Short* case cited *supra* pp. 16, 19, is that bad faith or its absence, while not absolutely required, is "an important factor" and that it would be a "rare case" where exclusion is appropriate without bad faith. Other courts, such as the New Mexico and Colorado Supreme Courts – and the Ninth Circuit in the present case – seem to take a view that bad faith is just one of multiple factors to be considered. *See supra* p. 18. The present case is a good vehicle to resolve this secondary disagreement, for it falls well short of the "rare case" envisioned in the Tenth Circuit's *Short* opinion.

There is also a third line to be drawn for which this case would be a good vehicle. In some cases, the availability of alternative remedies is limited because the jury has already been empaneled and trial has begun at the time the defense evidence is disclosed, which makes continuing the case more problematic. *See, e.g., Tyson v. Trigg*, 50 F.3d at 445-46 (disclosure of witnesses near close of prosecution's case, so that allowing witnesses to testify "would have delayed the trial and worse"); *State v. Watley*, 788 P.2d 375, 376 (N.M. 1989) (disclosure of witness on the evening of tenth day of trial and objection by prosecutor that state would be required to re-interview 10 to 15 witnesses and recall victim as rebuttal witness). *See also People v. Gonzales*, 28 Cal. Rptr. 2d at 333 (suggesting willful misconduct might not be required when there is "prejudice that would be substantial and irremediable"). *Compare Noble v. Kelly*, 246 F.3d at 100 & n.3 (noting prejudice to the prosecution could be minimized by adjournment because of "prosecution's

familiarity with the locale of the alibi and its ability to obtain impeachment evidence against [the undisclosed witness]"). That was not the situation here, for the problem had started to appear likely at least several weeks before trial, when the defense filed its general notice, and became fully apparent several days before trial when the defense finally obtained and disclosed the expert's report.

This presents the additional secondary question of whether the ultimate remedy of exclusion is prohibited at least when trial has not yet begun.[7] The Second Circuit *Noble* opinion suggests this should be the rule, *see id.*, 246 F.3d at 100 & n.3, while other opinions suggest disruption of the trial schedule and scheduling of witnesses is a valid consideration, *see United States v. Johnson*, 970 F.2d at 912 (noting defendant's proposal of continuance "would have disrupted the trial schedule and harmed the government, which had brought in witnesses from all over the country"). The present case can serve as a vehicle for resolving this conflict as well.

C. THE PETITION SHOULD BE GRANTED BECAUSE THE PRESENT CASE IS A GOOD EXAMPLE OF A CASE IN WHICH EXCLUSION WAS IMPROPER.

A final reason to grant the petition is that the present case is a good example of a case in which the defense evidence should not have been

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[7] With a possible exception for other rare circumstances where a continuance would cause irremediable prejudice. *See People v. Gonzales*, 28 Cal. Rptr. 2d at 333, *cited supra* pp. 17, 20.

excluded. First, a flat rule requiring bad faith as a prerequisite for exclusion is appropriate. The right at stake – to present a defense – is one of the most basic and fundamental rights a criminal defendant has. As the Court explained in *Taylor*:

> [O]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. Few rights are more fundamental than that of an accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself. We have elected to employ an adversary system of criminal justice in which the parties can test all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id., 484 U.S. at 408-09 (internal quotations and citations omitted).

A right this fundamental should not be taken away based on defense attorney negligence, defense attorney inattention to deadlines, and/or logistical expert problems such as those which were present here. The right should also not be subject to the vagaries of a balancing test. The right should be taken away only when there is clear misconduct such as that which was present in *Taylor*.

Assuming arguendo the contrary – that the right can be taken away in other circumstances – that should not include circumstances such as those

here. Perhaps the right can be taken away if there is no other way to remedy the harm done to the government, as might be the case if the disclosure takes place in the middle of a trial that cannot effectively or fairly be restarted. But that was not the case here. The possibility of the expert witness was signaled well before trial, and there was actual, full disclosure several days before trial. A continuance might have been inconvenient, but inconvenience pales in comparison to the fundamental nature of the right taken away by exclusion of a witness.

Perhaps the right can be taken away if there was something approaching but falling just a bit short of bad faith, such as a complete lack of concern for court rules, procedures, and/or orders. That also was not the case here, however. To the contrary, there were multiple indicators of affirmative good faith, including oral notice the expert was being consulted two months before trial, subsequent logistical difficulties coordinating the expert's review of the evidence with the government, general notice of the expert three weeks before trial, and preparation of a report in the space of a few days once the expert had the complete access to the evidence that he needed.

In sum, this is not a case that falls just over the line from the facts of *Taylor*. It is on the far side of the continuum. The present case is one of the last cases in which the remedy of exclusion should have been chosen.

* * *

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: January 23, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JESUS EDER MORENO ORNELAS, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 23rd day of January, 2019, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

January 23, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JESUS EDER MORENO ORNELAS, AKA Jesus Edgar Juanni Moreno, AKA Jesus Eder Mendivel-Mendivel, *Defendant-Appellant.*	No. 15-10510 D.C. No. 4:14-cr-01568-CKJ-EJM-1 OPINION

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted May 15, 2018
San Francisco, California

Filed October 25, 2018

Before: Sidney R. Thomas, Chief Judge, Michelle T. Friedland, Circuit Judge, and Thomas S. Zilly,[*] District Judge.

[*] The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

Opinion by Judge Friedland;
Partial Concurrence and Partial Dissent by
Chief Judge Thomas;
Dissent by Judge Zilly

SUMMARY[**]

Criminal Law

The panel affirmed the defendant's convictions for assault on a federal officer, use of a firearm during and in relation to a crime of violence, possession of a firearm by a convicted felon, and possession of a firearm by an illegal alien; reversed his convictions for attempted robbery of the officer's gun and attempted robbery of the officer's truck; and remanded.

The panel held that in instructing the jury on the elements of attempted robbery under 18 U.S.C. § 2112, the district court was correct not to instruct the jury that the defendant must have formed the specific intent to steal by the time he used force, but plainly erred by omitting an instruction that, to convict, the jury needed to conclude beyond a reasonable doubt that the defendant had formed the specific intent to steal the gun and truck by the time he tried to take them. The panel held that the obvious instructional error affected the defendant's substantial rights and seriously undermined the fairness and integrity of the proceedings.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel rejected the defendant's contentions that the jury instructions were flawed in two additional ways that warrant reversal of his other convictions. The panel held that the general self-defense instruction given at trial adequately covered the defendant's resistance-to-excessive-force theory of the case. With respect to the defendant's convictions under 18 U.S.C. § 111 for assault on a federal officer and under 18 U.S.C. § 924(c) for use of a firearm during and in relation to a crime of violence (the assault), the panel held that the instruction for determining whether the officer was engaged in the performance of "official duties" was appropriate.

The panel held that the district court did not abuse its discretion by excluding expert testimony the defendant belatedly sought to introduce at trial.

Chief Judge Thomas dissented from the majority's reversal of the defendant's attempted robbery convictions, and concurred in the remainder of the majority opinion. He wrote that under the limited standard of review for plain error, the defendant failed to demonstrate that any instructional error was not harmless in light of his post-arrest admissions.

Dissenting in part, District Judge Zilly wrote that the district court's exclusion of the defendant's expert witness, without any finding that the defendant engaged in willful or blatant conduct, violated the defendant's fundamental right to due process, requiring reversal and a new trial on all appealed counts.

COUNSEL

Carlton F. Gunn (argued), Pasadena, California, for Defendant-Appellant.

Angela W. Woolridge (argued), Assistant United States Attorney; Robert L. Miskell, Appellate Chief; Elizabeth A. Strange, Acting United States Attorney; United States Attorney's Office, Tucson, Arizona; for Plaintiff-Appellee.

OPINION

FRIEDLAND, Circuit Judge:

On a summer day in the Arizona desert, not far from our country's southern border, United States Forest Service Officer Devin Linde ("Linde") encountered Defendant-Appellant Jesus Eder Moreno Ornelas ("Moreno"). A struggle ensued. Afterwards, each man claimed that the other had forced him into a fight for his life. Moreno was convicted at trial of multiple federal crimes. We reverse his convictions for attempted robbery of Linde's gun and vehicle because there was plain error in the jury instructions on those counts, but we otherwise affirm.

I.

Linde was responsible for patrolling a vast swath of mountainous desert stretching across Arizona and New Mexico and running down to the Mexican border, which contained areas of National Forest. Apart from the Forest Service, the United States Border Patrol was the only law enforcement agency operating in that remote area. While carrying out his duties, Linde often encountered people who had crossed the border unlawfully, some of whom were

smuggling drugs. Many of those people fell victim to the heat and harsh terrain. Stranded without food and water, they sometimes sought help from federal officers on patrol. Linde carried water and other supplies in his truck to prepare for such encounters.

A.

One day during a patrol, Linde received a report of suspicious people walking along a road near an area of National Forest. Linde called Border Patrol and was asked to respond. As he had many times before, Linde agreed to assist and set out in his truck, which was clearly marked as a law enforcement vehicle. Before long, he encountered two men, one of whom had scrapes and scratches on his face. The other, who did not appear injured, was Moreno.

The two men walked up to the truck. Linde offered them water, but they declined. Linde then directed Moreno and his companion to come to the front of the truck and put their hands on the hood. The injured man complied, but Moreno did not. With verbal commands failing, Linde drew his gun. A struggle between Linde and Moreno began moments later, the details of which are in dispute.[1]

1.

Linde testified in Moreno's subsequent jury trial that he ordered Moreno to turn away and put his hands on his head. This time, Moreno complied. Linde approached with his gun drawn. When he was a few feet away, Linde holstered

[1] The injured man appears to have fled during the struggle.

his weapon and pulled out handcuffs. After cuffing Moreno's right hand, Linde began to cuff Moreno's left.

At trial, Linde admitted not remembering exactly what happened next, but he recalled being yanked forward, then going blank. The next thing he knew, he and Moreno were fighting. Moreno went for the gun. Linde threw his hands down to his holster, one covering the handle of the gun, the other fending off Moreno.

Moreno responded by throwing Linde to the ground. Entangled, the two men rolled towards an embankment on the side of the road. Moreno started pummeling Linde in the face. Linde blacked out briefly before feeling his gun being pulled out of its holster. Two shots rang out. Having lost control of his weapon, Linde flailed his arms, searching for the gun.

Linde testified that he located the weapon right before Moreno could take aim at his chest. Linde pushed Moreno's hand away and then rolled onto his side, just as another shot discharged near his head. Linde grabbed Moreno's wrist, trying to keep the gun pointed away. Moreno nearly broke free, but Linde grabbed him by the neck, wrapped his leg around Moreno's throat, and squeezed. Moreno fired several shots skyward before dropping the gun.

Linde grabbed it. He aimed at Moreno and pulled the trigger. Nothing happened. Linde rolled away, backing up to put distance between them. Moreno—on his knees, hands in the air—cried "no, no, no, no." Thinking the clip was empty, Linde reloaded. Moreno bolted for the truck.

As Moreno ran, Linde realized that the gun was jammed. Linde quickly cleared the jam but, knowing that his truck contained no weapons and that its security system would

prevent Moreno from driving away, did not fire. Instead, as he told the jury, Linde went to the truck, aimed the gun at Moreno's chest, and threatened to kill him if he moved. Linde then grabbed the radio and reported, "Shots fired."

2.

Moreno gave law enforcement a very different account of the incident. In a post-arrest interview that was recorded and later played for the jury, Moreno admitted that he initially refused to comply with Linde's commands but claimed that he sat down as the officer approached with handcuffs. By Moreno's telling, Linde never holstered the gun but instead kept his finger on the trigger, with the barrel pointed at Moreno. Fearing for his life and wanting to return to Mexico rather than go to prison, Moreno tried to grab the gun. A shot went off. Moreno tackled Linde with all the force he could muster. Two more shots rang out as the two men struggled on the ground, each trying to wrest the gun from the other.

Moreno claimed that, by this point, he could have beaten Linde unconscious. Instead, Moreno slammed Linde's hand onto the ground, forcing him to release the gun. Moreno seized it, fired the remaining rounds into the air, and tossed the gun aside. He ran for the truck, thinking he would drive to the border and leave it there.

Moreno recounted that, when he got behind the wheel, he suddenly realized that he had been acting stupidly and that he should not drive away. For that reason, Moreno explained, he got out of the truck and gave himself up voluntarily.

B.

Moreno was charged with assault on a federal officer, attempted murder of a federal officer, use of a firearm during and in relation to a crime of violence, possession of a firearm by a convicted felon, possession of a firearm by an illegal alien, attempted robbery of Linde's gun, attempted robbery of Linde's truck, and illegal reentry. At trial, the jury hung on the attempted murder charge but convicted on the others. The district court sentenced Moreno to just over 43 years in prison.

II.

On appeal, Moreno challenges all of his convictions except the one for illegal re-entry. We reverse both of Moreno's convictions for attempted robbery but affirm the rest.

A.

Moreno argues that the jury instructions given at trial did not accurately define the elements of attempted robbery under 18 U.S.C. § 2112. The district court instructed that, for the jury to convict Moreno of attempted robbery under that statute, the Government had to prove that he "did take or attempt to take from the person or presence of another any kind or description of personal property belonging to the United States," and that he "did so by force and violence, or by intimidation." Although Moreno requested an instruction requiring the Government to prove that he acted with the "intent to steal" and that his use of "force or intimidation" was "directly related" to the attempted taking, he acknowledges that he did not object when the district court instructed the jury differently at trial. We may therefore

review only for plain error. *See Jones v. United States*, 527 U.S. 373, 388 (1999); *see also* Fed. R. Crim. P. 30(d).

On appeal, Moreno maintains that the district court plainly erred in two ways in instructing the jury on the elements of attempted robbery under § 2112: (i) by failing to instruct that Moreno must have possessed the specific intent to steal; and (ii) by failing to instruct that Moreno must have formed such intent by the time he used force, not just by the time he tried to take the property in question. We agree with the first contention but reject the second.

1.

We may reverse for plain error only if four conditions are met. "First, there must be an error that has not been intentionally relinquished or abandoned." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). "Second, the error must be plain—that is to say, clear or obvious." *Id.* "Third, the error must have affected the defendant's substantial rights," which in cases like this one means that there is "'a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Id.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004)); *see also, e.g.*, *United States v. Conti*, 804 F.3d 977, 981 (9th Cir. 2015). If those conditions are met, we will exercise our "discretion to correct the forfeited error if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Molina-Martinez*, 136 S. Ct. at 1343 (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

2.

Although the district court was correct not to instruct the jury that Moreno must have formed the specific intent to

steal by the time he used force, the court was wrong—and plainly so—to omit an instruction on specific intent altogether.

The statute under which Moreno was charged with attempted robbery of Linde's gun and truck punishes "[w]hoever robs or attempts to rob another of any kind or description of personal property belonging to the United States." 18 U.S.C. § 2112. Although the statute does not further define "robs or attempts to rob," *see id.*, those terms had "established meanings at common law," *Carter v. United States*, 530 U.S. 255, 266 (2000). And when "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," we presume that Congress "knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Id.* at 264 (emphasis omitted) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Thus, when Congress has "simply punished" a common law crime, Congress has "thereby le[ft] the definition of [the offense] to the common law." *Id.* at 267 n.5. In fact, the Supreme Court has pointed to this very robbery statute as an example of this legislative method.[2] *See id.* (citing 18 U.S.C. § 2112). We accordingly "turn to the common law for guidance" in interpreting the statutory phrase "robs or attempts to rob." *Id.* at 266.

[2] In *Carter*, the Supreme Court distinguished the statute at issue here (§ 2112 robbery of government property) from that at issue there (§ 2113 bank robbery). *See* 530 U.S. at 267 & n.5. Because § 2113, unlike § 2112, spells out elements of the offense and does not simply punish "robbery," the Court declined to import elements of common law robbery not specifically enumerated in the text of § 2113. *See id.* at 264–67.

At common law, robbery was "the felonious and forcible taking, from the person of another, of goods or money [of] any value by violence or putting him in fear." 4 W. Blackstone, Commentaries on the Laws of England 241 (1769). In addition to requiring a defendant to assault another person and take his things, this definition required the defendant to take them with "felonious intent."[3] *Id.* And "felonious" is just "a common-law term of art signifying an intent to steal." *Carter*, 530 U.S. at 278 (Ginsburg, J., dissenting); *accord United States v. Lilly*, 512 F.2d 1259, 1261 (9th Cir. 1975) (observing that "feloniously" was "recognized as signifying the element of specific intent to steal in robbery at common law").

Common law robbery was therefore a specific intent crime. *See, e.g.*, *Lilly*, 512 F.2d at 1261; *United States v. Klare*, 545 F.2d 93, 94 (9th Cir. 1976); 3 Wayne R. LaFave,

[3] For completed robbery at common law, there must have been a taking involving some degree of "asportation," *Carter*, 530 U.S. at 272, which meant "at least a slight movement" of the property, 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(a)(2) (3d ed. 2017). But attempted robbery could not have required the same, because it would otherwise have collapsed into the completed offense. *Cf.* 4 Blackstone at 231 (observing that even the "bare removal from the place in which [the thief] found the goods, though the thief d[id] not quite make off with them, is a sufficient asportation, or carrying away" for completed larceny). Instead, attempted robbery "at common law require[d] proof that the defendant . . . took some overt act that was a substantial step toward committing" robbery with the requisite intent. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000) (en banc) (addressing common law attempt generally). Given our reversal here based on the omission from the jury instructions of the specific intent element, we need not also rule on Moreno's new argument on appeal regarding the district court's failure to instruct the jury on the substantial step element.

Substantive Criminal Law § 20.3(b) (3d ed. 2017). That meant, for example, that a defendant accused of "snatching [a] pistol" was not guilty of robbery at common law if he had "not . . . intended at the time to steal it" and intended instead to "prevent its being used against [hi]m." *Jordan v. Commonwealth*, 66 Va. (25 Gratt.) 943, 948 (1874). This principle held true even if a defendant later formed an intent to permanently deprive the owner of the property—thus, a defendant was not guilty of robbery even if after "t[aking] a gun by force . . . under the impression that it may be used against him," he admitted "that he w[ould] sell the gun." *R v. Holloway* (1833), 5 Car. & P. 524, 524–25. Common law robbery—and by extension common law attempted robbery—thus required the defendant to have formed the specific intent to steal by the time he took the property in question.[4]

But, at common law, the defendant need not have formed the specific intent to steal by the time he used or threatened to use *force*. To the contrary, it was enough for a defendant to "take[] advantage of a situation which he created for some other purpose." 3 LaFave § 20.3(e). As a result, a defendant "who str[uck] another, perhaps intentionally but with no intent to steal . . . and who then, seeing his adversary helpless, t[ook] the latter's property" was guilty of robbery. *Id.* & n.98 (collecting cases)[5]; *see also, e.g.*, *R v. Hawkins*

[4] For a defendant to possess the specific intent to steal, he need not intend "to convert the property to [his] own use; it is sufficient that there is an intention to permanently deprive the owner of the property." 3 LaFave § 20.3(b); *see also Carter*, 530 U.S. at 268 (equating the "specific intent" to steal with the intent to "permanently . . . deprive" the victim of its property).

[5] We recognize that this well-regarded treatise is not entirely consistent on this point. Another section of the treatise suggests that the

(1828), 3 Car. & P. 393, 393 (observing that where "a gang of poachers attack[ed] a game-keeper, and le[ft] him senseless on the ground," the "one of them [who] return[ed] and st[ole] his money" was guilty of robbery even if he and the others had attacked only to "resist the keeper[']s" efforts at preventing poaching). The same was true of a defendant who threatened a woman with the intent to rape her, only to accept her offer of money instead. *See R v. Blackham* (1787), 2 East P.C. 711, 711.

It follows that a defendant would have committed attempted robbery at common law if he struck another without the specific intent to steal and then reached to take the helpless adversary's property—only to be thwarted in carrying out his freshly formed specific intent to steal by the timely arrival of a constable. *See* 2 LaFave § 11.3(a) (describing the requisite mental state for attempt as "the intent to do certain proscribed acts or to bring about a certain proscribed result"); *see also United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1193 (9th Cir. 2000) (en banc) ("The reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct.").

Congress's use of the common law terms "robbery" and "attempted robbery" in § 2112 imported the common law meanings of those terms. The district court therefore should have instructed the jury that, to convict Moreno of attempted robbery, it needed to conclude beyond a reasonable doubt

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specific intent to steal must coincide with the use or threatened use of force, but that section is unpersuasive because it relies only on a single modern case analyzing a state robbery statute. *See* 1 LaFave § 6.3(a) & n.11 (citing *People v. Green*, 609 P.2d 468, 498-500 (Cal. 1980)).

that he had formed the specific intent to steal the gun and truck by the time he tried to take them, though not necessarily by the time he used force against Linde. And, given the well-settled elements of common law robbery as well as *Carter*'s clear indication that § 2112 incorporates the common law, failing to instruct the jury on specific intent was an obvious omission.[6]

3.

That obvious instructional error affected Moreno's substantial rights, and it seriously undermined the fairness and integrity of the proceedings. *See Molina-Martinez*, 136 S. Ct. at 1343. We therefore reverse both of Moreno's convictions for attempted robbery.

To begin, there is a reasonable probability that failing to instruct the jury that Moreno must have had the specific intent to steal the gun—that is, the specific intent to permanently deprive Linde of the weapon—affected the jury's verdict. Again, Moreno claimed that he grabbed the gun to avoid being shot. Even if the jury did not believe that Moreno reasonably feared for his life before the struggle, the jury might well have believed Moreno when he said that he "struggled with the officer for all the bullets to be fired" so that he "could go to Mexico," and that he tossed the gun

[6] Indeed, even as to robbery statutes that, unlike § 2112, require only general intent for the completed offense, we have required specific intent for an attempt. *See, e.g.*, *United States v. Goldtooth*, 754 F.3d 763, 770 (9th Cir. 2014) (requiring specific intent for attempted robbery within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 2111); *United States v. Darby*, 857 F.2d 623, 626 (9th Cir. 1988) (requiring specific intent for attempted bank robbery under 18 U.S.C. § 2113(a)).

aside once he had emptied the clip.[7] On those facts, Moreno would have lacked the specific intent to steal. Accordingly, Moreno has shown that the evidence was not "overwhelming" as to the omitted element, and thus has convinced us that the plain instructional error affected his substantial rights. *United States v. Nguyen*, 565 F.3d 668, 677 (9th Cir. 2009); *see also Conti*, 804 F.3d at 981–82 (collecting plain error cases).

The same is true of the attempted robbery conviction related to the truck. Recall Linde's testimony. He told the jury that, in the heat of the struggle, he tried to shoot Moreno but the gun did not fire. Linde then rolled away from Moreno, who was left kneeling on the ground, pleading for his life. Linde reloaded, and Moreno ran for the truck. On those facts, the jury could have found that Moreno intended to flee for fear of being shot, rather than with intent to steal the truck. And given how close to Mexico the struggle occurred, Moreno's statement that he planned to abandon the truck at the port of entry left room to conclude that he expected all along that the truck would be recovered. Failing to instruct on specific intent thus affected Moreno's substantial rights on this count too.[8]

[7] Chief Judge Thomas's dissent argues that Moreno's admission that he intended to "throw [the gun] away in the desert," shows he intended to permanently deprive Linde of the gun. But given that the struggle occurred in the desert, the jury could just as easily have concluded that Moreno intended to toss the gun out of reach but not in a way that would prevent Linde from later locating it.

[8] All that said, construing the trial record in favor of the Government, we reject Moreno's contention that no reasonable jury could find that he had the specific intent to steal as to either attempted robbery count. *See United States v. Nevils*, 598 F.3d 1158, 1169 (9th

Finally, the error seriously affected the fairness and integrity of the proceedings. As in *United States v. Paul*, 37 F.3d 496 (9th Cir. 1994), the "instructions improperly deprived [the defendant] of his right to have a jury determine an essential element" of the offense: "mental state." *Id.* at 501. Also as in *Paul*, the jury was presented with a version of the events under which the requisite mental state was lacking. *See id.* at 500. Thus, following *Paul*, we correct the instructional error in this case because "a miscarriage of justice would otherwise result." *Id.*

B.

Moreno maintains that the jury instructions were flawed in two additional ways that warrant reversal of his other convictions. First, Moreno urges us to reverse all of his remaining convictions on the ground that the jury instructions given at trial failed to present resistance to excessive force as a defense, and that the instructions thus failed to cover his theory of the case. Second, Moreno challenges his convictions for assault on a federal officer under 18 U.S.C. § 111 and for use of a firearm during and in relation to a crime of violence (the assault) under 18 U.S.C. § 924(c), contending that the instructions improperly defined "official duties." Neither argument is persuasive.

Cir. 2010) (en banc) (rejecting a sufficiency of the evidence challenge because the evidence at trial was not "so supportive of innocence that no rational trier of fact could find guilt beyond a reasonable doubt"). Accordingly, the Government is not prohibited from retrying Moreno on the attempted robbery counts. *See, e.g.*, *United States v. Shipsey*, 190 F.3d 1081, 1088-89 (9th Cir. 1999).

1.

Moreno's theory of the case was that Linde, by pointing his gun directly at Moreno, used excessive force—and that Moreno thus acted in reasonable self-defense from the start. In line with that theory, Moreno requested an instruction observing that "[a] person has a right to resist an officer who is using excessive force" to supplement our court's model instruction on general self-defense.[9] The district court declined to add that language to the model instruction. Moreno objected.

As a criminal defendant, Moreno had "a constitutional right to have the jury instructed according to his theory of the case" so long as the instruction he requested was "supported by law and ha[d] some foundation in the evidence." *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011) (first quoting *United States v. Johnson*, 459 F.3d 990, 993 (9th Cir. 2006), then quoting *United States v. Bello-Bahena*, 411 F.3d 1083, 1088–89 (9th Cir. 2005)). If the district court failed to give such an instruction, we would have to reverse unless "other instructions, in their entirety, adequately cover[ed]" Moreno's theory of the case. *Id.* (quoting *United States v. Thomas*, 612 F.3d 1107, 1120 (9th Cir. 2010)). We assume without deciding that Moreno's excessive force instruction was supported by law and had some foundation in the evidence, but we hold on de novo review that the general self-defense instruction given at trial adequately covered

[9] We use the term "general" to differentiate this model instruction from the model instruction geared specifically to a charge under § 111 of assault against a federal officer, which will be discussed below. *Compare* Ninth Circuit Model Criminal Jury Instruction No. 6.8 (general self-defense instruction), *with id.* No. 8.5 (§ 111 self-defense instruction).

Moreno's resistance-to-excessive-force theory. *See Bello-Bahena*, 411 F.3d at 1089.

Following our court's model instruction on general self-defense, the district court instructed the jury that the "[u]se of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force," and that "[t]he government must prove beyond a reasonable doubt that [Moreno] did not act in reasonable self-defense." *See* Ninth Circuit Model Criminal Jury Instruction No. 6.8. That instruction left Moreno ample room to argue that Linde's use of force was excessive and therefore "unlawful"—and that Linde's use of (allegedly) excessive force justified Moreno's attempt to grab the gun. Indeed, Moreno's closing argument made those very points. Thus, even if express language on excessive force might have helped Moreno, and even if such language would have done no harm, its absence did not "impair [Moreno's] right to have the jury decide whether the government ha[d] proven" that he had not acted in reasonable self-defense.[10] *Marguet-Pillado*, 648 F.3d at 1009 (emphasis omitted).

[10] For three reasons, it also does not matter that the district court declined to instruct the jury on a justification defense specific to the two counts of unlawful possession of a firearm. First, the general self-defense instruction allowed Moreno to argue not only that he was justified in wrestling the gun away from Linde, but also that (by extension) he was justified in possessing the gun despite his prior felony conviction and immigration status—which is precisely what Moreno's closing argument contended. Second, Moreno was in some ways better off without the proposed justification instruction. For example, the self-defense instruction given at trial put the burden on the Government to prove a lack of self-defense beyond a reasonable doubt, but Moreno's proposed justification instruction would have put the burden on Moreno to prove justification by a preponderance of the evidence. Third,

Contrary to Moreno's contentions, *United States v. Span*, 970 F.2d 573 (9th Cir. 1992) ("*Span I*"), and *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996) ("*Span II*"), do not require a different result. In those two cases we confronted—on direct appeal and collateral review, respectively—a different instruction on a different record. The problematic instruction in the *Span* cases was our court's model instruction geared specifically towards the charge of assault on a federal officer. That instruction shielded from guilt only defendants who (1) "reasonably believed that use of force was necessary to defend [themselves] against an immediate use of unlawful force," (2) "used no more force than appeared reasonably necessary in the circumstances," *and* (3) "did not know that [the alleged victims] were federal officers." *Span I*, 970 F.2d at 576; *see also Span II*, 75 F.3d at 1387–88. As we observed in *Span I*, that instruction "allow[ed] the government to defeat an excessive force theory of defense merely by proof beyond a reasonable doubt that the defendant knew that the person that [the defendant] allegedly assaulted was a federal law enforcement officer." 970 F.2d at 577. The district court's instruction in *Span* thus precluded an acquittal even if the jury "believed that the [officers'] exercise of force . . . was unlawful because it was excessive" and "found that the [defendants] reasonably defended themselves from that unlawful exercise of force." *Id.*

although the general self-defense instruction referenced the "[u]se of force" without expressly mentioning possession of a firearm, the district court gave that instruction after instructing the jury on the elements of every charge at issue in the trial. Giving the instructions in that order suggested that the self-defense instruction applied beyond just the assault and attempted murder charges.

The general self-defense instruction given at Moreno's trial, by contrast, did not hinge on whether Moreno knew that Linde was a federal officer. That being so, the jury in Moreno's case was not led to believe that, "regardless of the amount of force used by" Linde, Moreno "had no legal right to do anything except [to] submit." *Span II*, 75 F.3d at 1390. Rather, to reiterate, the jury was instructed that the "[u]se of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force."

To be sure, we observed in *Span I* that "the general self-defense instruction offered by the [defendants] d[id] not amount to a proposed instruction on the right to offer reasonable resistance to repel any excessive force used by federal law enforcement officers." 970 F.2d at 578. But we did so while emphasizing that the defendants had neither presented at trial an excessive force theory of self-defense nor preserved for direct appeal a challenge to the district court's use of a self-defense instruction foreclosing that otherwise very promising theory. *See id*. And it is true that, in *Span II*, we faulted trial counsel for "failing to request an instruction that . . . self-defense in the face of an excessive use of force . . . is an affirmative defense." 75 F.3d at 1389. But we did so while holding that trial counsel was constitutionally ineffective for failing to present an excessive force theory or to preserve a challenge to the self-defense instruction given at trial. *See id.* at 1389–90. We did not consider in *Span I* or *Span II* whether a general self-defense instruction that did not depend on lack of knowledge of officer status (if given) would adequately cover an excessive force theory of self-defense (if presented). Having confronted that question for the first time today, we hold that the general self-defense instruction given at Moreno's trial

adequately covered the excessive force theory of self-defense that he presented to the jury.

2.

To convict Moreno of assaulting a federal officer, the jury needed to find that he assaulted Linde while the officer was "engaged in . . . the performance of [his] official duties."[11] 18 U.S.C. § 111(a)(1). Moreno argues that, by improperly defining "official duties," the jury instruction given by the district court misstated an element of the offense. Moreno objected to the instruction at trial, so on appeal we consider this contention de novo. *See United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010).

The district court instructed the jury that "the test" for determining whether an officer is "[e]ngaged in the performance of official duties" is "whether the officer is acting within the scope of his employment, that is, whether the officer's actions fall within his agency's overall mission, in contrast to engaging in a personal frolic of his own." The district court added that the question was not "whether the officer is abiding by laws and regulations in effect at the time of the incident" or "whether the officer is performing a function covered by his job description." That instruction was appropriate.[12] *See United States v. Juvenile Female*, 566 F.3d 943, 950 (9th Cir. 2009) (describing the test for

[11] The statute further punishes those who assault federal officers "on account of" their official duties, 18 U.S.C. § 111(a)(1), but the Government has not relied on that clause here.

[12] There was sufficient evidence at trial to support a finding that Linde was performing his official duties. For example, Linde testified that he was routinely tasked with assisting Border Patrol, and that he was doing just that when he encountered Moreno.

whether an officer is engaged in an official duty under § 111 as "whether he is acting within the scope of what he is employed to do, as distinguished from engaging in a personal frolic of his own" (quoting *United States v. Lopez*, 710 F.2d 1071, 1074 (5th Cir. 1983))); *accord United States v. Hoy*, 137 F.3d 726, 729 (2d Cir. 1998).

C.

Moreno's final argument on appeal is that the district court abused its discretion by excluding expert testimony he belatedly sought to introduce at trial. We disagree.

1.

On February 3, 2015—five months after trial counsel was appointed to represent Moreno—the district court granted Moreno's third request for a continuance and pushed the trial date from February 18 to April 7. In the same order, the district court set a clear deadline for the parties to request disclosures mandated by Federal Rule of Criminal Procedure 16—requiring that such requests be made within two weeks and that the parties respond within seven days of receiving one. As relevant here, Rule 16 requires a defendant to reciprocate government disclosure of expert witnesses by disclosing, "at the government's request . . . . a written summary" of any expert "testimony that the defendant intends to use" at trial. Fed. R. Crim. P. 16(b)(1)(C)(i). Rule 16 further instructs that "[if] a party fails to comply with this rule," the district court may "prohibit that party from introducing the undisclosed evidence." Fed. R. Crim. P. 16(d)(2)(C).

On February 13, the Government represented that it had complied with a request from Moreno for disclosure of the Government's expert witnesses. It then requested reciprocal

disclosure, which under Rule 16 had to include the defense expert "witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(b)(1)(C). Seven days came and went. Then two more months went by, until on April 16—two weeks after the trial date was pushed from April 7 to June 23—Moreno informed the Government at a status conference that an expert named Weaver Barkman "would be potentially assisting the defense." Moreno provided no further information.

On June 1—six weeks after the status conference and three weeks before trial—Moreno filed a formal notice that he intended to call Barkman as an expert witness. Moreno's filing listed Barkman's qualifications and stated that Barkman would likely "provide more information regarding the Glock pistol fired in this case." The filing represented that trial counsel could not yet provide a summary of Barkman's proposed testimony because Barkman had "not yet finished viewing the evidence in th[e] case." A week later, Moreno filed his sixth request for a continuance, in part to allow Barkman time to finish his report. The district court denied the request the next day.

On June 18—four months after Moreno's expert disclosures were due and a mere five days before trial—the Government finally received Barkman's expert report. The report indicated that Barkman would testify that the available physical evidence suggested that Linde never holstered his gun, the gun could have slipped out of the holster accidentally, several shots were accidentally fired, and no shot was fired near Linde's head.

The Government moved to exclude Barkman's testimony. It argued that Moreno's disclosure was "incredibly untimely" and, in the alternative, that Barkman's testimony would be inadmissible for evidentiary reasons.

The district court granted the Government's motion "based on [a] lack of timeliness and failure to follow the Court's orders," explaining that the "whole idea" of setting a deadline was for the parties to "disclose expert opinions early enough . . . so the other side c[ould] have an opportunity to evaluate those opinions and hire his or her own expert prior to trial to meet those opinions."[13]

2.

Relying on his constitutional right to present witnesses in his own defense, Moreno argues that the district court abused its discretion in imposing the "sanction" of excluding Barkman's expert testimony. Such a sanction, he maintains, is inappropriate for a discovery violation unless the violation was found to be willful and blatant, and the district court made no such findings here.

Like the government in *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (en banc), Moreno "mischaracterizes the enforcement order[] as an exclusionary 'sanction.'" *Id.* at 514. The exclusion here, as in *W.R. Grace*, was no sanction. It "simply enforce[d] the [district court's] earlier pretrial order" setting disclosure deadlines. *Id.* And so far as we can tell from the record, as well as from Moreno's own representations on appeal, Moreno "did not object to the disclosure deadline[] set by the [district court's pretrial] order." *Id.* The exclusion thus "could hardly have been a surprise." *Id.* Moreover, in view of Moreno's "acquiescence" to the disclosure deadline when it was set, along with the several months of trial preparation

[13] Having excluded the expert testimony on timeliness grounds, the district court did not rule on the Government's evidentiary objections to the testimony.

that had already occurred by that point, we see nothing unreasonable about the deadline. *See id.*

Moreno is correct that we distinguished between the government and criminal defendants in *W.R. Grace*. But we did so with respect to the appropriate standard for excluding a witness as a "sanction"—an issue we discussed while affirming the district court's exclusion order on the alternative ground that the exclusion was appropriate even if viewed as a sanction. *See id.* at 514–15. We did not similarly cabin our earlier, independent holding that simply enforcing reasonable deadlines established in a pretrial order is not a sanction in the first place.[14] The cases cited by Judge Zilly in dissent do not hold otherwise.[15] *W.R. Grace* therefore controls.

[14] It also makes no difference that we did not decide in *W.R. Grace* "whether or to what extent the defense can be compelled to disclose a list of its witnesses before trial." 526 F.3d at 509 n.7. That footnote, read in context, clearly referred to disclosure of a list of *nonexpert* witnesses, which Rule 16 requires of neither party. *See id.* at 510 (holding that, "[a]lthough Rule 16 does not expressly mandate the disclosure of nonexpert witnesses," district courts may nevertheless "order the government to produce a list of such witnesses as a matter of its discretion"). The present case, by contrast, concerns *expert* witnesses, which Rule 16 expressly requires both parties to disclose under these circumstances. *See* Fed. R. Crim. P. 16(a)(1)(G), (b)(1)(C).

[15] In *United States v. Verduzco*, 373 F.3d 1022 (9th Cir. 2004), we did not even reach the question whether it would have been an abuse of discretion to exclude the expert's testimony because of a minor discovery violation, as we resolved the issue on Rule 403 grounds instead. *Id.* at 1033 (stating only that there "might" have been an abuse of discretion if the district court had excluded the expert solely on discovery violation grounds). In *United States v. Peters*, 937 F.2d 1422 (9th Cir. 1991), the government conceded that, unlike here, "it never sought an order for an exchange of witness lists prior to trial, nor was

Moreno counters that the district court's order required him to disclose only expert testimony that he "intend[ed]" to use at trial, and that he had not yet intended to call Barkman when the disclosure deadline came and went. This argument is meritless, for it would render deadlines meaningless. By requiring the parties to disclose by a certain date expert witnesses whom they intended to call at trial, the district court required the parties to figure out before that date whom they wanted to call.

United States v. Schwartz, 857 F.2d 655 (9th Cir. 1988), is not to the contrary. In *Schwartz*, a fellow defendant flipped at the eleventh hour, and the government sought to call him as a cooperating witness at trial. *Id.* at 656. Although the newly minted cooperator had not been

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there any agreement between counsel regarding the exchange of such lists." *Id.* at 1424-25. In the absence of such a request, the defendant did not actually have any affirmative disclosure obligation under Rule 16 that the district court could have sought to enforce. Fed. R. Crim. P. 16(b)(1)(C) (requiring that the government make a disclosure request to the defendant). Our holding that the sanction was impermissible because no willful and blatant discovery violations had occurred was a response to the government's alternative argument that, even if the defendant's attorney did not commit a clear-cut violation of any discovery rule, the witness was properly excluded because defense counsel deliberately failed to divulge the existence of the expert witness to get an advantage at trial. *Peters*, 937 F.2d at 1426. And, in *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002), the issue was not timely disclosure but rather an alleged divergence between the disclosure that had been timely made and what the expert actually testified to at trial. *Id.* at 1018. Moreover, in *Finley*, the expert witness presented the only evidence of Finley's diagnosed mental disorder, and the district court's exclusion of the entirety of the expert testimony—not just the arguably undisclosed part—left Finley unable to present his main defense. *Id.* Even assuming the expert testimony excluded in this case was relevant to and supportive of Moreno's self-defense theory, it was not essential to that theory to anywhere near the extent the expert testimony in *Finley* was.

disclosed as a witness on time, we held that he could still testify. *Id.* at 659–60. We did reason that "the government could not then have intended to call" the cooperator when the district court's disclosure deadline came and went. *Id.* at 659. But that was because the cooperator "had an absolute privilege not to testify," leaving the government powerless to disclose him as a witness it intended to call at trial. *Id.* (citing U.S. Const. amend. V). Expert witnesses, in contrast, have no such privilege and, relatedly, are not normally being prosecuted in the very criminal case for which they would be called to testify. Moreno thus had full control over his intent to call an expert witness. Because he did not come close to meeting the district court's reasonable disclosure deadline, Moreno was properly left to proceed without his desired expert testimony.

III.

For the foregoing reasons, we reverse Moreno's convictions for attempted robbery and remand for a new trial on those charges. We affirm Moreno's remaining convictions.

AFFIRMED in part, REVERSED in part, and REMANDED.

THOMAS, Chief Judge, concurring in Parts I, II(A)(1) and (2), and II(B) and (C); and dissenting from Part II(A)(3).

When the defendant requests a specific jury instruction, but fails to object when the district court instructs the jury differently, we may only review for plain error. *Jones v. United States*, 527 U.S. 373, 388 (1999). Although Moreno initially requested that the district court instruct the jury that,

with respect to the two attempted robbery charges under 18 U.S.C. § 2112, the Government must prove he acted with the specific "intent to steal," Moreno failed to object to the instructions he now challenges in the district court. As such, our review is a limited review for plain error. *Id.*; *see also* Fed. R. Crim. P. 52(b). Under this difficult standard, Moreno fails to demonstrate that any instructional error was not harmless in light of his post-arrest admissions. Accordingly, I respectfully dissent from the majority's reversal of Moreno's two attempted robbery convictions. The failure to preserve a claim ordinarily prevents a party from raising it on appeal, but Rule 52(b) "recognizes a limited exception to that preclusion" for plain errors. *Puckett v. United States*, 556 U.S. 129, 135 (2009). "[T]he authority created by Rule 52(b) is circumscribed." *United States v. Olano*, 507 U.S. 725, 732 (1993). Plain error review under Rule 52(b) involves a four-pronged process, and "[m]eeting all four prongs is difficult." *Puckett*, 556 U.S. at 135. First, "there must be an error or defect . . . that has not been intentionally relinquished or abandoned." *Id.* "Second, the legal error must be clear or obvious." *Id.* "Third, the error must have affected the appellant's substantial rights." *Id.* To affect the appellant's substantial rights, the appellant must demonstrate the error "'affected the outcome of the district court proceedings.'" *Id.* (quoting *Olano*, 507 U.S. at 734). And finally, even if the appellant establishes the first three prongs, our discretion to remedy the error "ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Olano*, 507 U.S. at 736). As such, Rule 52(b) "leaves the decision to correct the forfeited error within the sound discretion" of this Court, *Olano*, 507 U.S. at 732–34, and the discretion conferred on us by Rule 52(b) should be exercised only where a "'miscarriage of justice would otherwise result,'" *United*

States v. Young, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

Even if there were plain instructional error as to the robbery counts, I respectfully disagree that it affected Moreno's substantial rights and seriously undermined the fairness and integrity of the proceedings. Any instructional error was harmless in light of the record evidence. The evidence introduced at trial, in conjunction with Moreno's post-arrest statements, demonstrates that he possessed the specific intent to permanently deprive the officer of both the gun and the vehicle, and the failure to instruct the jury regarding that intent did not affect the outcome of the district court proceedings. With respect to the officer's gun, Moreno admitted that at the time he attempted to disarm the officer, he intended to gain possession of the gun and take the gun so that the officer could not use it against him. Although Moreno claimed that he went after the gun to avoid being shot, Moreno further admitted that he intended to take the gun from the officer, and throw it out somewhere in the desert so that the officer could not use the gun against him, effectively depriving the officer of the gun. Specifically, Moreno admitted that in going after the officer's gun, he "wanted to take the gun from [the officer]," and once he gained possession of the gun, he intended to "throw it out into the desert" so that he would not be shot by the officer. The logical implication of Moreno's admission is that in order to avoid being shot, Moreno intended to permanently deprive the officer, and the government, of the gun by taking it and throwing it out in the desert in such a way that the officer would not able to recover it. Moreno's admissions evidence more than an intent to momentarily take the gun from the officer. In fact, Moreno's claimed motive to avoid being shot, when viewed in conjunction with his admitted intent to take the gun and throw it in the desert, establish that

he possessed the requisite intent to permanently deprive the officer, and the government, of the gun. The failure to instruct the jury on that element therefore did not have an impact on the ultimate conviction because Moreno freely admitted that he possessed the requisite intent. As such, Moreno failed to establish plain error.

With respect to the officer's vehicle, Moreno's admissions, when coupled with his actions, once again establish the requisite intent to sustain the attempted robbery conviction. In the post-arrest interview, Moreno admitted that his overall intent in getting in the officer's vehicle was to use the vehicle in his escape. Specifically, at the time he got inside the officer's vehicle, and just before he put the vehicle in gear, Moreno admitted he intended to "tak[e] off" in the vehicle in order to "get to the border." Further, following the sheriff's paraphrase of his statement, Moreno agreed that when he initially got in the vehicle, "his original intentions" were to "take off" and "just keep going." Moreno clarified, he "was going to go all the way to the border," and that he "was going to take the car and go in it all the way to the border." Although ultimately, once he arrived at the border, Moreno intended to "jump and flee to [Mexico]" and necessarily "leave the truck at the port of entry," Moreno's admissions establish that at the time he attempted to drive off in the officer's vehicle, he had formed the requisite intent to permanently deprive the officer, and the government, of it.

Further, the fact that the overall incident took place near the border does not negate Moreno's admitted intent to deprive the officer and the government of the vehicle. Moreno stated that when he got into the driver's seat of the officer's vehicle, he intended to flee, and that he was "just [going to] keep going." Although Moreno stated that if he

had been able to drive off in the vehicle, he would have left the vehicle at the port of entry, that does not negate his original admitted intent to take off in the vehicle, to just "keep going," and to deprive the officer of the use of the vehicle in such a way that the officer would not be able to recover the vehicle or use it to apprehend Moreno. Even though the overall incident took place near the border, the record does not indicate that Moreno intended to relinquish the vehicle at the border, or that he intended for the government to regain possession of the vehicle. Aside from the proximity to the border, there is no indication that Moreno intended for his taking of the vehicle to be only temporary, or for the government to regain possession of the vehicle.

Because the evidence was sufficient to establish the requisite intent, any instructional error was harmless, and certainly did not constitute plain error as to the robbery counts. I join the majority in all other respects.

For these reasons, I respectfully dissent, in part.

ZILLY, District Judge, dissenting from Part II(C):

In the criminal context, courts have upheld the "drastic remedy" of excluding a witness only in cases involving "willful and blatant" discovery violations. *Taylor v. Illinois*, 484 U.S. 400, 416 (1988); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991). In this case, the district court made no finding that Moreno engaged in willful and blatant conduct. Rather, in the district court's own words, Moreno's expert witness was excluded "based on lack of timeliness and failure to follow the Court's order." The district court's exclusion of Moreno's expert witness (Weaver Barkman),

without any finding of willful or blatant conduct, violated Moreno's fundamental right to due process. This exclusion of the expert witness requires reversal and a new trial on all appealed counts. *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002).

The Supreme Court has recognized that the right to present evidence in one's own defense is a fundamental constitutional right. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). The Supreme Court considered the intersection of this right and discovery sanctions in *Taylor*, and held that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor*, 484 U.S. at 408. *Taylor* holds that exclusion is possible ***only*** if the violation was "willful and blatant." *Id.* at 416–17.

The majority wrongfully attempts to avoid this well-established law by reasoning that Barkman's exclusion "was no sanction," but rather simply enforcement of an earlier pretrial order. The district court, however, imposed a "sanction," plain and simple. A discovery sanction is defined as: "[a] penalty levied by a court against a party or attorney who … inexcusably fails to comply with … the court's discovery orders." Black's Law Dictionary 1542 (10th ed. 2014). Numerous Ninth Circuit opinions have characterized the exclusion of a witness for violating a discovery or scheduling order as a "sanction." *See United States v. Verduzco*, 373 F.3d 1022, 1033–35 (9th Cir. 2004) (observing that, if the discovery violation at issue had been the sole ground for excluding the defense expert, a Ph.D. sociologist, the district court would have abused its discretion in imposing such sanction, but affirming on the basis of the district court's additional Rule 403 analysis); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991) (holding that, with respect to a forensic pathologist proffered

as an expert by the defendant in an allegedly untimely manner, "no willful and blatant discovery violations occurred" and "application of the exclusionary sanction is impermissible"); *see also Finley*, 301 F.3d at 1016–18 (9th Cir. 2002) (reversing the exclusion of the defendant's expert witness, a licensed clinical psychologist, reasoning that, even if a discovery violation occurred, the "severe sanction of total exclusion of the testimony was disproportionate to the alleged harm suffered by the government.").[1]

The majority nevertheless asserts that Moreno "mischaracterizes the enforcement order as an exclusionary 'sanction'" relying on *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (en banc). *W.R. Grace*, however, does not support the majority, but rather Moreno's right to a new trial. In *W.R. Grace*, the district court had excluded undisclosed witnesses from the government's case-in-chief.[2] Ironically, in *W.R. Grace*, the government, rather than the defendant, argued that the exclusion of witnesses can be imposed as a sanction only when the district court finds that the violation was "willful and motivated by a desire to obtain a tactical advantage." *Id.* at 514–15 (quoting *Finley*, 301 F.3d at 1018). Because the district court in *W.R. Grace* made no such finding, the government contended the exclusion order could not stand. *W.R. Grace* rejected the

[1] The majority's attempt to distinguish these cases is unconvincing. Each decision stands for the proposition that the exclusion of a witness on the basis of a discovery or scheduling order violation constitutes a sanction. The majority does not suggest otherwise.

[2] In *W.R. Grace*, the district court did not exclude any witnesses, but rather precluded the government from identifying additional witnesses after the deadline. Thus, *W.R. Grace* involved only the enforcement of a scheduling order, as opposed to sanctions for a discovery violation.

government's argument, which relied on *Finley*, observing that "*Finley*, . . . like *Taylor*, involved a ***defendant's*** right to present evidence, not the government's, and has no bearing here." *Id.* at 515 (emphasis added). *W.R. Grace* explicitly recognized that the government and a criminal defendant are subject to different standards,[3] and its ruling, which was unfavorable to the government, had no effect on the doctrines applicable to the exclusion of criminal defense witnesses.

The majority's conclusion that Moreno was "properly left to proceed without his desired expert testimony" completely ignores Supreme Court jurisprudence. Even if Moreno violated the applicable scheduling order, the district court improperly precluded the defense expert without making the requisite finding of willful or blatant conduct. As a result, the district court never reached the merits of the government's evidentiary objections or conducted a *Daubert* hearing. Any skepticism about the proffered evidence that stems from an undeveloped record is not within the province of an appellate court to consider.

I would reverse Moreno's convictions on all counts, except for the unappealed illegal re-entry count, because his defense expert was excluded in violation of his constitutional rights, and I therefore respectfully dissent. I concur, however, in the result reached in Part II(A) of the majority opinion, reversing Moreno's convictions for attempted robbery of the gun and the truck based on instructional error.

[3] The majority's suggestion that *Verduzco*, *Peters*, and *Finley* do not contradict *W.R. Grace* is analytically flawed because (i) all three cases **predate** *W.R. Grace*, and (ii) all three cases involve a **criminal defendant's** right to call witnesses, which was not even at issue in *W.R. Grace*.

A P P E N D I X 2

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESUS EDER MORENO ORNELAS, AKA Jesus Edgar Juanni Moreno, AKA Jesus Eder Mendivel-Mendivel, Defendant-Appellant.	No. 15-10510 D.C. No. 4:14-cr-01568-CKJ-EJM-1 District of Arizona, Tucson ORDER

Before: THOMAS, Chief Judge, FRIEDLAND, Circuit Judge, and ZILLY,* District Judge.

The majority of the panel has voted to deny appellant's petitions for rehearing and rehearing en banc. Chief Judge Thomas and Judge Friedland have voted to deny the petitions for rehearing and rehearing en banc. Judge Zilly voted to grant the petition for rehearing and recommends granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

The petitions for rehearing and rehearing en banc are DENIED.

A P P E N D I X 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jesus Eder Moreno Ornelas, Defendant.	CR-14-1568-TUC-CKJ(EJM) Tucson, Arizona June 24, 2015 10:12 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTIONS IN LIMINE

BEFORE: THE HONORABLE CINDY K. JORGENSON, DISTRICT JUDGE

APPEARANCES

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curtailing me from arguing what official duties is. And since we haven't agreed on instructions, I think we disagree what official duties is.

THE COURT: Okay. So you think an additional jury instruction might be helpful?

MR. MARBLE: Yes. Absolutely.

THE COURT: All right. I just wanted to get your thought on that idea.

And then the last motion in limine is the issue about the Government's request to preclude any expert opinion testimony from Mr. Barkman. And I know I have that here someplace. Yes, that's Document 78. I do have that motion. I am inclined to preclude it as untimely.

I don't know, Mr. Marble, if you were intending to call Mr. Barkman as an expert witness to give some of the opinions that he's outlined in his report to you June 16th, but I know I denied the motion to continue the trial already based on your request to have Mr. Barkman do some additional investigation and perhaps prepare a report and render some opinions in that report. I denied your motion to continue trial basically saying that that was untimely. So this is the Government's motion in limine to preclude Mr. Barkman as an expert witness in this case, so I am inclined to grant that motion based on untimeliness. I mean, I don't even think I need to get to some of the merits of his opinions, but I

definitely think if we did get to that, I would need -- the Government would be entitled to have a Daubert hearing on some of the opinions that he has here.

Obviously, if he's a fact witness and done some things for the defendant that says he took a picture and this is a picture of this or that, that's not expert testimony. But that's my preliminary thought on that motion in limine.

Do you want to be heard on that, Mr. Marble?

MR. MARBLE: Yes, Ms. Brambl is going to do that.

THE COURT: Okay. Then I'll allow the Government to also make a statement on that issue.

MS. BRAMBL: Well, your Honor, we're asking that you not preclude the testimony including the expert witness portion of that. And we do concede that our disclosure of his opinions was very late in the case, but I think there are several reasons for that and not all of them -- the responsibility for that doesn't fall squarely just on our shoulders alone.

And I believe that the Government's remedy, because they obviously were aware since for at least the last two months when we've been trying to schedule these meetings to review -- so Mr. Barkman could review the physical evidence, and I believe sometime in April he actually met with the Forest Service agent or a Government agent at the scene location, so they've known for some time that he's been

working on the case. It's not something that was dumped on them the very last minute. Obviously, we didn't know his opinions until he had a chance to review everything because he wouldn't have been able to form complete opinions until that happened.

A remedy, had this motion been raised a little earlier, would have been -- an alternative remedy would have been to continue the trial, and in fact that's what the defense had asked for because we anticipated this was getting close to trial and we didn't have all of his opinions. In fact, I believe when the motion to continue was filed, he didn't even -- our expert didn't even have possession of the gun to do some test firing.

Our position is that preclusion should be a last resort because of the importance of the testimony and the right for Mr. Moreno Ornelas to have a fair trial. As this Court has seen, there are a lot of issues in this case, and you're dealing with them all right now. They're right in your lap right now when it would have been nice to have a little more time, you know, to prepare these more fully and have it done in a more orderly way. I think that would have benefited everyone -- the Court for judicial economy, the defense, and also the Government.

THE COURT: Well, now, you had the police reports early on, right, summarizing the incident? Because the

firearm -- there's nothing wrong with the firearm. I mean, he test-fired it and it was -- some of these opinions deal with how the incident occurred and Mr. Barkman's opinions about that. So I mean, he could have done this months -- this incident happened last August; right? He could have done that analysis much earlier assuming that the gun operated correctly; right? He didn't have to wait until -- and even the request to have the gun and test fire the gun, that could have been done in September, for example, or December or January.

MS. BRAMBL: I don't believe we had retained him as an expert or contacted him until sometime early in this year. I can't tell you the exact date. I think it was sometime in February. For many, many reasons, personal events, the Shawn Miguel trial which I'm sure you're painfully aware, Mr. Barkman was involved in and testified twice. I believe that part of that, between the two trials he was adding to and supplementing areas of investigation. So he was very, very busy on that.

And when the parties tried to get together to, you know, review the evidence, it was a matter of coordinating not just his schedule and our schedule, but the FBI agent, the case agent, the evidence custodian, the AUSA. So we had quite a few people, four or five people that had to be together on a certain day.

And instead of being able to do it all at once on the first day, we had requested five hours, which, you know, is not an unreasonable request. But it ended up being divided into three separate days six weeks apart based on scheduling. And it was when we were up against that last -- the last meeting where Mr. Barkman was going to take possession of the gun and be able to test fire it, I believe when that hadn't occurred yet was when Mr. Marble filed his motion to continue.

And I suppose we could have done things piecemeal, but until someone has looked at all the evidence and see how it fits together, it's hard to offer a complete opinion which is what we wanted to do in this case. And I think that the defense has made real efforts to keep this trial date, and in fact here we are proceeding with trial. Given a case of this complexity and with the very, very serious consequences for Mr. Moreno Ornelas if he were to be convicted, the case is not yet a year old. So I think that we've made very good progress in trying to prepare and get ready for this in a timely way.

I would also add that, and I think this is true of both parties, it's a real leap of faith to schedule a firm trial date. Because unless you have absolutely everything done when you're making those commitments, you're just basically saying that you're going to do your very best to get ready. And I don't believe that all of the delay -- I'm not blaming anyone. It's just getting so many people together to

get all of this done took a lot more time and effort than I believe we realized it would earlier on.

And so it's certainly not a disregard for the Court's ruling or, you know, trying to sandbag counsel or anything like that, that all of this happened so very late in the day. The testimony that we want to elicit is very important, and I'd like to take just a minute or two and just explain what we plan to do with this witness.

Just prefatorily, Mr. Barkman's testimony is essential to presenting a complete and fair defense for Mr. Moreno Ornelas. We view this as a due process, fundamental fairness concern and also obviously ineffectiveness of counsel concern.

There are basically two versions of the events and there's physical evidence. You know, one is that this was a deliberate attempt to kill the agent. The other is that it was basically an attempt to get away and no intent to cause harm. How that physical evidence fits in with this I think is very important for Mr. Moreno Ornelas, and it's also I think important for the Court and the jury to note these things as well. Because otherwise, you know, they're going to see things but not really understand in a way that is easily explained how they would fit in.

And we've also heard that the key witness, because we won't know until the time actually comes whether Mr. Moreno

Ornelas will testify or not, so the only other person who was there has critical gaps in his memory. We already heard he has two important gaps during very important events of this altercation that took place.

One, and this is maybe a gray area between a fact witness and an expert witness, but a key question is, you know what was this holster like that Agent Linde was wearing and how did it work? Did it retain the weapon or was it one where the weapon could easily fall out? He's already testified that the weapon would not easily fall out. We would expect that Mr. Barkman would say that this was not -- this had no retention mechanism on it. And so it would be -- it wouldn't take a lot of effort for that gun to fall out of the holster. And obviously how the gun got out of the holster is an important issue, you know, what was going on at that time.

The opinions themselves, we're not planning, if we're allowed to call Mr. Barkman, to elicit anything about his opinions about the credibility of the witnesses, and I know that's in his report. But he's not a lawyer; he doesn't know the intricacies of the rules of evidence.

And so what we had planned to ask him about would be how the evidence at the scene that was recovered and that he examined either -- there's a couple of ways we could do it. Just how it fits in with, you know, the rest of the evidence in the case, or perhaps, you know, more specifically to say,

you know, there's been testimony of X, Y and Z. You know, does this gun cartridge placement, for instance, fit in with that? Is it consistent or inconsistent with that? And not all of this evidence helps us, but I think it's important for the jury to get just a picture of how all of these things fit together.

We have a short clip of what happens when a gun is fired, for instance; a slow motion showing, you know, the cloud that leaves the weapon. Things like that that, you know, I don't think there's any real dispute that that's what happens. But you know, the average juror may not know exactly how that works.

THE COURT: How would that be relevant, what a gun looks like when it's fired?

MS. BRAMBL: Well, the cloud of gases that come out -- it's to show that what Mr. Barkman did with the gun. He test-fired it and then he was able to measure, like, how wide that cloud is because there's little particles of lead and that can show up or not show up. So every gun is a little different in how wide that is, so he actually tested it on the gun.

He tested how much of a pull it takes to pull the trigger. That's something that I certainly wouldn't know how to do, and he would have to explain this is what he did. That's a little bit of a gray area, too, because he's not

really putting that in with all of the other evidence. He's just saying this is the trigger pull.

Now, where that would come in, there's a concept called a "sympathetic squeeze," which, again, when you hear it, it makes perfect sense but not something that anyone would know off the top of their head. Which is if you've got a gun in one hand and you're doing something with the other and you're making some exertion, then you might not purposely pull -- cause the gun to fire. So that probably is an expert opinion because that's not something that's within the realm of our experience.

And maybe because it's fairly early in the trial, there are other things that might come out that he might have something to say about that isn't in the discovery.

As far as whether he's qualified to do this, you're in a unique position because you sat through two trials and heard his qualifications. But just very briefly, he's been a sheriff's officer for 25 years and a detective. And in the course of that he handled over 200 complex investigations. He's been a private investigator for almost 20 years. Nineteen. And in the course of that he's handled over 200 investigations. He belongs to several associations that are important and relevant to his qualifications in this case: Association of Homicide Investigators, Homicide Research Working Group, International Law Enforcement Officer Educators

and Training Association, and the American Academy of Crime Scene Reconstructionist. So basically the work that he did in this case was to look at the crime scene and reconstruct it and basically look at various pieces of evidence.

And another area would be the injuries and what is likely to have caused those injuries. Is this injury consistent with or inconsistent with the event that was supposed to have happened or how this event was supposed to have happened.

It would seem that these are not areas of dispute. I mean, they're common sense. It seems like those would be areas that would be for cross-examination. I don't see that his opinions are the kind that would require a Daubert hearing, although we definitely would be able to satisfy those requirements.

And under Rule 702, the test is or what the rule requires, a witness who is qualified by knowledge, skill, experience, training or education may testify if his specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. And I believe strongly that his testimony is needed just to help the jury evaluate all of the evidence in the case and understand what it means.

I don't know that the Government is planning to do that with any of their witnesses or if they've even undertaken

the kind of analysis that Mr. Barkman did with the crime scene and the other evidence in the case.

So to summarize, I wish that we could have received a continuance so that we weren't dealing with all of these important issues so late, but I would ask the Court not to preclude the evidence. I think that that would be a very unfair result for Mr. Moreno Ornelas. If the Court is going to limit the testimony to strictly facts, I think that the defense would need some guidance so that we make sure that we don't accidentally stray over the boundaries of what your ruling would be.

Thank you.

THE COURT: All right. Thank you, Ms. Brambl.

Ms. Woolridge. I'm going in opposite order. It's your motion, but I thought that it might save a little time just to have Ms. Brambl speak to her thoughts first. So go ahead.

MS. WOOLRIDGE: And I appreciate that, your Honor. And let me just respond, then, to some of the points that Ms. Brambl makes.

First of all, the concept of fundamental fairness, your Honor, would have required the defense to comply with this Court's order back in February. That would have required disclosure of this evidence -- sorry, this -- not evidence, of expert opinions by February 20th. To allow such opinions that

were disclosed to the Government on June 18th, two business days prior to trial and almost four months after the deadline, would severely undercut the concept of fundamental fairness. It would completely eviscerate this Court's order and the Government's request for disclosure of these items on February 13th.

We had no notice of what type of opinions Mr. Barkman would render, that he would even render any opinions until last Thursday.

We had no idea he ever met with a Forest Service agent. In fact, Ms. Duryee and I heard this first just a few minutes ago in open court here. We had no notice of this. And even so, your Honor, that happened in April, two months after the deadline, and eight months after the defense had notice of where this incident location was.

And, your Honor, it was clear from the outside of this case this case was going to trial. The plea offer was rejected very early on and we began discussions of trial. In fact, at some point I believe we felt we had a firm trial date in March, so I'm not sure why this all of a sudden started happening in April.

May 1st was the first request we received, and I have that documented in e-mail, for Mr. Barkman to review the evidence. Again, at that point certainly they're entitled to view the evidence. They're entitled to hire someone to look

at the evidence and to give factual testimony about it. And we have no problem with him coming in and saying: I looked at the evidence. Here's a picture of what the evidence looked like. Certainly, there's no issue with the fact witness coming in.

But to allow him to render opinions that were disclosed to us two days prior to trial is really to allow trial by ambush, and it completely deprives us of the ability to have a rebuttal expert; for instance, someone who was an expert with firearms which, I submit to you, Mr. Barkman is not. Someone who is an expert of firearms who is an expert in this particular Glock pistol, who can testify that this is a pistol that requires a great deal of pressure and is one that is not likely, in fact is highly, highly unlikely to have an accidental discharge or to be subject to sympathetic squeeze. And that's why it's the preferred firearm of law enforcement, and there are several characteristics of this firearm that support that.

The Government has been completely deprived of that opportunity and is put in this conundrum of agreeing to a continuance which would be entirely prejudicial to the Government and the victim in this case. Or allowing such testimony is completely against the rules of evidence, it's against the rules of procedure. It's in violation of this Court's order and puts us in a incredibly untenable position.

I agree with the Court that we would be entitled to a Daubert hearing if he was allowed to testify, and that should have taken place far in advance of trial so the Government would know to expect whether or not opinion testimony was coming in and, again, to prepare to rebut it if necessary.

But, your Honor, there is absolutely no excuse for this untimeliness. The defense never asked for an extension of this February 20th deadline. They could have -- they never approached either counsel or the Court to explain why more time was needed for these opinions. And your Honor, at this point in the game it is simply improper, it's untimely. At this point, unless the Court would like me to, since we're not in a Daubert hearing I'm not going to then address why the witness is unqualified. If the Court wants to hear more, we certainly could; but I think that just as a preliminary matter the untimeliness requires preclusion.

THE COURT: Thank you.

MS. BRAMBL: Your Honor, I would like to just correct one thing that I --

THE COURT: Sure, go ahead.

MS. BRAMBL: Counsel corrected me. When Mr. Barkman went to the scene it was not in the presence of any Government employees. I was mistaken.

THE COURT: Oh. Okay. Thank you.

I am going to grant the motion in limine which is Document 78 based on the untimeliness of the disclosure, and I have considered the nature of Mr. Barkman's opinions -- proposed opinions in his report in determining this issue also. But even apart from the nature of his opinions which I think we would need a Daubert hearing on some of these opinions, for example his opinion that the holster was grossly inadequate for on-duty law enforcement purposes, that's just one example of an opinion, and some of his other opinions as to the injuries, the clothing, those sorts of things, I think the summary that the Government has outlined in Document 78 as to the timeliness of events and court orders is correct so I'm not going to repeat those.

Mr. Barkman is perhaps a very busy individual, but he doesn't -- and if he's too busy, unfortunately defense counsel should have gone to somebody else. But this trial is not going to be set based on Mr. Barkman's schedule. He should have accommodated our firm trial date, the Court's orders, and been much more available. And perhaps he was, I don't know. But be much more available so he could render -- do his analysis and render opinions consistent with the deadline of the Government's request for disclosure filed back on February 13th of 2015. So that means the disclosure was due on February 20th. The Government didn't receive that until June 18th, his proposed opinions, so I'm going to

preclude any expert opinion based on lack of timeliness and failure to follow the Court's orders.

The whole idea is to disclose expert opinions early enough for both sides so the other side can have an opportunity to evaluate those opinions and hire his or her own expert prior to trial to meet those opinions, and that obviously wasn't done in this case. The Government has virtually no opportunity to digest, evaluate, or prepare for the opinions -- the proposed opinions of Mr. Barkman which some of them are expert opinions outside the province of what the jury would normally know.

But again, as I said, if defense wants to use him as a fact witness, we could certainly talk about the parameters of that, what is a fact witness versus what is an expert witness. So we can do that either before he testifies, we can talk about that, or at some other time during the trial if you still want to call him as a fact witness.

All right. So any additional matters before we recess? Yes, Ms. Brambl.

MS. BRAMBL: I don't know if the Court already has a copy of his report and his -- Mr. Barkman's report and CV, but I'd like to approach and ask that they be made part of the record.

THE COURT: They are attached to Document 78, the Government's motion in limine. I have his report and his CV.

A P P E N D I X 4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jesus Eder Moreno Ornelas, Defendant.	CR 14-1568-TUC-CKJ (EJM) **SCHEDULING ORDER** **AND** **ORDER CONTINUING TRIAL DATE AND PLEA DEADLINE**

This case is presently set for trial on February 18, 2015. The Defendant filed a motion to continue and, for the reasons set forth therein, additional time is required to adequately prepare for trial. The Government has no objection to a continuance.

The Court finds that the ends of justice served by granting a continuance outweigh the best interests of the public and the Defendant in a speedy trial because, for the reasons set forth in the motion, failure to grant the continuance is likely to result in a miscarriage of justice if the Defendant is required to go to trial on the present trial date.

This is the third motion to continue trial filed in this case; accordingly, the Court issues this scheduling order to ensure the prompt disposition of this matter. Fed.R.Crim.P. 12(c) and 50. Any further request for a continuance of the trial date shall result in a pretrial status hearing being held by the magistrate judge.

IT IS ORDERED that the following deadlines shall govern this action:

1. **The plea deadline is March 20, 2015 by 3:00 p.m.** The Court has the discretion to reject any plea entered into post-deadline, except a plea to the indictment.

2. **The trial date is April 7, 2015 at 9:30 a.m.**

3. Should the Defendant elect to proceed to trial:

(a) All pretrial motions, except motions *in limine*,[1] are referred to the magistrate judge, pursuant to 28 U.S.C. §636(a) and (b), and shall be heard by the magistrate judge with a Report and Recommendation (R&R) to be provided to the district judge. Objections to the R&R, if any, and responses to any objections, are governed by Fed.R.Civ.P. 72(b)(2), LRCiv. 7.2(e)(3).[2]

(b) Deadlines for filing proposed voir dire, jury instructions, list of witnesses, list of exhibits, and motions *in limine* will be set by future order of this Court.

4. **The discovery/disclosure/notice/request deadline is 14 days from the filing date of this Order for the following:**[3]

(a) All disclosures within the possession, custody, and control of a party required to be produced pre-trial pursuant to Fed.R.Crim.P. 16, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), the Jencks Act, 18 U.S.C. §3500, and their progeny. The imposition of this deadline does not supercede any requirement that certain disclosure need not be made until trial. *See e.g.* 18 U.S.C. §3500(a); Fed.R.Crim.P. 16(a)(2).

(b) All requests for disclosures required by Fed.R.Crim.P. 16. *See e.g.* Fed.R.Crim.P. 16(a)(1)(A); Fed.R.Crim.P. 16(b)(1)(C). Disclosure pursuant to such a

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[1]Motions *in limine* should be aimed at prejudicial or irrelevant evidence or references, *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985), which includes a challenge by the government to the sufficiency of an affirmative defense, *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000).

[2]*See* LRCrim. 12.1 making LRCiv. 7.1, 7.2, 7.2(e)(3), and 7.3 applicable to criminal motions, memoranda and objections.

[3]The disclosure deadline does not obviate the parties' continuing duty to disclose. *See* Fed.R.Crim.P. 16(c) ("A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the Court if: (1) the evidence or material is subject to discovery or inspection under this rule; and (2) the other party previously requested, or the Court ordered, its production."); *see also* Fed.R.Crim.P. 12.1(c).

request shall be made within seven (7) days of the request.

(c) The filing by the government of a notice of its intent to use specified evidence at trial (e.g., Notice of Intent to Use Fed.R.Evid. 404(b) Evidence, Notice of Intent to Use Statement). Fed.R.Crim.P. 12(b)(4); LRCrim. 16.1.

(d) The filing of any required notices of defenses. *See e.g.* Fed.R.Crim.P. 12.1 (alibi). If such a notice is filed, the government shall provide the responsive disclosure within fourteen (14) days of the filing of the notice. *See e.g.* Fed.R.Crim.P. 12.1(b)(2).

(e) A request pursuant to Fed.R.Crim.P. 16(a)(1)(G) or 16(b)(1)(C) for a written summary of any expert testimony the government or the Defendant intends to use at trial. The written summary of any expert testimony, which "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[,]" Fed.R.Crim.P. 16(a)(1)(G), shall be produced within seven (7) days of the request.

5. **The pretrial motions deadline is 28 days from the filing date of this Order. Pretrial motions filed, thereafter, without leave of the Court upon a showing of good cause, shall be subject to being stricken and precluded, LRCiv. 7.2(a)**. All pretrial motions shall be filed in compliance with LRCiv. 7.2(a) and (b).

(a) Responses to any motion shall be filed pursuant to LRCiv. 7.2(c). A failure to respond or a late response may be subject to LRCiv. 7.2(i).

(b) A reply to a response may be filed, unless otherwise ordered by the magistrate judge, but there shall be no supplements to a motion or response nor any sur-reply. LRCiv. 7.2(d). Any supplements to a motion or response, or any sur-reply, filed without leave of the Court shall be stricken.

6. Pretrial motions will be heard by the magistrate judge. At the motion hearing, the parties, with the assistance of the magistrate judge, shall discuss whether or not a continuance of the trial date should be sought by the parties to accommodate the pending motion. *See* LRCiv. 7.2; Fed.R.Civ.P. 72(b)(2); Fed.R.Crim.P. 50.

7. **Failure to comply with these directives may be cause for sanctions.** *See e.g.*

Fed.R.Crim.P. 12(e); Fed.R.Crim.P. 16(d); LRCiv. 83.1(f); LRCrim. 57.12.

8. **Any motion to continue the trial date and/or plea deadline that is granted by the Court DOES NOT EXTEND the deadline set herein for filing pretrial motions**.

9. **Any motion or stipulation to continue the scheduled trial date and change of plea deadline shall be filed with the Clerk of the Court no later than 5:00 p.m. on Monday, March 23, 2015. Alternatively, by that same deadline, if after consultation between government and defense counsel it is determined that a motion to continue the scheduled trial date and change of plea deadline will not be filed, government counsel shall notify the Court by an email to the chambers email address that the case and counsel are ready to proceed to trial on the scheduled trial date. The notification shall also include the estimated number of trial days needed to complete the trial.**

10. Excludable delay under 18 U.S.C. §3161(h)(7) is found to commence on February 19, 2015 and end on April 7, 2015. Such time shall be in addition to other excludable time under the Speedy Trial Act and shall commence as of the day following the day that would otherwise be the last day for commencement of trial.

11. Any and all subpoenas previously issued shall remain in full force and effect through the new trial date.

DATED this 3rd day of February, 2015.

Cindy K. Jorgenson
United States District Judge

A P P E N D I X 5

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jesus Eder Moreno Ornelas, aka Jesus Edgar Juanni Moreno, aka Jesus Eder Mendivel-Mendivel, Defendant.	CR 14-01568-TUC-CKJ (EJM) GOVERNMENT'S REQUEST FOR DISCLOSURE (Pursuant to Fed. R. Crim. P. 16(b))

Now comes the United States of America, by and through its undersigned attorneys, and hereby states that the defendant has requested disclosure under Fed. R. Crim. P. 16(a)(1), and that the government has complied with these requests and acknowledges its continuing duty to disclose.

Wherefore, the United States of America hereby requests pursuant to Fed. R. Crim. P. 16(b), that the defendant provide the government with the following:

1. Documents and Tangible Objects. Permit the government to inspect and copy or photograph all books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial. Fed. R. Crim. P. 16(b)(1)(A).

2. Reports of Examinations and Tests. Permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony. Fed. R. Crim. P. 16(b)(1)(B).

3. Expert Witnesses. Disclosure of a written summary of testimony the defendant intends to use under Fed. R. Evid. 702, 703 and 705 at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefore, and the witnesses' qualifications. Fed. R. Crim. P. 16(b)(1)(C).

4. Continuing Duty to Disclose. Prompt notification of the existence of additional evidence or material which is subject to discovery or inspection under Fed. R. Crim. P. 16, up to or during trial.

Respectfully submitted this 13th day of February, 2015.

JOHN S. LEONARDO
United States Attorney
District of Arizona

s/Angela W. Woolridge

ANGELA W. WOOLRIDGE
Assistant U.S. Attorney

Copy of the foregoing served electronically or by other means this 13th day of February, 2015, to:

Jay A. Marble, Esq.

A P P E N D I X 6

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Jesus Eder Moreno-Ornelas,

Defendant.

CR 14-01568-TUC-CKJ (EJM)

NOTICE OF EXPERT WITNESS PURSUANT TO FRCP 16(b)(1)(C) AND FRE 702

Counsel on behalf of Defendant, Jesus Eder Moreno-Ornelas, hereby gives notice that the defense plans to call Weaver Barkman as an expert witness.

RESPECTFULLY SUBMITTED: June 1, 2015.

JON M. SANDS
Federal Public Defender

/s/ Jay A. Marble
JAY A. MARBLE
Assistant Federal Public Defender

Copy delivered this date to:

Angela Woolridge & Carin Duryee
Assistant United States Attorneys

MEMORADUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Criminal Procedure 16(b)(1)(C) and Federal Rule of Evidence 702, counsel provides this Notice of expert testimony through Weaver Barkman. Mr. Barkman is a retired Pima County Sheriff's Office sergeant whose areas of expertise include case, crime scene, and evidence analysis. Currently, Mr. Barkman is a private investigator and consultant. Mr. Barkman has testified in state court in excess of one hundred times in criminal cases. Mr. Barkman has also testified as an expert witness in Federal Court including recently in *United States v. Shawn Miguel*, CR14-790-TUC-CKJ.

Generally, expert testimony under Rule 702 is admissible if the expert's testimony will assist the trier of fact, and if the person providing the testimony is qualified as an expert in his area of expertise based upon "knowledge, skill, experience, training, or education." Fed.R.Evid. 702.

At this time, counsel is unable to provide a summary of Mr. Barkman's proposed testimony since he has not yet finished viewing the evidence in this case. It is anticipated that Mr. Barkman will provide more information regarding the Glock pistol fired in this case. Mr. Barkman is also reviewing the other physical evidence in this case. This summary, as required by Rule 16(b)(1)(C) will be promptly disclosed after Mr. Barkman has finished viewing the evidence and finalized his opinions.

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RESPECTFULLY SUBMITTED: June 1, 2015.

JON M. SANDS
Federal Public Defender

/s/ Jay A. Marble
JAY A. MARBLE
Assistant Federal Public Defender

Copy delivered this date to:

Angela Woolridge & Carin Duryee
Assistant United States Attorneys

A P P E N D I X 7

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jesus Eder Moreno-Ornelas, Defendant.	CR14-1568-TUC-CKJ (EJM) **MOTION TO CONTINUE PLEA DEADLINE AND TRIAL DATES** (SIXTH REQUEST)

It is expected that excludable delay under Title 18, United States Code, § 3161(h)(7)(A), (B)(iv), will occur as a result of this motion or an order based thereon.

Defendant Jesus Eder Moreno-Ornelas, through counsel, requests a continuance of the trial date set for June 23, 2015, and the plea deadline set for June 5, 2015. This request for continuance is made for the following reasons:

1. Counsel requests additional time to finalize the investigation and research in this case. Expert witness Weaver Barkman has not yet finished viewing the evidence. The final day to view the evidence is Thursday, June 11th. It is expected that Mr. Barkman will take possession of the weapon in this case on June 11th to test fire it and view it in coordination with the tactical holster. After this review, Mr. Barkman will need a reasonable time to finish his report and findings. The circumstances for the delay were not avoidable. Counsel is also finishing additional work in this case. Counsel has been diligent in this case and this request is not made for any other reason than to adequately prepare Mr. Moreno-Ornelas' case for trial.

2. Counsel is concerned with the proposed trial schedule. Five days of testimony may be enough to finish, but there is no way to know for certain. If the parties are unable to finish the opening statements, testimony, finalize the jury instructions, and closing arguments in this time frame, the jury will be forced to be present in this case for days in three different weeks, including the possibility of coming back after a three-day holiday weekend to deliberate. The defense plans to present evidence in this case, and there is the possibility that Mr. Moreno-Ornelas will be a witness in his case. This adds another level of uncertainty to finishing within the suggested time since the government may wish to present rebuttal testimony.
3. This is a very serious case. Mr. Moreno-Ornelas is charged with eight felony offenses. Counsel has been attempting to meet this deadline for trial, but not everything has been completed as desired. A short continuance would serve the interests of justice and allow Counsel to finish all items. This would provide Mr. Moreno-Ornelas with a proper defense.
4. Assistant United States Attorney Angela Woolridge has been contacted and she objects to this request. In an email Ms. Woolridge states, "both counsel for the government and the victim in this case strongly oppose any further continuance."

RESPECTFULLY SUBMITTED:

June 9, 2015.
JON M. SANDS
Federal Public Defender

/s/ Jay A. Marble
JAY A. MARBLE
Assistant Federal Public Defender

ECF Copy to:

Carin Duryee & Angela Woolridge
Assistant United States Attorneys

A P P E N D I X 8

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jesus Eder Moreno Ornelas, Defendant.	CR-14-1568-TUC-CKJ(EJM) Tucson, Arizona June 10, 2015 9:34 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

STATUS CONFERENCE

BEFORE: THE HONORABLE CINDY K. JORGENSON, DISTRICT JUDGE

APPEARANCES

For the Government:
U.S. Attorney's Office
By: ANGELA W. WOOLRIDGE, ESQ.
CARIN C. DURYEE, ESQ.
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Tucson, Arizona 85701-4050

For the Defendant:
U.S. Federal Public Defender's Office
By: JAY AARON MARBLE, ESQ.
VICTORIA A. BRAMBL, ESQ.
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Cheryl L. Cummings, RDR-CRR-RMR
Official Court Reporter
Evo A. DeConcini U.S. Courthouse
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

P R O C E E D I N G S

(Call to order, 9:34 a.m.)

MS. WOOLRIDGE: Good morning, your Honor. Angela Woolridge appearing on behalf of the United States.

THE COURT: Good morning.

MR. MARBLE: Good morning, your Honor. Jay Marble appearing for Jesus Moreno Ornelas. He's not present, your Honor. He's in custody. I ask that his presence be waived for this status conference.

THE COURT: Yes, good morning. His presence may be waived.

Let me just pull this case up on my docket. I did review just now the motion to continue filed by defense counsel last night. I don't know if you've seen that, Ms. Woolridge.

MS. WOOLRIDGE: I have, your Honor. Thank you.

THE COURT: So we can talk about that today also if you like.

I set the status conference originally due to some scheduling issues that I had. And I know that Penny, my secretary, had talked with I think both sides about working around the Court's schedule or assigning the case to another judge or possibly having a magistrate judge pick the jury. I would -- it's currently set for June 23rd. Is that right?

MS. WOOLRIDGE: That's correct.

MR. MARBLE: Yes, your Honor.

THE COURT: I would be available -- I could clear my calendar on the 22nd and have that available as a trial day, which is a Monday. I'm not available Tuesday and Wednesday. I would be available Thursday, Friday, Monday and Tuesday.

I'm not sure why this case is anticipated to take five days. I did briefly review the Complaint. I'll take a look at that again. One incident that occurred on August 23rd, 2014, involving Forest Service Officer John Linde and his encounter with two undocumented people including, one, Mr. Moreno. So I don't know why we would need five days, but I'm not either of the trial attorneys.

But in any event and further, Mr. Barkman has very recently been "hired," I guess would be the right word, Mr. Marble, by you to conduct some examination?

MR. MARBLE: Well, he's been on the case. We've been viewing the evidence. I wouldn't say it's recently; it's just taken some time to view the evidence so that's part of the reason for the delay. But yes, he is on the case.

THE COURT: So why has he not -- he's testifying about the weapon. This incident happened in August of 2014. Why is he just doing that tomorrow?

MR. MARBLE: Well, we've been viewing the evidence, and he wanted to view the evidence first. So when I hired him, we set up the dates to view the evidence. And it's taken

several meetings. He hasn't quite finished viewing the evidence because there are several circumstances. I could say part of it is our delay, part of it is kind of the agent's in Sierra Vista and the evidence in Tucson.

THE COURT: When you say "evidence," it's the firearm, right?

MR. MARBLE: Well, there's other physical evidence as well.

THE COURT: What kind of other evidence?

MR. MARBLE: Tactical belt, clothing, clothing of the client. There's several -- there's a list -- I don't have it here, but probably a list of 25 to 30 items -- about 20.

THE COURT: So was there anything in our scheduling order -- I mean, the whole idea is to have all of this done far enough in advance of a firm trial date so that there aren't continuances. Was there anything in the scheduling order, which I haven't looked at this morning, that would have required you to have done this much earlier? And if he's going to be an expert, provide the report to the Government so they can have an opportunity to review it, decide if they want to hire their own expert. Obviously, there's no time to do that now, but is there anything you know, Mr. Marble, in the scheduling order that would have made this -- assuming that Mr. Barkman is going to render some opinions as a expert that you'd like to use at trial, is there anything, do you know in

our scheduling order that would make that untimely at this point?

MR. MARBLE: I don't know in the order. I couldn't answer that.

THE COURT: Do you agree that that's the whole idea, is to try to get all this done much more than two weeks before trial?

MR. MARBLE: I agree. I agree.

THE COURT: Because there's no way Ms. Woolridge is going to have an opportunity. Is he going to prepare a report, do you know?

MR. MARBLE: He will after. I mean, that's part of the problem is the report will be completed after he views the evidence. I'm trying to remember the first date we viewed the evidence, and I think I'd have to look at my phone, but I believe it's been -- it was in May. And the first meeting we weren't able to finish it. And the second meeting due to conflicts which I think are kind of circumstances partially out of our control and partially just because Mr. Barkman is very thorough and takes his time, and he told -- he told -- he told us how long he thought he would need the first meeting, and it couldn't be completed in the first or second meeting.

THE COURT: But did you -- when I was told through the grapevine this was a firm trial date a couple of weeks ago, were you involved in that decision that it was a firm

date?

MR. MARBLE: Well, we try to meet the deadlines because I'd like this case to go as well, your Honor, to be honest with you. But sometimes we've got to kind of reevaluate as we go along with things, and things took longer than anticipated so here we are.

THE COURT: So at that point when you agreed that there was a firm -- you did agree that this was a firm date and we were going to go to trial? Would that be fair? I don't want to mischaracterize.

MR. MARBLE: I would have liked to have kept with starting on the 23rd with a firm trial date. Yes, that's what we were anticipating.

THE COURT: At that point you did anticipate getting a report from Mr. Barkman?

MR. MARBLE: Well, after -- he can't -- you know, he can't finish his report until the evidence is finished viewing, and that was -- I can tell more details if you like.

THE COURT: No, I'm just wondering why you would have agreed that this was a firm trial date if Mr. Barkman hadn't even viewed the evidence yet or prepared a report. I mean, how could this possibly be a realistic trial date? Just looking back.

MR. MARBLE: You're right. I know. It's just in the sake of things trying to meet that trial date because we

had talked about this before. It was an oversight. I was wrong.

THE COURT: Okay. So let's see, so Government objects. So let me ask you, Ms. Woolridge, some of the same questions.

Do you think that there was any previous court order that would have required the exchange of any proposed expert testimony which obviously takes much more time to meet that sort of opinion from the other side. Sometimes not, but sometimes it does. Do you think there was anything in a previous court order that would have required both sides to produce any proposed expert opinion prior to a couple of weeks before trial?

MS. WOOLRIDGE: I do, your Honor. And I'm specifically talking, referencing Docket No. 27 which is signed on February 3rd, 2015, and that is this Court's scheduling order. Item No. 4 on page 2 requires the discovery, disclosure, notice, request deadline 14 days from the filing of the date of this order for any of the following: And Item B is all requests for disclosures.

Well, the very next docket item -- I'm sorry, two docket items after that, Docket No. 29, which I filed on February 13th within that 14-day period was the Government's request for disclosure. And that included reports of examinations and tests, tests, expert witnesses to name a few

specifically and a few other items as well. Disclosure, according to this Court's order, disclosure pursuant to such a request shall be made within seven days of the request. So pursuant to this court order, the defense had until February 20th to disclose any of this evidence.

Despite that, your Honor, we have been very accommodating, and I can't stress that enough. To the lengths we have gone to despite the late disclosure, despite the fact that we weren't even asked until May 1st of this year to even arrange to -- and I've gone through my e-mails that have documented all this, your Honor -- that we weren't even contacted and asked until May 1st to set up an appointment for Mr. Barkman to view the evidence. And already at that point was months after the court-imposed deadline given Documents 27 and 29. We still made those arrangements, your Honor.

And I would point out that while there have been -- we've had to make three separate appointments for Mr. Barkman to view the evidence, that is due in no -- the delay in that is due in no part on the Government. Yes, we have a case agent that has to come up from Sierra Vista which limits the times of day. For instance, we can't start at 7 in the morning. And of course, the evidence vault at the FBI closes at the end of the business day, and I don't think it's reasonable to ask support staff to stay incredibly late.

However, that first appointment took place in May as

well. At that appointment, Mr. Barkman viewed the firearm, the holster, all of the firearm-related evidence that he now seeks to test and that we have arranged for testing tomorrow. Granted, he did not view other evidence such as clothing and other items at that time because he ran out of time, which I would submit to the Court is delay on his part and the speed that he was conducting his examination. In any event, he had seen the evidence that he wished to test back in May at this first visit. He easily could have then done the test-firing at that point. It wasn't necessary to then set additional appointments to look at the rest of the evidence for him to do the test-firing.

And if that's the crux of what his report is going to be in this case or his testimony -- even assuming that he qualifies as an expert witness which I would submit to the Court he is not going to be able to, your Honor, he has absolutely no expertise or specialized training and experience in firearms other than being a retired law enforcement officer. That is his only experience in that area. He is not an armorer. He was never a firearms instructor with the Sheriff's Department. I'm well aware of what his experience entails, and it does not qualify him as an expert.

But just assuming he was, your Honor, we have bent over backwards to accommodate this and to permit him to look at the evidence and accept this going -- accepting this

happening at such a late stage. Had we simply just perhaps objected after February 20th when we had absolutely no disclosure from the defense, then we wouldn't be in this position, and they wouldn't be able to call him at all. But now I feel like we are being put in this position because we have been accommodating. That this trial date that we have reasonably relied on since it was set in March, that we have coordinated several victims from around the state -- several witnesses from around the state, and our victim who very strongly objects to this request and would like to go forward. This was a very serious event for him and after six continuances, it's, I think, been long enough.

THE COURT: How many witnesses does the Government have? Just roughly.

MS. WOOLRIDGE: Sure, your Honor. We have I believe 10 witnesses which seems like a lot, but many of them are going to be very brief. And I don't see any reason, especially if this Court's able to start the trial on the 22nd, even with a break of the 23rd and 24th and the Court being available the next week, that we can't reasonably conclude this trial. The Court not being available on the 23rd doesn't change anything if it's available on the 22nd and we can switch that day. It wouldn't result in this case taking any longer. So I don't think that that scheduling is a problem at all, and I don't see any reason why we cannot

finish the trial in this case on time.

I would also like to point out that we have a material witness in Mexico that we have gone to great lengths to parole in for the dates of this current trial. As the Court knows, that's not easy. As the Court knows, a delay in this case may cause that witness to become unavailable and certainly would cause a lot of issues and a lot of extra work. We're certainly willing to do the extra work, but, your Honor, it may mean losing a potential witness that we now have on these dates.

But most importantly, your Honor, the defense has known all along about the Government's position and the victim's position with regard to any further continuances in this case. They and we were under the understanding that this was a very firm trial date, and they were aware that we would strongly oppose any further continuances. It certainly was on the defense to prepare any defenses in a reasonable time, and especially in light of the Court's scheduling order, especially in light of our subsequent request for notice of defenses and disclosure of this information. They chose not to do so, and I don't believe it's appropriate, then, to respond to such a decision by granting their request for continuance. Especially when the Government has strong reasons to go ahead on the current trial. And the most important reason I believe is the position of the victim in

this case.

THE COURT: All right. So let me just ask you the questions. Your motion requesting notice of defenses, I'm looking at it here, is Document 28.

MS. WOOLRIDGE: Correct.

THE COURT: In looking at it, that deals more with Federal Rules of Criminal Procedure 12, 12.1, 12.2 and 12.3 which is affirmatively asserting a defense of entrapment, duress, coercion, alibi, insanity or public authority.

MS. WOOLRIDGE: That's correct. I'm referring to Docket No. 29, our request for disclosure that was filed the same date.

THE COURT: Oh, okay. Let me look at that.

That motion, it still has a little gavel. I'm going to grant that motion. I don't think any of those defenses apply in this case, Mr. Marble?

MR. MARBLE: No.

THE COURT: So I'll grant Docket 28.

Let me look at Docket 29.

MS. WOOLRIDGE: And just for the Court's information and to credit defense counsel, they have recently provided a notice of the defense they do intend to use, so that has been complied with.

THE COURT: Okay. So Government's request for disclosure, Document 29, is pursuant to Rule 16(b) which talks

about -- which I'm looking at, requires the defendant to disclose the intent to use the item in the defendant's case-in-chief at trial or intends to call the witness who prepared the report, this relates to reports of examinations and tests and it talks about expert witnesses. The defendant must, at the Government's request, give to the Government a written summary of any testimony that the defendant intends to use.

So it appears that the Government, in this document, which is Document 29, has requested that disclosure. That was back in February. So I guess at this point it would be fair to say, Mr. Marble, that you haven't yet disclosed anything other than the fact that Mr. Barkman is looking at the items. But you haven't responded to that request for disclosure yet?

MR. MARBLE: There's no report to disclose yet because he hasn't finished viewing the evidence. But the Government was aware that Mr. Barkman was involved through requesting this. I can provide some additional information if the Court would like.

THE COURT: All right. And then I do note in looking back, and you've had some scheduling conferences or hearings before the magistrate judge, that there was an indication at some point of a firm trial date, that language being used. And I think that was before the magistrate judge.

MS. WOOLRIDGE: That's correct, your Honor. There

was a status conference in front of Magistrate Judge Markovich on April 16th, 2015. And the ECF says, Both counsel informed the Court that the current trial date of June 23rd, 2015 is a firm date. And at that point, your Honor, I believe that was the status conference we were made aware that Mr. Barkman would be potentially assisting the defense in that case. Though other than his name, we were not provided with any additional information. But yes, defense counsel did raise at that point the possibility of his involvement.

THE COURT: And Mr. Marble, did you want to be heard further? You said indicated you had some additional information.

MR. MARBLE: Just so the Court knows, I spoke with Mr. Barkman early on. He was also working on other cases. He had other cases set for trial.

THE COURT: Probably my case. Two trials.

MR. MARBLE: That slowed things down. I'll be honest with the Court, he's very meticulous. He does it the way he wants to do them in the sense of taking as much time as he needs, and I think that's why he has a special eye for this. He wanted to view the location first. The location is, you know, about 15, 16 miles north of Douglas. It's a remote location. We went and saw that site first. He wanted to see the scene first.

Then he was, to be honest with you, wrapped up in

the Miguel trial. So we set a time when he could view the evidence because he was still finishing things in that case. The Government set up a date. We went to view the evidence here in town, your Honor. The agent is from Sierra Vista. He accommodated us by driving up from Sierra Vista. However, the first day, my recollection was we were set from 1 to 3 in the afternoon. We did not -- we had a general idea of what was in evidence just the from reports. The Government had the list of items, kind of what we saw. Mr. Barkman was not able to see them all that day. We inquired how long is it going to take you to see all the evidence and he said five hours.

And the Government thought -- that was a disagreement of how long it was going to take, but that's how long he takes to view these items. And it couldn't be accomplished that day because the evidence locker closed. We set up another date, another two-hour block, and it wasn't finished. And the next hour -- the next segment he'll be able to finish. It's taken over a course of time because the agent is not here in Tucson, Mr. Barkman had a conflict, and so that just -- that slowed things down significantly.

And so that could be our fault, but I think it's equal. You know, we ask -- I understand there's rules of where the evidence can be taken. The agent's in Sierra Vista. We offered to go down to Sierra Vista to view the evidence where he works, and we would take the time to travel down

there. That couldn't work because of where the evidence is. I didn't know the first viewing that the evidence locker would be closed at 3:30, and we only had a two-hour window, and we were there till 3. So these are out of our control.

THE COURT: Is there any issue in dispute that the firearm was operable?

MR. MARBLE: No, no, not at all.

THE COURT: That's not the issue? The Government's --

MR. MARBLE: But there's different tests that can be tested to a weapon. What I think are going to be important as long as -- as far as the strength of trigger, how the weight -- the poundage of what it takes to pull off a round, I think that's important.

THE COURT: Thank you.

MR. MARBLE: And that can only be done by testing a weapon.

THE COURT: All right. Thank you.

I'm going to deny the motion to continue the plea deadline and trial date and confirm our trial date, but I'm going to accelerate it from June 23rd to June 22nd at 9:00. Then we will continue with trial on June 25th, 26th, and go into the next week. We have until July 2nd to finish the case which would give us one, two, three, four, five, six, seven trial days. So that should certainly be hopefully sufficient.

A P P E N D I X 9

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jesus Eder Juanni Moreno Ornelas, Defendant.	CR14-1568-TUC-CKJ (EJM) GOVERNMENT'S MOTION IN LIMINE (OPINION TESTIMONY)

Now comes the United States of America, by and through its undersigned attorneys, and hereby submits its Motion in Limine to exclude introduction of opinion testimony by defense witness Weaver Barkman.

On February 3, 2015, this Court issued an order that all requests for disclosure be filed within fourteen days, and that all disclosure pursuant to such requests be made within seven days of the request. (Doc. 27.) On February 13, 2015, the government filed its Request for Disclosure in which it requested notice and a summary of the testimony of any expert the defendant intends to use at trial, including the opinions of the witness, the bases and reasons therefore, and the witness' qualifications. (Doc. 28.) Therefore, any expert witness disclosure by the defendant was due on February 20, 2015. On June 1, 2015, the defendant filed a Notice of Expert Witness in which he stated he intended to call Weaver Barkman. (Doc. 53.) The Notice did not identify the area(s) or issue(s) to which the defendant expected Mr. Barkman to testify, nor did it provide a summary of

Mr. Barkman's proposed testimony or opinions. On June 18, 2015, two business days prior to trial in this case, the defense disclosed a copy of Mr. Barkman's report (attached hereto as Attachment 1) and resume (attached hereto as Attachment 2).

As a preliminary matter, the defendant's disclosure of Mr. Barkman's report is incredibly untimely. Counsel for the government received the report, attachments, and resume almost four months after they were due, pursuant to this Court's order. Failure to adhere to the Court's order alone provides sufficient grounds for preclusion of Mr. Barkman's testimony.

Furthermore, while Mr. Barkman's report includes several opinions, primarily as to whether the statements of the victim or the defendant should be afforded greater weight, it provides no basis whatsoever for those opinions. Mr. Barkman viewed the physical evidence collected from the incident, but it is entirely unclear how his inspection of the items of evidence led to his conclusory opinions regarding the credibility of the victim and defendant.

Additionally, much of Mr. Barkman's report and many of his opinions involve examination of the firearm and firearm-related evidence in this case. Mr. Barkman has no expertise in the area of firearms. He is a retired police officer who works as a private investigator. He has never been a firearms instructor, firearms investigator, or armorer, nor has he held any other position or designation with a specific emphasis in firearms. He has no specialized education, training, certification, or specialty courses related to firearms. While he identifies "involuntary firearms discharge" as one of his areas of expertise, his resume is devoid of any support for such self-promotion. It does not appear he has achieved the status of subject matter expert in any area. There is nothing about his experience that sets him apart from any current or former law enforcement officer – or qualifies him to render expert opinions – especially in the area of firearms.

While Mr. Barkman may be able to provide limited testimony regarding his observations of the items of evidence he examined, the Federal Rules of Evidence preclude him from testifying as to any opinions he formed as the result of such

observations. *See* Fed. R. Evid. 702. Mr. Barkman cannot qualify as an expert witness by knowledge, skill, experience, training, or education in the areas in which the defense expects him to testify. His opinions are not helpful to the trier of fact in understanding the evidence or determining a fact at issue in this case. Therefore, any opinion testimony by Mr. Barkman should be precluded.

For the reasons discussed, the government respectfully requests an order by the Court that the defendant be precluded from introducing opinion testimony of Mr. Barkman at trial in this case.

Respectfully submitted this 21st day of June, 2015.

JOHN S. LEONARDO
United States Attorney
District of Arizona

s/ Angela Woolridge
ANGELA WOOLRIDGE
Assistant U.S. Attorney

Copy of the foregoing served electronically or by other means this 21st day of June, 2015, to:

Jay Marble, AFPD
Victoria Brambl, AFPD
Attorneys for Defendant

Report of Analysis andFindings

Prepared for:	Mr. Jay Marble Assistant Federal Public Defender Federal Public Defenders Office Tucson, Arizona
Reference:	United States versus Jesus Eder Moreno-Ornelas cr14-01568 TUC-CKJ-EJM
Prepared by:	Weaver Barkman Barkman & Associates, LLC
BA Case. No.:	150123
Date prepared:	June 16, 2015
Date provided:	June 16, 2015
Copy to:	File

SUMMARY

This report provides general and specific observations, conclusions and opinions arising from a review and analysis of material, evidence examinations and tests relating to the above captioned case.

Discovery of further evidence may modify the findings.

RETENTION

I was retained by the Federal Public Defender's Office, Tucson, Arizona, (FPDO) to review the facts and circumstances of this case, conduct an analysis of the evidence, reconstruct the events and provide my findings.

GENERAL CASE HISTORY AND BACKGROUND

The Defendant's admissions, his companion's statements, the government agents' versions and criminal allegations are well documented within the material provided me and will not be recounted in detail.

The seemingly undisputed facts are that on August 23, 2014, at approximately 1445 hours, Devin John Linde, a United States Forest Service Law Enforcement Officer (USFSLEO), wearing a subdued USFSLEO uniform, driving a marked USFSLEO K-9 vehicle (no canine was present) on an unpaved rural road in Cochise County Arizona when he encountered the Defendant and Mr. Aaron Trinidad Abril-Moreno. Both men were illegally present in the United States.

At the encounter Officer Linde was wearing a "tactical belt" composed of a heavy nylon web belt, a heavy plastic pistol holster devoid of any retention devices, a black nylon open handcuff case and was armed with a Glock 9mm semi-automatic pistol loaded with FC 9 mm Plus P HPJ hollow point rounds. Based on the examination of the Known rounds, the bullet weight was most likely 124 grains.

"Coming back from a training exercise", Officer Linde was not wearing a protective vest, nor was he in possession of his baton or chemical spray device. It appears he was not wearing any type of headgear, official or otherwise.

During the course of the confrontation, which apparently took place outside of Officer Linde's jurisdiction, a physical struggle erupted contiguous to Officer Linde handcuffing Mr. Moreno-Ornelas. Mr. Moreno-Ornelas and Officer Linde's versions are generally consistent regarding the events leading up to the struggle, but conflict regarding how and when Mr. Moreno-Ornelas wrested the Glock from Officer Linde. Mr. Moreno-Ornelas states Officer Linde was holding the weapon when he (Mr. Moreno-Ornelas) attempted to disarm Officer Linde; Officer Linde claims the weapon had been holstered and was lost during an on-the-ground grappling struggle.

Though the defendant was interviewed at length, in detail and his statements recorded, Federal Bureau of Investigation Agents (FBI) failed to record any of Officer Linde's several statements, all of which are evidence. As a result, the critical and best evidence of Officer Linde's recollections, namely the words spoken, the paralinguistic affect and to an extent, the behavioral communication has been irretrievably lost.

Irrespective of FBI policies and procedures, an understandable recording and reliable transcript of Officer Linde's statements would have greatly assisted in the analysis of this case. The pristine statements may have assisted in Mr. Moreno-Ornelas' defense.

MATERIALS REVIEWED

During the course of my analysis I reviewed material provided by the Federal Public Defender's Office. That material consists of:

1. FBI reports
2. Summaries of interviews
    a. Officer Linde
    b. USFS personnel
    c. Mr. Moreno-Ornelas
    d. Mr. Aaron Trinidad Abril-Moreno
3. Scene descriptions
4. Examinations of the USFS vehicle

5. FBI scene images
6. Law enforcement diagrams
7. Transcript of interrogation of Mr. Moreno-Ornelas
8. Diagrams prepared by Mr. Moreno-Ornelas and Mr. Abril-Moreno
9. Cochise County Sheriff's Office reports
10. Cochise County Sheriff's Office scene images

EXAMINATIONS

I visited the scene in the company of FPDO personnel. In the presence of FBI Agents and Assistant United States Attorneys I conducted examinations of items held by the FBI. I fired sixty rounds from the Glock Model 17.

GENERAL CHARACTERISTICS: GLOCK 17, 9 MM SAP, SN KHB981

The weapon functioned properly. Its trigger pull to break is eight (8) pounds, trigger travel is ½ inch. Unable to locate replicate FC 9 mm Plus P ammunition, Remington Golden Saber and Hornady TAP 9 mm rounds were used in testing.

The type of powder used in major brand 9 mm Plus P ammunition may vary, but is of no meaningful consequence in the instant case. Both substitute rounds are 124 grain HPJ's and share the same factory listed velocity of 1180 fps at the barrel.

OPINION

Based on my review of provided material, my training and experience, personal examinations and tests, it is my opinion that Mr. Moreno-Ornelas' version of events relating to his disarming Officer Linde are highly consistent with, and supported by the majority of the evidence. Though they cannot be dismissed, the accuracy of Officer Linde's versions is diminished.

UNINTENTIONAL DISCHARGE

The first round, fired into the roadway, was an unintentional discharge (UID), fired by Officer Linde. The UID was caused by Sympathetic Squeeze Response (SSR) and /or Loss of Balance Response (LBR), or combination of both. Any rounds fired while the men were grappling on the ground may well have been the result of, and are consistent with SSR. After the men fell to the ground, either or both of the grasping/grappling men may have applied pressure to the trigger causing one or more UID's.

Sympathetic Squeeze Response and Loss of Balance Response are two (2) of the well-established causes of Unintentional Discharge (UID). Their existence and effect are undisputed in the scientific, law enforcement and firearms community. *(Enoka, et al)*

In any shooting wherein a participant, while holding a firearm, particularly a handgun, is forcibly grasping, grappling or falling in any manner, UID must be considered. Not only is UID a consideration in a factual reconstruction, it goes directly to the legal issue of intent. The instant case provides an excellent opportunity for UID.

OBJECTIVE EVIDENCE

Rounds fired

Though no firearms examinations/comparisons were conducted between the ejected Questioned casings and a Known casing, the evidence shows to a reasonable investigative certainty that five (5) rounds were discharged from the Glock during the confrontation. An intact round was discovered, seemingly cleared in a malfunction procedure.

Ejected casings

Due to the dynamics of the encounter, the sloped roadway and the hard packed, rock and pebble strewn substrate, only the most general inferences can be derived from the locations of the ejected casings. The expended casings can only be used to eliminate the position of the shooter/weapon when discharged.

Conditions of equipment and Glock firearm

That the men engaged in an on-the-ground grappling struggle is undisputed. The scuffing impressions on the roadway, the damage to the officer's holster, clothing and person irrefutably establish the struggle. Mr. Moreno-Ornelas clothing and injuries are also consistent with a grappling struggle.

Injuries

The officer's injuries were minor, requiring no treatment at the scene. In the material provided me, there is no indication he ever sought medical attention or initiated a Workman's Compensation claim.

Officer Linde states the weapon was "very close" to his head when one or more rounds were fired. He has no gunshot wounds or patent gunshot residue on his head. He neither reported, nor did any responding law enforcement agents mention any complaints of hearing loss.

During examinations of Officer Linde's clothing, I saw no evidence of gunshot residue or defects.

The officer's injuries consisted of abrasions and contusions. The anterior and lateral surfaces of his arms are injury free.[1]

Abrasions and contusions are noted on the dorsal surfaces of the Officer Linde's fingers, left hand. Two small (< ½ inch) abrasions are noted on the dorsal surface of his right hand, one on the first joint of the first finger, the second on his thumb.

The contusions on the medial right upper arm are reminiscent of fingertip contusions. The inferior curvilinear abrasions are consistent with having been produced by a fingernail, a rock, handcuffs, or other scraping object. A similar, perhaps companion, curvilinear abrasion appears on the posterior forearm.

The distribution and nature of the injuries to the right arm support Mr. Moreno-Ornelas' version.

Gunfire injuries

Officer Linde's version is that all rounds were fired after the men "fell to the ground and began rolling around." The distance separating the grappling men ranged from contact to at most, arm's length. Any contact gunshot would have produced a major and readily visible injury to one or both men, including explosive fabric tearing and blast injuries to tissue.

If Officer Linde's person was in close proximity to an unobstructed blast/residue cone angled toward him, it is highly likely that gunfire damage would be visible.

Shirt

As seen in the images provided by the government, and noted during a defense examination of the evidence, the upper half of the left lateral seam of the USFS shirt has been forcibly separated. Soil impressions on the garment are consistent with and were almost certainly created during the struggle.

Trousers

As seen in the images provided by the government, and noted during a defense examination of the evidence, the soil impressions noted on the garment are consistent with and were almost certainly created during the struggle. What are likely transfer pattern bloodstains, most likely the officer's, are noted at, in and on both front pockets.

[1] All descriptions are based on the Anatomical Position.

Holster and Weapon

As seen in the images provided by the government, the holster and weapon were carried on the officer's right side in the usual position. As depicted in the images of the officer at the scene, and noted during a defense examination of the evidence, the brown, molded holster is composed of a substantial, ballistic-like heavy plastic material. Noted on the "outside" of the holster are well defined striations and gouges. The creation of these defects required a significant amount of pressure. These defects appeared to have been created contiguous to and are highly consistent with the on-the-ground struggle described by Officer Linde and Mr. Moreno-Ornelas.

As depicted in the images of the officer at the scene, the weapon at the scene, and as noted during a defense examination, the Glock pistol and magazine are devoid of any damage consistent with having been forcibly scraped on the roadway. This absence is in contrast to the damage to the holster. Further, the injury to the officer's right hand is inconsistent with a violent weapon retention struggle on the ground.

The significant defects on the holster, absence of corresponding defects on the weapon and no corresponding injuries to Officer Linde's right hand support Mr. Moreno-Ornelas' version.

The holster is grossly inadequate for on-duty law enforcement purposes. It has no retention devices and exposes a large portion of the weapon's receiver, ejection port, slide and trigger guard. During my examination, I noted the weapon (without the tactical light), when placed into the holster and mildly shaken, falls out of the holster. Normal extraction requires only minimal exertion

Magazine/flashlight carrier and portable radio

As seen in the images provided by the government, the magazine/flashlight carrier and portable radio are affixed to the tactical belt's left anterior. The carrier is constructed of the same material as the holster. The radio is posterior to the carrier.

As depicted in the images of the officer at the scene, and noted during a defense examination of the evidence, the carrier is undamaged, almost pristine. A flashlight and magazine are in place at the scene and bear no readily identifiable fresh damage.

The portable radio depicted in the scene images was not provided for a defense examination. The images provide no record of any significant, apparently recent defects on the radio body. The evidence suggests that the radio was not affixed to Officer Linde's belt at the time of the confrontation and struggle.

Based on the evidence, it appears Officer Linde was on his right side during the time Mr. Moreno-Ornelas was on top of him. The position, weight and violent movement of the men were sufficient to create the substantial defects in the holster. Had the weapon been holstered as Officer Linde claims, it would bear companion defects to the holster. Had Officer Linde been trying to retain the weapon while on his right side on the ground, significant abrasions would have been present on his right hand.

This evidence supports Mr. Moreno-Ornelas version.

Target substrate

The substrate of the Projectile Impact Point (PIP) is hard packed caliche topped with a light layer of pebbles and scattered embedded rocks. Though not as dense as concrete, caliche is highly resistant to any type of penetration.

Projectile Impact Point

A single projectile impact point (PIP) appears at the scene. Identified as "9" in the Cochise County Sheriff's Office images, this gouging defect is in the caliche roadway.

Presenting as a haloed[2], penetrating defect, this defect is well outside the scuffle impressions. The barrel of the pistol firing the round was almost certainly more than a one (1) foot and less than four (4) feet above the target (roadway), and generally downward. The PIP gas halo measures approximately seven (7) by (7) seven inches.

Mr. Moreno-Ornelas consistently describes Officer Linde as holding the weapon, ostensibly in his right hand, when he (Mr. Moreno-Ornelas) began his attempt to disarm the officer. He stated that the first round was fired "to the side" immediately after he grabbed Officer Linde's hand, prior to the men hitting the ground.

The PIP location and characteristics support Mr. Moreno-Ornelas' version.

External ballistics

When a firearm is discharged, ignited, hot, expanding, high velocity gasses are expelled along with soot, vaporized lead and particulate matter. These gasses precede the projectile and travel further than the particulate matter, frequently referred to as stippling. During firearms examinations on June 14, 2015, firing Remington and Hornady 9mm Plus P 124 grain rounds into white ceiling tiles, it was noted that observable stippling was present at three (3) inches. No stippling was noted at six (6) inches.

[2] The "halo" is the roughly circular area devoid of pebbles surrounding the penetrating defect.

A demonstrative video is provided.

Terminal Ballistics

On June 14, 2015, firing two (2) rounds of Golden Saber 9mm into a highly similar substrate of pebble-strewn, highly compressed caliche at the Marana Shooting Club produced impact defects like that seen in the impact defect identified as "9" at the scene.

One round was fired at thirty (30) degrees, one at forty five (45) degrees. The distances from the weapon to the target decreased commensurately with the angle. My point of aim was approximately six (6) feet to my front to produce the forty five (45) degree trajectory; approximately nine (9) feet to produce the thirty (30) degree trajectory.

At both distances a defect was produced consistent with the general size, depth and shape of the PIP at this scene. At neither distance was a halo created. Safety concerns precluded any further decrease in angle and distance.

NFI

Resume

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PROFESSIONAL EXPERIENCE

Law Enforcement: Twenty-five (25) years with the Pima County Sheriff's Department in Tucson, Arizona retiring as a sergeant in 1995. Conducted in excess of one hundred felony investigations, including homicides, sexual assaults, organized crime, internal affairs and a number of other serious and complex cases and death cases. As a sergeant, was responsible to supervise, train, observe, evaluate, correct and develop deputy sheriffs.

Private investigation and consultation: From 1996 to present. Conducted in excess of seventy-five (75) homicide and equivocal death investigations, as well as other complex criminal and civil matters. Consulted on state and federal criminal matters.

AREAS OF EXPERTISE

- Police procedures
- Unified Investigation Process and Analysis
- Crime Scene Analysis
- Bloodstain Pattern Analysis
- Shooting Incident Reconstruction
- Evidence evaluation and exploitation
- Death investigations: Homicide, suicide, equivocal, accidental, wrongful death
- Interview and Interrogation
- Involuntary Firearms Discharge
- Organized crime

EDUCATION AND TRAINING

Public, private and college courses relating to criminal investigations, homicide investigations, forensic sciences, forensic pathology and criminal law.

SPECIALTY COURSES

A list of Specialty Courses is submitted herewith.

PROFESSIONAL ORGANIZATIONS

- International Homicide Investigators Association
- International Association for Identification
- International Association of Bloodstain Pattern Analysts
- International Crime Scene Investigators Association
- Homicide Research Working Group
- International Law Enforcement Educators and Trainers Association
- Academy of Behavioral Profiling

TEACHING

Areas of instruction: General and specialized law enforcement topics, Criminal Investigation, Death Investigation, Scene Investigation, Scene Analysis, Exterior Wound Pathology, Bloodstain Pattern Analysis, Class Characteristic Analysis and Comparison of Footwear and Tire Tread Impressions, Behavioral Analysis, Evidence, Evidence Procedures, Evidence Evaluation and Exploitation, Interview and Interrogation, Organized Crime.

Law Enforcement Agencies and Organizations

Provided training and lectures to every major police organization in Arizona. Provided training and lectures for the United States Department of Justice, Drug Enforcement Administration, the Arizona Supreme Court Intensive Probation Program, Arizona State Justice Planning Agency, the International Homicide Investigators Association, the International Association of Arson investigators, the Texas Narcotics Officers Association, the California Organized Crime Investigators Association, Arizona Parole, Probation and Corrections Officers Association , California Organized Crime Intelligence Officers Association, International Council on Welfare Fraud, International Association of Credit Card Fraud Investigators.

Colleges and Arizona Peace Officer Standards and Training Board

- Fundamental Principles of Law Enforcement Investigations (24 hours credit, P.O.S.T. Certification Retention)
- Instructor, Pima Community College Law Enforcement Academy
- Lecturer, Pima Community College: A. A. Criminal Justice Program
- Lecturer, Brown-Mackie College: A. A. & B.S. Criminal Justice Programs
- Lecturer, ITT Technical: Criminal Justice Program

ARTICLES AND TEXTS

Co-authored with the Hon. John M. Roll the Crime Scene and Investigations chapters in the Arizona Law Enforcement Officers Manual, published by the Arizona Prosecuting Attorneys Advisory Council. Commented on and edited original drafts of the Handbook. Contributed to Arizona P.O.S.T. curriculum on various topics including interview, interrogation and death investigations. Authored workbooks relating to the fundamental principles of law enforcement investigations, interview, interrogation, behavior oriented interviews, criminal personality profiles, types and categories of evidence, evidence identification, characteristics, evaluation, collection and exploitation.

All articles and texts were peer reviewed by APAAC and POST.

CERTIFICATIONS

Certified Instructor for the Arizona Peace Officers Standards and Training Board, hold a Law Enforcement and Law Enforcement Faculty Standards Certificate from Pima Community College, and member of the Curriculum Advisory Panel for Brown-Mackie College.

PROFESSIONAL PUBLICATIONS AND SUBSCRIPTIONS

- National Institute of Justice
- National Criminal Justice Reference Service
- International Bloodstain Pattern Analysts Journal
- Journal of Forensic Identification (IAI)
- FBI Law Enforcement Journal
- Bureau of Alcohol, Tobacco and Firearms Quarterly Bulletin
- Homicide Research Working Group
- Forensic Magazine
- Crime Scene Investigators, Consultants and Trainers Working Group

CASE ASSESSMENT AND CONSULTATION

Provided consultation and case assessment services for public and private organizations as well as private citizens. The majority of were homicide, suicide and accidental death cases. Included in the clients are the Greenlee County Sheriff's Office, the Santa Cruz County Sheriff's Office, the Arizona Counties Insurance Pool, the Pima County Public Defender's Office, the Pima County Legal Defender's Office, the Yuma County Public Defender's Office, the Federal Public Defender, District of Arizona, the Pima County Office of Court Appointed Counsel and a number of appointed attorneys in federal and state courts. Provided homicide and suicide consultation services to a number of surviving families, either directly or through their attorneys.

TESTIMONY

Testified in Arizona Superior Court in excess of one hundred times in criminal matters including, but not limited to, capital murder, aggravated assaults and other felonies. Testified in courts of record in California, New Mexico, Texas and Indiana.

Testified in United States District Court regarding investigation(s) of conspiracies, firearms violations, assaults with deadly weapons, burglaries, thefts, involuntary firearm discharge, crime scene examinations and evidence exploitation.

Expert opinions/testimony: Law enforcement

As a law enforcement officer, testified as an expert in gunshot and edged weapon wound interpretation *(State vs. Magby, State vs. Hoxie, State vs. Chapa, Coroner's Inquest, United States Border Patrol Agent Jerry Jelle, Coroner's Inquest United States Border Patrol Agent William Manypenny),* shooting reconstruction *(State vs. Woods, State vs. Wilkie, State vs. Childs),* blood stain pattern analysis (*State vs. Woods, State vs. Chapa).*

Expert testimony: Private sector

Federal

Testified as an expert in the United States Court, District of Arizona, the United States Merit Systems Protection Board on police and investigative procedures, scene investigation, scene analysis, homicide investigation, bloodstain pattern analysis, shooting reconstruction, evidence characteristics, evaluation and exploitation and involuntary firearm discharge.

- *United States vs. Norman Garcia,* United States District Court cr-10-914-TUC-FRZ
- *United States vs. Wilbert Tsosie,* United States District Court cr-10-8204-PCT-DGC
- *Marcos Payan, Jr. v. Department of Homeland Security,* DE-0752-14-0130-I-1
- *United States vs. Joseph Edward Camargo,* United States District Court cr 11-4012-TUC-RCC

State Courts of Record

Testified as an expert in Arizona Superior Courts regarding fundamental principles of law enforcement investigations, homicide investigation, scene investigation, evidence characteristics, bloodstain pattern analysis, involuntary firearm discharge, shooting incident reconstruction, external wound pathology and interpretation.

- *State vs. Mary Ann Biancuzzo,* Arizona Superior Court, Pima County CR97-718576
- *State vs. Scott A. King,* Arizona Superior Court, Pima County CR2008-1774 2009
- *State vs. Albert Gaxiola,* Arizona Superior Court, Pima County CR2009-2300
- *State vs. Kay Konesky,* Arizona Superior Court, Pima County CR2012-4429
- *State vs. Juan Nunez,* Arizona Superior Court, Yuma County S1400CR200800527
- *State vs. Joseph Lerch,* Arizona Superior Court, Pima County CR20131489

CONSULTANT

Provided crime scene and evidence exploitation analyses to attorneys, family members and various organizations in the following cases:

- *State vs. Micah Jerome Waggoner,* Superior Court Pima County CR 2002-0543
- *State vs. Scott A. King,* Superior Court Pima County CR 2008-1774 2009
- *State vs. Gerardo Zepeda,* Superior Court Pima County 2006-3374
- *State vs. Beverly Jean Forsberg,* CR 2010-000948 Superior Court Cochise County
- *Randall vs. Guth,* Superior Court Maricopa County CV 2008-025652
- *State vs. Adrian Robles,* CR-2010-1957, Superior Court Pima County
- *State vs. Thomas Jacob Fisher,* S1400 CR 2008-00047, Superior Court Yuma County
- *State vs. Preston A. Strong,* S1400 CR2008-00527, Superior Court Yuma County
- *State vs. Jennifer Amador,* S1400 CR2013-00100, Superior Court Yuma County
- *State vs. Steven DeMocker,* P1300CR20101325, Superior Court Yavapai County
- *United States vs. Joseph Edward Camargo,* United States District Court, cr-11-4012-TUC-RCC
- *United States vs. Martin Juarez-Martinez,* United States District Court, cr-01034-TUC-JGZ
- *State vs. Pamela Phillips,* CR 2006-4385 Superior Court Pima County
- *United States vs. Shawn Miguel* cr-14-790-TUC-CKJ

Equivocal Death Cases

- *In the Matter of Death of Gabriel Elias Verduzco,* Pima County Sheriff's Department Case No. 030224111, Pima County Medical Examiner's Office Case. No. ML 03-0341
- *In the Matter of the Death of Ross Victor Romeo,* Santa Cruz County Sheriff's Office Case No. 080313011, Santa Cruz County Medical Examiner's Case No. ML 08-0522
- *In the Matter of the Death of Christopher McIntyre, a juvenile,* Pima County Juvenile Case No. 16713402, Pima County Medical Examiner's Case ML 07-01814
- *In the Matter of the Death of Timothy Carl Salazar,* Gila County Sheriff's Department Case No. 070900293, Gila County Medical Examiner Case No. 07-01816
- *In the matter of the death of Lena Marie Vincent,* Phoenix Police Department Case No. 2011-00253496, Maricopa County Medical Examiner Case No. 11-1038
- *In the matter of the death of Van I., a protected person,* Orange County California Coroner Case No. 07-03422-CO
- *In the matter of the death of Sean Drenth,* Phoenix Police Department Case No. 2010-01489312
- *In the matter of the death of Quentine Barksdale,* Phoenix Police Department Case No. 2013-00051803
- *In the matter of the death of Dory Drago,* Pima County Sheriff's Department Case No. 101120249, Pima County Medical Examiner Case No. ML 10-2287

Miscellaneous

- *In the matter of the gunshot injury of Deputy Louis Puroll,* Pinal County Sheriff's Office Case No. 100430108

A P P E N D I X 10

CA NO. 15-10510

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESUS EDER MORENO ORNELAS, Defendant-Appellant.	(D.Ct. 4:14-cr-01568-CKJ)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HONORABLE CINDY K. JORGENSON
United States District Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

PAGE

TABLE OF CONTENTS (cont'd)

PAGE

TABLE OF AUTHORITIES

CASES

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

STATUTES, GUIDELINES, ETC.

TABLE OF AUTHORITIES (cont'd)

STATUTES, GUIDELINES, ETC. (cont'd)

OTHER AUTHORITIES

CA NO. 15-10510

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESUS EDER MORENO ORNELAS, Defendant-Appellant.	(D.Ct. 4:14-cr-01568-CKJ)

APPELLANT'S OPENING BRIEF

I.
STATEMENT OF JURISDICTION

This appeal is from judgments of conviction for multiple criminal offenses. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. The appeal is timely because judgment was entered on October 21, 2015, ER 347-49, and a notice of appeal was filed on October 23, 2015, ER 346.

* * *

II.

STATEMENT OF ISSUES PRESENTED

A. MUST ALL CONVICTIONS OTHER THAN AN ILLEGAL REENTRY CONVICTION BE VACATED BECAUSE THE INSTRUCTIONS FAILED TO ADEQUATELY COVER MR. MORENO'S SELF-DEFENSE THEORY BY OMITTING THE RIGHT TO RESIST AN OFFICER WHO IS USING EXCESSIVE FORCE?

B. ARE THERE INDEPENDENT INDIVIDUAL GROUNDS FOR VACATING ALL OF THE CONVICTIONS OTHER THAN THE ILLEGAL REENTRY CONVICTION BECAUSE THE DISTRICT COURT GAVE DEFICIENT INSTRUCTIONS ON THE ELEMENTS OF ASSAULT ON A FEDERAL OFFICER AND ATTEMPTED ROBBERY AND GAVE NO INSTRUCTION ON A JUSTIFICATION DEFENSE TO UNLAWFUL POSSESSION OF A FIREARM?

1. Did the District Court Err by Failing to Limit the "Official Duty" Element of Assault on a Federal Officer to Duties the Officer Is Authorized by Law to Perform?

2. Did the District Court Err in Its Instructions on the Elements of Attempted Robbery?

   a. Did the district court err in failing to instruct the jury that the force used in a robbery must be directly related to the taking of the property, or otherwise instruct that the intent to take property must exist at the time the force is used?

   b. Did the district court err in failing to instruct the jury on the substantial step element of attempted robbery?

c. Did the district court err in failing to instruct the jury that attempted robbery in violation of the robbery statute charged – 18 U.S.C. § 2112 – requires an intent to take and carry away the property and an intent to permanently deprive?

3. Did the District Court Fail to Adequately Cover an Alternative Theory of Defense to the Firearm Possession Counts by Failing to Give a Proposed Justification Instruction?

C. MUST JUDGMENTS OF ACQUITTAL BE ENTERED ON COUNTS CHARGING ASSAULT ON A FEDERAL OFFICER, A RELATED 18 U.S.C. § 924(c) COUNT, AND ATTEMPTED ROBBERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THOSE CONVICTIONS?

1. Was the Evidence Insufficient to Support the Assault and § 924(c) Convictions Because No Rational Trier of Fact Could Have Found Beyond a Reasonable Doubt a Forest Service Officer Was Engaged in the Performance of His Official Duties When He Detained a Suspected Undocumented Alien for the Border Patrol?

2. Was the Evidence Insufficient to Support the Attempted Robbery Convictions Because No Rational Jury Could Have Found the Required Intent Beyond a Reasonable Doubt?

D. DID EXCLUSION OF A DEFENSE EXPERT'S TESTIMONY BASED ON LATE DISCLOSURE VIOLATE MR. MORENO'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO PRESENT A DEFENSE WHEN (1) THE DEFENSE DID NOT HAVE THE EVIDENCE ANY EARLIER AND (2) THE COURT MADE NO FINDING OF A WILLFUL VIOLATION?

1. Was There No Discovery Violation Because Rule 16 Requires the

Defense to Disclose Only Expert Evidence It "Intends" to Introduce, and the Defense Could Not Intend to Introduce Evidence It Did Not Yet Have?

2. If There Was a Discovery Violation, Did It Violate Mr. Moreno's Constitutional Rights to a Fair Trial and to Present a Defense to Impose the Sanction of Exclusion Without a Finding of a Willful Violation?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory provisions are included in a Statutory Appendix.

III.
BAIL STATUS OF DEFENDANT

Mr. Moreno is presently serving the sentence imposed by the district court. His projected release date is August 23, 2052.

IV.
STATEMENT OF CASE

A. ARREST AND INDICTMENT.

On August 23, 2014, Mr. Moreno was arrested after a struggle with a United States Forest Service officer named Devin Linde during which several shots were discharged from Officer Linde's gun. Mr. Moreno was subsequently indicted for assault on a federal officer, in violation of 18 U.S.C. § 111(b); attempted murder of a federal officer, in violation of 18 U.S.C. §§ 1111, 1113, and 1114; discharge of a firearm during the assault and attempted murder, in violation of 18 U.S.C. §

924(c); attempted robbery of Officer Linde's firearm, in violation of 18 U.S.C. § 2112; attempted robbery of Officer Linde's vehicle, in violation of 18 U.S.C. § 2112; being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5)(A); and being found in the country illegally after having been deported, in violation of 8 U.S.C. § 1326. ER 396-99.

B. TRIAL.

Trial began on June 22, 2015. CR 81. That there was a struggle and shots fired during the struggle was undisputed, but how and why the shots were fired was disputed.

1. Officer Linde's Testimony.

Officer Linde testified his duties include enforcing regulations that protect Forest Service land and enforcing drug laws under Title 21 of the United States Code. *See* ER 161-62. He is also cross-designated to enforce Bureau of Land Management, United States Fish and Wildlife Service, and National Park Service regulations. ER 166. He is not cross-designated to enforce immigration laws and does not have authority to make immigration arrests. ER 162-63.

On the date of the incident, Officer Linde was on patrol in a mountainous area in southern Arizona. ER 167-68. A Forest Service technician told him there was a report of three illegal aliens in the area, one of whom was injured. ER 168. Another Forest Service employee subsequently informed Officer Linde he had just passed the individuals in a nearby wildlife preserve. ER 170. The first place the

men had been seen was on National Forest land, but the second was not. ER 173.

Officer Linde called the Border Patrol, which asked him to assist, and he told them he would. ER 170, 174. He drove toward the preserve and observed two men walking on a road south of the preserve and several miles from Forest Service land. ER 175, 245, 261. Officer Linde stopped his vehicle and asked the two men if they needed water; they said no. ER 175.

Officer Linde then ordered the men to put their hands on the front of his vehicle. ER 175. One of the men, who later gave a deposition as a material witness, *see* CR 165, Ex. B, complied. ER 177. The other man, who was Mr. Moreno, did not comply. ER 177. Officer Linde claimed Mr. Moreno clenched his fists, squared his shoulders, and looked angry – which Officer Linde labeled "pre-assault indicators" – and that Mr. Moreno then started "charging my driver's side door." ER 177-78.

Officer Linde testified he pulled out his pistol and told Mr. Moreno to get back.[1] *See* ER 178. He testified Mr. Moreno then put his hands up and walked back to the front of the vehicle. *See* ER 178-79. Officer Linde told the other man to prone out and walked up to Mr. Moreno. ER 179-80. Officer Linde kept his pistol out until he was "a couple of feet away," but claimed he holstered it before starting to handcuff Mr. Moreno. ER 180.

Officer Linde testified he then had a blank in his memory, and "[t]he next thing I knew he was in my area and we were fighting." ER 195. He claimed he remembered Mr. Moreno "going for my pistol on my holster," "used my hands to

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[1] Officer Linde testified he carries more intermediate forms of nonlethal force – a Taser, pepper spray, and baton – "if I am on regular duty in patrol." ER 193. He was not carrying them that day because he originally did not plan to go out on patrol and had gone out just "to do a quick patrol and then go home." ER 193-94.

retain the pistol," and that at that time, "I went to the ground." ER 196. Mr. Moreno ended up on top of him and he claimed Mr. Moreno was punching him in the face. ER 197. He testified there was then another blank in his memory until he felt "the sensation of my pistol being pulled out of my holster." ER 198.

Officer Linde then testified about several shots. He claimed two shots were fired as the pistol was coming out of the holster and he was trying to retain it. *See* ER 198-99. He claimed the pistol was being pushed into his chest, at which time he pushed it to the side, and another shot fired, which he claimed "went to my right," "by my chest, by my ear, my head." ER 200.

Officer Linde testified Mr. Moreno then tried to get up and off of him, *see* ER 201, but he locked his legs around Mr. Moreno's neck in a "tactical fighting" "MMA move" called "a modified triangle." ER 202. He squeezed Mr. Moreno's neck as hard as he could, and Mr. Moreno fired "a bunch of rounds up into the air." ER 202. Mr. Moreno dropped the pistol, and Officer Linde picked it up and tried to shoot Mr. Moreno. ER 203-04. The gun would not fire, so Officer Linde "kicked myself out of there," backed up, and did a "tactical reload." ER 204-05. The gun was jammed, but he managed to get it "back in battery" so it could shoot again. ER 205-07.

After Officer Linde backed away, Mr. Moreno started running toward the vehicle. ER 207. Officer Linde did not fire because there were no weapons in the vehicle and it had a security system which would prevent it from being driven away even if the engine was running. ER 207.[2] Mr. Moreno got into the vehicle when he reached it. ER 208. Officer Linde claimed he followed Mr. Moreno, put the gun to Mr. Moreno's chest, and told Mr. Moreno he would kill him if he

[2] Officer Linde could not remember if he had left the engine running on this occasion. ER 207.

moved. *See* ER 209.

2. Mr. Moreno's Statement.

Mr. Moreno presented a different version of events, in a videotaped interview. The government attempted to introduce just short excerpts of the interview, in which Mr. Moreno admitted resisting the officer and pulling him down, admitted grabbing the gun and discharging shots until it stopped firing, and, according to the government, characterized what he had done as "attempted homicide." *See* CR 165, Ex. A; RT(6/26/15) 213-15, 218-19, 223-24, 226. The district court ruled this selective presentation was misleading because Mr. Moreno's attempted homicide references referred only to how he thought the authorities would characterize his conduct. *See* RT(6/29/15) 25-26. The court ruled the defense would be allowed to play other excerpts under the rule of completeness, and the government stated it would just play the complete recording. *See* RT(6/29/15) 26, 29. The vast bulk of the interview was then played, with redaction of some relatively short portions the court found prejudicial and/or irrelevant. *See* ER 68-155; RT(6/29/15) 82-83.

In this more complete presentation, Mr. Moreno admitted he did not comply with Officer Linde's initial commands and was going to leave, but "when I saw that the officer pointed his gun at me and I saw it wasn't the one that gives you shocks and that it was a real one, I thought 'this guy is going to lose a bullet and kill me.'" ER 87. He said he grabbed the officer and went after the gun when the officer came closer and handcuffed one of his hands with the gun still out. *See* ER 96-99. He explained three shots were fired while the men were struggling for the gun, the first when he "tackled" the officer, and the other two when they fell to the

ground, with the third shot almost hitting his companion, whom he called his "cousin." *See* ER 97-99, 132. He stated he wanted to empty the weapon and fired three or four more shots into the air after he got the gun out of the officer's hand, until it stopped firing. *See* ER 101, 135. He wanted to escape with his companion, ER 102, but surrendered when he saw his companion had run away, ER 103-05.

Mr. Moreno also admitted getting in the officer's vehicle when confronted about that. *See* ER 105. He explained his plan was to take the car, drive it to the border, leave it at the port of entry, and "jump." ER 108-09. But "when I was about to gear, that is when it registered on me and had my five minutes of stupidity followed by the next five minutes of realization that I shouldn't do this." ER 109. He believed he "could've left in the vehicle" because "the guy didn't have any bullets left." ER 109.

3. Officer Linde's Supervisor's Testimony.

Officer Linde's supervisor also testified about Officer Linde's duties and authority. She testified Forest Service officers' "mission" is "public protection, public safety; . . . protect the natural resources of the U.S. Forest Service; and . . . protect the employees that work for the National Forest." RT(6/26/15) 94. They are also cross-certified with U.S. Fish and Wildlife, BLM, and the National Park Service. RT(6/26/15) 101. Finally, they are "tasked with Title 21, United States Code for drug enforcement." RT(6/26/15) 94. They do not enforce immigration laws and are not cross-designated with the Border Patrol. RT(6/26/15) 97, 130,

139.[3]

It is nonetheless "frequent" for the Border Patrol to ask Forest Service officers for their assistance, and that assistance sometimes includes detaining undocumented aliens until the Border Patrol arrives. RT(6/26/15) 98. The supervisor identified no formal directive requiring such cooperation, but testified she "expect[ed]" her officers to comply with such Border Patrol requests. RT(6/26/15) 162-63.

C. EXCLUDED DEFENSE EVIDENCE.

An order filed February 3, 2015 included several directives regarding discovery. Among those were directives that (1) all requests for disclosure of summaries of expert testimony under Rule 16(a)(1)(G) and Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure be filed within 14 days and (2) disclosures be provided within 7 days of the request. *See* ER 393-94. The government filed a general request for Rule 16 material on February 13, 2015 which included a request for disclosure of expert testimony. *See* ER 390-91.

The defense did not have any expert testimony to disclose at that time, but did retain a law enforcement expert to investigate issues regarding the struggle and the discharge of the gun. The defense told the government about the expert at a status conference on April 16, 2015, and subsequently made arrangements for the defense expert to examine the gun, Officer Linde's equipment, and other evidence. ER 55-56, 65. On June 1, 2015, the defense filed a notice it intended to call the expert as a witness but could not yet provide a summary of his testimony because

[3] The statute governing Forest Service officer authority is 16 U.S.C. § 559c and is included in the Statutory Appendix.

he was still reviewing the evidence. *See* ER 387-89. A week later, the defense filed a motion to continue the trial, in part because of this delay. The motion explained:

> Expert witness Weaver Barkman has not finished viewing the evidence. The final day to view the evidence is Thursday, June 11th. It is expected that Mr. Barkman will take possession of the weapon in this case on June 11th to test fire it and view it in coordination with the tactical holster. After this review, Mr. Barkman will need a reasonable time to finish his report and findings.

ER 385.

The government opposed a continuance, partly because it had gone to "great lengths" to parole Mr. Moreno's companion into the country as a witness,[4] but gave as "the most important reason" "the position of the victim." ER 62. The defense explained how and why the expert had needed more time, but the district court denied a continuance nonetheless. *See* ER 65-67. The defense expert did manage to complete his review and prepare a report which the defense disclosed to the government several days before trial, but the government moved to exclude the expert's testimony. *See* ER 374-76. The court granted the motion on the ground of untimeliness. *See* ER 50-51.

Among the opinions the report reflected the expert could have given were the following:

> The first round, fired into the roadway, was an unintentional discharge (UID), fired by Officer Linde. The UID was caused by Sympathetic Squeeze Response (SSR) and/or Loss of Balance Response (LBR), or combination of both. Any rounds fired while the men were grappling on the ground may well have been the result of, and are consistent with SSR. After the

[4] The government had deposed the companion before releasing him, so it had alternative evidence in the form of the deposition, which was what it eventually had to use anyway. *See* RT(6/29/15) 10-24, 30-34, 67-68; CR 165, Ex. B.

> men fell to the ground, either or both of the grasping/grappling men may have applied pressure to the trigger causing one or more UID's.
>
> Sympathetic Squeeze Response and Loss of Balance Response are two (2) of the well-established causes of Unintentional discharge (UID). Their existence and effect are undisputed in the scientific, law enforcement and firearms community. *(Enoka, et al)* In any shooting wherein a participant, while holding a firearm, particularly a handgun, is forcibly grasping, grappling or falling in any manner, UID must be considered. Not only is UID a consideration in a factual reconstruction, it goes directly to the legal issue of intent. The instant case provides an excellent opportunity for UID.

ER 379-80.

> Officer Linde states the weapon was "very close" to his head when one or more rounds were fired. He has no gunshot wounds or patent gunshot residue on his head. He neither reported, nor did any responding law enforcement agents mention any complaints of hearing loss.
>
> During examinations of Officer Linde's clothing, I saw no evidence of gunshot residue or defects.
>
> . . .
>
> If Officer Linde's person was in close proximity to an unobstructed blast/residue cone angle toward him, it is highly likely that gunfire damage would be visible.

ER 380-81.

> Based on the evidence, it appears Officer Linde was on his right side during the time Mr. Moreno-Ornelas was on top of him. The position, weight and violent movement of the men were sufficient to create the substantial defects in the holster. Had the weapon been holstered as Officer Linde claims, it would bear companion defects to the holster. Had Officer Linde been trying to retain the weapon while on his right side on the ground, significant abrasions would have been present on his right hand.

ER 383.

D. JURY DELIBERATIONS, VERDICT, AND JUDGMENT.

The jury had difficulty reaching verdicts. In a note sent during the first day of deliberations, it asked a question about the attempted robbery charge in Count 5: "Does the force & violence necessarily have to be concurrent with the act of taking possession or can the force & violence of the 'scuffle' be presumed to have been sufficient to meet the burden of proof for this element." CR 101, at 2. The court responded by simply stating: "Please consider the jury instructions previously given to you, the argument of counsel and the evidence presented at trial." CR 101, at 2.

The jury continued to deliberate, through the rest of that day and into the next day. It then sent out a note stating it had unanimous verdicts "on several counts," but remained "deeply divided on some elements of the other counts." CR 101, at 3. The court gave an "*Allen* charge," and told the jury to continue deliberating. *See* RT(7/2/15 a.m.) 5-7. Several hours later, the jury sent out another note, stating it had reached verdicts on seven counts but remained deadlocked on the remaining count. *See* CR 101, at 4. There were verdicts of guilty on the assault count, § 924(c) count, attempted robbery counts, unlawful firearm possession counts, and illegal reentry count. *See* RT(7/2/15 p.m.) 3-4. The count on which the jury had not reached a verdict was the attempted murder counts, and the court declared a mistrial on that count. *See* RT(7/2/15 p.m.) 7.

The court then sentenced Mr. Moreno on October 21, 2015. *See* RT (10/21/15). Despite the jury's failure to convict of attempted murder, the court found he had committed that crime, using the lesser standard of clear and convincing evidence. *See* RT(10/21/15) 28-29. Under a cross-reference in the firearms guideline – U.S.S.G. § 2K2.1(c)(1) – this dramatically increased Mr.

Moreno's sentencing guidelines offense level and led to a final guideline range of 360 months to life. *See* RT(10/21/15) 28-31. *See also* PSR, ¶ 17; CR 112, at 2-7; CR 117, at 9-11. Combining this range with the mandatory consecutive sentence required for the § 924(c) count, the court imposed a total sentence of 520 months. *See* ER 347; RT(10/21/15) 41-42.

V.

SUMMARY OF ARGUMENT

Initially, there were multiple instructional errors. The first instructional error was the failure to give an instruction on the right to resist a law enforcement officer's excessive force. While the district court did give a general self-defense instruction, this Court's precedent recognizes a general self-defense instruction does not amount to an instruction on the right to resist excessive force by a law enforcement officer. When the alleged victim is a law enforcement officer, there must be an additional instruction on the right to resist excessive force. The failure to give this additional instruction requires reversal of all of the convictions other than the illegal reentry conviction because self-defense would have justified both the use of force on which the assault and attempted robbery convictions were based and Mr. Moreno's brief possession of the firearm.

There were also instructional errors affecting individual counts. First, the district court erred by failing to limit the "official duty" element of assault on a federal officer to duties the officer is authorized by law to perform. As pertinent here, the statute makes assault on a federal officer a federal crime only if the officer is acting within his "official duties," and "official duties" means duties the officer is statutorily authorized to perform. Second, the district court erred in its

of the vehicle armed and stood with their attention directed toward the bank, and they had both weapons and disguises. *See id.* at 1295, 1301-02. The Court found insufficient evidence of intent to commit the charged crime of attempted bank robbery because "[i]f intent to rob existed at all, it could easily have been directed against the [nearby] Payless market, or the nearby state bank." *Id.* at 1302. The Court reasoned: "The suggestion that they were 'casing' something could be true, but is supported by little more than speculation. The evidence is focused no more on the [federal bank] than on other nearby institutions."

Similarly here, it "could be true" that Mr. Moreno intended to "take and carry away" the gun, rather than just discharge it and was planning on taking the vehicle at the time of the struggle. But the evidence "is focused no more" on those intents than the intents which fall short of attempted robbery. The intents "could easily have been" the ones falling short of attempted robbery, and choosing between them would have been mere speculation. That makes the evidence insufficient to support the attempted robbery convictions.

D. EXCLUSION OF THE DEFENSE EXPERT'S TESTIMONY VIOLATED MR. MORENO'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO PRESENT A DEFENSE BECAUSE (1) THERE WAS NO DISCOVERY VIOLATION AND (2) THE COURT MADE NO FINDING THERE WAS A WILLFUL VIOLATION.

1. Reviewability and Standard of Review.

The government moved to exclude the defense expert's testimony on both evidentiary grounds and the ground the disclosure was untimely. ER 374-76. The

defense objected that "preclusion should be a last resort because of the importance of the testimony and the right for Mr. Moreno Ornelas to have a fair trial." ER 38. The district court granted the government's motion on the ground of untimely disclosure. *See* ER 50-51.[12]

District court interpretations of discovery rules are reviewed de novo, and sanctions for violation of a discovery rule are reviewed for abuse of discretion. *United States v. Peters*, 937 F.2d 1422, 1424 (9th Cir. 1991).

2. There Was No Discovery Violation Because Rule 16 Requires the Defense to Disclose Only Expert Evidence It "Intends" to Introduce, and the Defense Could Not Intend to Introduce Evidence It Did Not Yet Have.

Initially, there was not a discovery violation in the first place. The rule governing disclosure of expert opinion evidence requires summaries of only testimony "the defendant intends to use . . . as evidence at trial." Fed. R. Crim. Pro. 16(b)(1)(C). And a defendant cannot "intend[ ] to use," let alone summarize, expert testimony until he knows what the testimony will be. As this Court reasoned in *United States v. Schwartz*, 857 F.2d 655 (9th Cir. 1988), where the Court found no discovery violation in the late disclosure of a cooperating codefendant with whom the government had negotiated a plea agreement just before trial:

> The district court's pretrial guidelines directed the parties to file a "list of witnesses whom they *intend* to call at trial" (emphasis added). Assuming that these "guidelines" constituted a "specific discovery order" which could be

[12] The court did not address the government's evidentiary objections, but simply noted the government would be entitled to a *Daubert* hearing. *See* ER 37, 50.

> enforced by sanctions . . . , it cannot be said that the government violated this order unless, when it filed its witness list, it then intended to call [the cooperating codefendant] to testify. Obviously, the government could not then have intended to call [the cooperating codefendant], prior to the entry of his guilty plea, since [the cooperating codefendant] had an absolute privilege not to testify.

Id. at 659.

The Court has refused to read a general due diligence requirement into the discovery rules, moreover. In *United States v. Gatto*, 763 F.2d 1040 (9th Cir. 1985), the Court considered whether the provision governing disclosure of documents by the government – then Rule 16(a)(1)(C), and now Rule 16(a)(1)(E) – had such a requirement. It noted the rule governing disclosure of defendant statements expressly requires due diligence in some instances and that "no such language is found in rule 16(a)(1)(C)." *Gatto*, 763 F.2d at 1048. From this, the Court concluded there is not a due diligence requirement for the disclosure of documents and that disclosure of documents is required only once they are in the control of the government. *See id.* And this is true even if the government was negligent or reckless in failing to timely obtain the documents. *See id.* at 1047 (characterizing issue as whether rule requires government to obtain and produce documents even when government "negligently or recklessly" fails to appreciate documents' relevance).

The rule governing disclosure of expert opinion testimony similarly has no due diligence requirement. As noted above, it requires disclosure only when the defense "intends" to use the opinion evidence at trial. The holding of *Gatto* regarding disclosure of documents therefore extends to disclosure of expert opinion evidence; there is no duty of due diligence to timely obtain the opinion.

A later en banc opinion in *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (en banc), does suggest courts have supervisory authority to overlay a

deadline on Rule 16, at least "in appropriate circumstances," *id.* at 513. *W.R. Grace* is distinguishable in at least two respects, however. First, the case there was an exceedingly complex one with a time period spanning nearly 30 years, potentially more than 1,000 victims, and more than 230 government witnesses. *See id.* at 503. Second, the pretrial order in that case clearly set a deadline, by requiring "a preliminary list of [the government's] intended witnesses and exhibits" the month after the order was filed, and a "finalized list of witnesses and trial exhibits, including [a] finalized disclosure of prosecutions expert witnesses" five months after that. *Id.*

The district court order here was nowhere near as clear. To begin, the order allowed only seven days for compliance, *see supra* p. 10, which would be realistic only for expert witnesses the parties already had. Secondly, the order simply tracked the language of Rule 16, by requiring disclosure of expert testimony the parties "intend[ ] to use at trial." ER 394. It did not approach the clarity of the *W.R. Grace* order setting, first, an initial deadline a month down the road for a "preliminary" list, and, second, a deadline five more months down the road for a "finalized" list.

In sum, there was not a discovery violation here to start with. First, Rule 16 on its face creates no due diligence requirement for expert evidence but simply requires disclosure once the defendant has evidence to disclose. Second, the district court's pretrial order did not so clearly create a deadline for obtaining opinions that it can be read as requiring something more than the rule requires.

* * *

3. If There Was a Discovery Violation, It Violated Mr. Moreno's Constitutional Rights to a Fair Trial and to Present a Defense to Impose the Sanction of Exclusion Without a Finding of Willful Violation.

The Supreme Court has recognized the right to present evidence in one's own defense as a fundamental constitutional right. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The Court considered the interaction of this right and discovery sanctions in *Taylor v. Illinois*, 484 U.S. 400 (1988). It initially noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 408. It then went on to hold this necessarily places limits on the sanctions which can be imposed for violations of discovery rules.

> The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights we have previously held applicable to the States." [*Washington*, 388 U.S. at] 18. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

Taylor, 484 U.S. at 409. The Court held the exclusion of evidence was permissible in *Taylor*, but only after noting the trial court had found the violation there was "blatent [sic] and willful." *Id.*, 484 U.S. at 405.

The *Taylor* opinion also recognized "[i]t may well be true that alternative sanctions are adequate and appropriate in most cases, ..." *Id.* at 413. And this Court has held exclusion is appropriate only when there is a willful violation. As first expressed in *United States v. Peters*, 937 F.2d 1422 (9th Cir. 1991):

> The Supreme Court has emphasized that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor*, 484 U.S. at 408. For this reason, the

> Court has upheld the drastic remedy of excluding a witness only in cases involving "willful and blatant" discovery violations. *Taylor*, 484 U.S. at 416. Here, no willful and blatant discovery violations of rules occurred. Accordingly, application of the exclusionary sanction is impermissible.

Peters, 937 F.2d at 1426. The Court then reiterated this limitation in *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002), stating: "Exclusion is an appropriate remedy for a discovery rule violation only where 'the *omission* was willful and motivated by a desire to obtain a tactical advantage.'" *Id.* at 1018 (quoting *Taylor*, 484 U.S. at 415, and adding emphasis). Finally, the Court reiterated the limitation a third time in *United States v. Verduzco*, 373 F.3d 1022 (9th Cir. 2004), stating: "Exclusion of a witness as a sanction for a violation of a discovery rule in a criminal trial is generally appropriate 'only in cases involving "willful and blatant"' violations." *Id.* at 1033 (quoting *Peters*, 937 F.2d at 1426, and citing *Finley* and *Taylor*).

Other decisions illustrate the circumstances in which exclusion is appropriate. In *Eckert v. Tansy*, 936 F.2d 444 (9th Cir. 1991), the Court held exclusion appropriate where the defendant dissuaded his attorney from giving notice of an alibi witness, because the omission was "willful and motivated by a desire to obtain a tactical advantage." *Id.* at 447. In *United States v. Henderson*, 241 F.3d 638 (9th Cir. 2001), the Court again held exclusion of an alibi witness was permissible, because the district court had found the violation motivated by an attempt to gain "a tactical advantage that would minimize the effectiveness of cross-examination, and the ability of the government to present rebuttal evidence." *Id.* at 650. In *United States v. Duran*, 41 F.3d 540 (9th Cir. 1994), the Court held exclusion appropriate because the defense attorney made a "strategic decision to withhold [documents] until after the close of the government's case." *Id.* at 546 (quoting *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987)).

Similarly, in *United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999), the Court held exclusion of documents permissible because the district court there had found "'a strategic decision to withhold the [evidence]' until the government would be unable to fully investigate." *Id.* at 972. In *United States v. Nash*, 115 F.3d 1431 (9th Cir. 1997), the Court held exclusion of an expert witness appropriate because "[t]he district court did not abuse its discretion in concluding that the failure to disclose was willful." *Id.* at 1439.[13]

There was no comparable finding in the present case, and there could not have been one. Defense counsel had not disclosed the expert opinions earlier only because they did not have them. They explained there were multiple logistical problems that caused the delay, for which both sides were arguably at fault. Those included that the agent and the evidence were in different cities, ER 55; that multiple examinations of the evidence were necessary, in part because the government initially assumed two hours would be enough, ER 39-40, 56; that the expert was tied up in other cases, ER 39, 65; and that the expert was "very meticulous," ER 65.

The defense also kept the government and court aware it was seeking expert testimony. It notified the government at a status conference more than two months before trial. It filed a notice of the expert three weeks before trial, albeit without

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[13] The Court did not note an express finding of a willful violation in *United States v. Urena*, 659 F.3d 903 (9th Cir. 2011), but that case presented a unique game-playing scenario, in which the defense attorney tried to evade an objection to his cross-examination by announcing in response that he wanted to designate the witness as a defense expert. *See id.* at 906, 908. The Court rejected this game-playing based in part on expert discovery rules. *See id.* at 908. It did not discuss the caveats in *Taylor* and their application in *Peters*, *Finley*, and *Verduzco*, presumably because the defense attorney's game-playing was comparable to the willful violations found in this Court's other cases.

the expert's report because the expert had not completed his investigation. A week later, still two weeks before trial, and in part so there could be more timely disclosure, the defense filed a motion for continuance, noting the expert needed additional time to complete his investigation. The government opposed a continuance largely because the victim strongly objected to it, *see* ER 62-63, and it was "prejudicial" to the victim, ER 48, but did not offer any victim-specific reason. When the district court denied a continuance, the defense did rush to get a report from the expert before trial and succeeded in doing so, albeit just several days before trial.

This is the exact opposite of the sort of bad faith, willful violation the Court has found to justify exclusion of evidence. It is exactly the sort of situation where a continuance is the appropriate remedy, especially where there was no prejudice to the government's case other than adding another month or two to an already significant – and reasonable – delay in a very serious case.

4. The Exclusion of the Defense Expert's Testimony Was Prejudicial Because It Was Important Testimony and the Case Was a Close One.

The defense expert's testimony was important because it corroborated the defense theory in three ways. First, the expert would have explained the concept of "Sympathetic Squeeze Response," whereby a person can accidentally fire a gun possibly without even being aware of it. *See supra* pp. 11-12. Second, the expert's testimony would have suggested there should have been gunshot residue on the officer if the gun was fired very close to his head as the officer claimed. *See supra* p. 12. Third, the expert's testimony there should have been scratches on the gun and the officer's hand if the gun was still holstered as the officer claimed,

see supra p. 12, would have raised doubt about that claim by the officer.[14]

Each of these opinions would have supported the defense theory that the first three shots were accidentally fired by the officer during the struggle for the gun. And the testimony about the "Sympathetic Squeeze Factor" was important for an additional rebuttal purpose. The government elicited testimony from no less than four law enforcement witnesses that they had (1) never personally experienced an accidental discharge and (2) never heard of any other officer who had such an experience. *See* RT(6/26/15) 14, 51, 82-84, 207. This made the defense expert's testimony about how and why there could be an accidental discharge all the more important.

Finally, this was a close case. The jury deliberated for a full day and then sent a note the next morning indicating it was deadlocked on multiple counts. The court responded by giving an *Allen* charge, and the jury then deliberated for several more hours, but was still unable to reach a verdict on the most serious count of attempted murder. These lengthy and close deliberations suggest almost any significant evidence could have made a difference.

* * *

[14] As noted *supra* p. 42 n.12, the district court did indicate there would need to be a *Daubert* hearing, but the court never held such a hearing, so a remand would be necessary for this. *Cf. Peters*, 937 F.2d at 1427 (remanding for further hearing on expert testimony issues which district court did not address).

VI.

CONCLUSION

All of Mr. Moreno's convictions other than the illegal reentry conviction must be vacated, and judgments of acquittal entered on the assault, § 924(c), and attempted robbery convictions.

Respectfully submitted,

DATED: July 24, 2017

By s/ Carlton F. Gunn
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Attorney at Law

A P P E N D I X 11

C.A. No. 15-10510

D. Ct. No. CR 14-01568-TUC-CKJ

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS EDER MORENO ORNELAS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING THE DEFENDANT FROM PRESENTING OPINION TESTIMONY.

1. Standard of Review

This Court reviews for abuse of discretion a district court's decision whether to exclude expert testimony. *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997) (en banc). A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. *Id*.

2. Argument

Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure requires a defendant to disclose to the government a written summary of any expert testimony the defendant intends to introduce, which must include "the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(b)(1)(C).

A district court has the authority to enforce discovery requirements mandated by Rule 16, and may issue orders regarding expert witness disclosure consistent with Rule 16. *United States v. W.R. Grace,* 526 F.3d 499, 516 (9th Cir. 2008). When a district court issues an order setting a deadline for the pretrial disclosure of expert witnesses, and a party violates such order, the district court may exclude evidence as sanction. *Id*.

Here, the district court issued a scheduling order that was consistent with Rule 16, requiring requests for expert witness disclosure be filed within 14 days of the order, and disclosure pursuant to such a request be made within 7 days of the request. (CR 27; ER 393-94.) The government filed a timely request for expert witness disclosure (CR 29; ER 390-91), but the defendant did not provide any disclosure in response to the request. The defendant did not provide notice of its proposed expert witness until over three months after the deadline set by the court, and only three weeks prior to the firm trial date. (CR 43, 53; ER 387-89.) The defendant's notice did not comply with Rule 16(b)(1)(C); the defendant failed to disclose the proposed witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. The defendant clearly violated the district court's order, and preclusion of opinion testimony was appropriate.

The district court noted that the defendant had the reports summarizing the incident early in the case and that Mr. Barkman could have conducted his analysis much earlier. (ER 38-39; RT 6/24/15 45-46.) The court also questioned the relevancy of the opinion testimony the defendant sought to introduce through Mr. Barkman. (ER 43; RT 6/24/15 50.) The court considered the nature of Mr. Barkman's proposed opinions as well as the untimeliness of the defendant's disclosure in granting the government's motion in limine to preclude the opinion testimony. (ER 50; RT 6/24/15 57.) The court also noted that the defendant could

have sought another expert if Mr. Barkman was too busy to conduct his analysis in a timely manner, and stated that Mr. Barkman should have accommodated the firm trial date and the court's orders. (*Id*.) The court recognized that the government was not provided with Mr. Barkman's proposed opinions until four months after the deadline for such disclosure as set by the court's order, and discussed the resultant prejudice to the government:

> The whole idea is to disclose expert opinions early enough for both sides so the other side can have an opportunity to evaluate those opinions and hire his or her own expert prior to trial to meet those opinions, and that obviously wasn't done in this case. The Government has virtually no opportunity to digest, evaluate, or prepare for the opinions – the proposed opinions of Mr. Barkman which some of them are expert opinions outside the province of what the jury would normally know.

(ER 50-51; RT 6/24/15 57-58.)

The defendant argues that there was no discovery violation because Rule 16 only requires disclosure of evidence the defense "intends" to introduce, and he did not yet have Mr. Barkman's opinions at the time of the district court's disclosure deadline. This argument misses the mark. First, the defendant's position is squarely foreclosed by this Court's precedent recognizing the authority of the district court to enforce Rule 16 discovery requirements and issue orders regarding expert witness disclosure. *See W.R. Grace,* 526 F.3d at 516. Second, acceptance of the defendant's position would eviscerate Rule 16, as any defendant could thereby avoid the Rule

16 disclosure requirements by simply claiming he or she did not "intend" to use expert opinion testimony until the eve of trial.

Furthermore, the defendant has not shown that Mr. Barkman would have been qualified as an expert witness had the district court not precluded him from offering opinion testimony on the basis of untimely disclosure. As the court pointed out, had Mr. Barkman been disclosed in a timely manner, the court would have had to hold a *Daubert* hearing to determine whether he was qualified to testify as to the proposed opinions he espoused in his report. (ER 50; RT 6/24/15 57.) Neither prior to trial nor now on appeal did the defendant establish that Mr. Barkman was an expert in any of the areas to which his proposed opinions pertained. As the government noted in its Motion in Limine to preclude opinion testimony by Mr. Barkman:

> Mr. Barkman has no expertise in the area of firearms. He is a retired police officer who works as a private investigator. He has never been a firearms instructor, firearms investigator, or armorer, nor has he held any other position or designation with a specific emphasis in firearms. He has no specialized education, training, certification, or specialty courses related to firearms. While he identifies "involuntary firearms discharge" as one of his areas of expertise, his resume is devoid of any support for such self-promotion. It does not appear he has achieved the status of subject matter expert in any area. There is nothing about his experience that sets him apart from any current or former law enforcement officer – or qualifies him to render expert opinions – especially in the area of firearms.

(CR 78; ER 375.) The record, both before the district court and now on appeal, is devoid of any proof to the contrary, and it is thus highly unlikely Mr. Barkman would have been allowed to give opinion testimony even had he been timely disclosed. The

district court did not abuse its discretion by precluding Mr. Barkman from providing opinion testimony at trial.

VIII. CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

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