No. 18-7599

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

REPLY BRIEF

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I.

INTRODUCTION

Petitioner is not seeking review of "the district court's exercise of discretion on the facts of this case, [which] is the sort of factbound determination that does not merit this Court's review," Brief in Opposition, at 15.[1] He is seeking review of the *legal standard* to be applied in making that factbound determination. He is seeking resolution of a split in the lower courts about whether there must be a finding of willful violation of a discovery rule to justify the sanction of exclusion. If such willfulness is not required, there is a secondary question – on which lower courts are also divided – of whether exclusion is permissible only when there is no other way to remedy prejudice to the government. This case is an excellent vehicle to resolve these conflicts because, first, there was no finding of willfulness in this case, and, second, the alternative remedy of a continuance would have eliminated any prejudice to the government.

[1] Petitioner is also not challenging the constitutionality of evidentiary rules which exclude certain types of evidence – such as in *Rock v. Arkansas*, 483 U.S. 44 (1987), *United States v. Scheffer*, 523 U.S. 303 (1998), and *Holmes v. South Carolina*, 547 U.S. 319 (2006) – or the constitutionality of rules requiring discovery disclosures – such as in *Williams v. Florida*, 399 U.S. 78 (1970), and *Michigan v. Lucas*, 500 U.S. 145 (1991).

II.

ARGUMENT

A. THERE IS A CONFLICT IN THE LOWER COURTS WHICH THIS COURT SHOULD RESOLVE.

The government may think there is no uncertainty or conflict in the lower courts, but federal jurists, state jurists, and respected commentators certainly do. Now retired Judge Posner stated in *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995), that, "[a]lthough 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* [*v. Illinois*, 484 U.S. 400 (1988),] itself, other courts disagree." *Tyson*, 50 F.3d at 445 (citations omitted). A respected treatise opines that *Taylor* "arguably raises as many questions as it answers," 5 Wayne R. LaFave, et al., *Criminal Procedure* 608 (4th ed. 2015), and then sees the same disagreement in the lower courts as Judge Posner:

> Some courts suggest that the tactically motivated willful violation may be the only situation in which preclusion is constitutionally acceptable. Others, noting the broad range of interests cited by *Taylor* as relevant to the constitutional balancing process, have looked to several additional factors that may justify imposing the preclusion sanction.

Id. at 610 (footnotes omitted). Other courts have stated 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); "it is not certain whether sanctions are permissible if the

violation is not egregious," *United States v. Vitek Supply Corp.*, 144 F.3d 476, 484 (7th Cir. 1998); and "it is not yet clear whether preclusion of defense evidence is constitutionally permitted absent a finding of bad faith or willful misconduct," *State v. Killean*, 915 P.2d 1225, 1226 (Ariz. 1996).

The federal appellate decisions cited in the Petition may be slightly qualified, but only to a very limited extent. As one example, the Second Circuit's most recent decision – *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001) – after stating in its text that "a finding of willfulness was therefore *required* to justify the exclusion of [the witness's] testimony," *id.* at 100 (emphasis added), did add, in a footnote, the caveat that it "need not decide whether, and to what extent, a finding of willfulness is required in every case," *id.* at 100 n.3. The court went on to add a caveat to this caveat, however, stating 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.* Similarly, the Sixth Circuit opinion in *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007), after stating that only an "egregious" violation could justify exclusion and giving "willful misconduct" as an example, *id.* at 476, added the following more general limitation:

> 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, 501 F.3d at 476. This creates a split at least on the other line the Petition suggests the Court needs to consider drawing – that exclusion at least

be limited to cases in which no other remedy is sufficient to cure prejudice to the prosecution. *See* Petition, at 20.[2]

There are state court holdings requiring willfulness that are absolutely unqualified, moreover. The state court opinions the government characterizes as relying on state procedural or statutory rules, *see* Brief in Opposition, at 18, in fact rely on *Taylor*. *Ross v. State*, 954 So. 2d 968, 1000 (Miss. 2007), stated: "*Relying on Taylor*, we have held that exclusion 'ought to be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage.'" *Id.* at 1000 (quoting *Houston v. State*, 531 So. 2d 598, 612 (Miss. 1988)) (emphasis added). *People v. Edwards*, 22 Cal. Rptr. 2d 3 (Cal. App. 1993), engaged in a lengthy discussion of *Taylor* and *Lucas* and then concluded:

> We interpret *these authorities* to instruct that preclusion sanctions may be imposed against a criminal

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[2] In the First Circuit, there is what may be fairly viewed as an intracircuit conflict. On the one hand, the reasoning of *Bowling v. Vose*, 3 F.3d 559 (1st Cir. 1993), compels the conclusion there is a willfulness requirement. It noted that "most circuit court cases affirming exclusion in response to discovery violations involve willful conduct," noted that "[i]n this case, there was no such misconduct," noted that "[i]n this circumstance, it is obvious that concerns related to the integrity of the trial process do not weigh in favor of exclusion," noted that "[a]lternative remedies exist," and held that exclusion was therefore an improper sanction. *Id.* at 561-62. *See also* LaFave, *supra* p. 2, at 610 & n.83 (citing *Bowling* as one of cases "suggest[ing] that the tactically motivated willful violation may be the only situation in which preclusion is constitutionally acceptable"). On the other hand, there are later First Circuit decisions asserting that "we have never held that the exclusion sanction is available only when a party willfully violates [the discovery rule]." *United States v. Acosta-Colon*, 741 F.3d 179, 190 (1st Cir. 2013). *See also United States v. Nelson-Rodriguez*, 319 F.3d 12, 37 (1st Cir. 2003); *United States v. Portela*, 167 F.3d 687, 705 n.16 (1st Cir. 1999).

> 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*.

Id. at 12 (emphasis added).

Other of the state court opinions cited in the Petition state similarly unqualified holdings. *People v. Flores*, 522 N.E.2d 708 (Ill. App. 1988), interpreted *Taylor* as holding "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" and held exclusion improper in the case at bar because "we cannot agree that those violations were deliberate, contumacious, or demonstrated unwarranted disregard for the trial court's authority so as to merit the exclusion of a material witness." *Id.* at 714 (internal quotations and citations omitted) (emphasis added). *White v. State*, 973 P.2d 306, 311 (Okla. Crim. App. 1998), similarly stated:

> "Excluding 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.'" [*Allen v. State*, 944 P.2d 934, 937 (Okla. Crim. App. 1997)] (quoting *Taylor v. Illinois*, 484 U.S. 400, 415, 108 S. Ct. 646, 656, 98 L. Ed. 2d 798 (1988)). Where the discovery violation is not willful, latent, or calculated gamesmanship, alternative sanctions are adequate and appropriate. *See Allen*, 1997 OK CR 44, P11, 944 P.2d at 937.

White, 973 P.2d at 311 (emphasis added).

These state court opinions create a direct conflict even if the federal opinions are equivocal. The Court should resolve this conflict, and the

secondary question suggested by the federal appellate opinions – whether there must at least be an absence of alternative remedies that will cure prejudice to the government.

B. THE GOVERNMENT'S ARGUMENTS ABOUT WHY THIS CASE IS NOT A SUITABLE VEHICLE FOR RESOLVING THE CONFLICT LACK MERIT.

The government also claims this case is not a suitable vehicle for resolving the conflict in the lower courts and offers three arguments in support of that claim. None of those arguments are a reason to deny review, however.

1. The Evidence of Willfulness.

The government's first argument is that this case is not a suitable vehicle because the district court "could have," Brief in Opposition, at 19, found the failure to make timely disclosure was willful. This argument fails for two reasons.

First, assuming arguendo the district court "could have" found the failure to make timely disclosure to be willful, it did not do so. This is a factual question for the district court which should be resolved on remand after the district court is instructed it must make such a finding. It is not the sort of issue this Court should consider, especially in the first instance. *See Michigan v. Lucas*, 500 U.S. at 153 (rejecting lower court's per se rule that preclusion unconstitutional, "express[ing] no opinion as to whether or not preclusion was

justified in this case," and "leav[ing] it to the Michigan courts to address in the first instance").

Second, the record raises grave doubt that a fair district court would or could make a finding of willfulness. Defense counsel had not disclosed the expert opinions earlier only because counsel did not have them. Counsel 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, App. A068; that multiple examinations of the evidence were necessary, in part because the government initially assumed two hours would be enough, App. A041-42, A069; that the expert was tied up in other cases, App. A041, A078; and that the expert was "very meticulous," App. A078.

The defense also kept the government and court aware it was developing 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 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. 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 polar opposite of a bad faith, willful violation. Indeed, it is arguably the prosecutor who acted in bad faith, for she never objected to any of this until filing her motion to exclude the expert just before trial.

2. The Expert's Qualifications.

The government's second argument is that this case is not a suitable vehicle because the expert was not qualified to testify about involuntary firearms discharge. This argument also fails for two reasons.

First, this question is also one for the district court, as it is that court which is to exercise the "gatekeeping" role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *see id.* at 597. The district court never held the *Daubert* hearing it could have held, so it never exercised its gatekeeping role. And the gatekeeping role is not a role for this Court; it is precisely the sort of factbound inquiry this Court should leave for the lower courts.

Second, what record there is suggests the expert was sufficiently qualified under the Ninth Circuit case law the district court would have had to apply. That case law, like *Daubert*, recognizes a "liberal standard" for the admission of expert testimony. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014); *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1196 (9th Cir. 2005). *See also Daubert*, 509 U.S. at 588 (recognizing "liberal thrust" of Federal Rules of Evidence). For qualifications, the expert need have only a "*minimal foundation* of knowledge, skill, and experience." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (quoting *Thomas v. Newton Int'l Enterprises*, 42 F.3d 1266, 1269 (9th Cir. 1994), and adding emphasis). The district court is merely a gatekeeper and the main test of expert testimony is to be through cross examination before the jury. *See Primiano v. Cook*, 598 F.3d 558, 564 (9th

Cir. 2010); *Dorn*, 397 F.3d at 1196 (quoting *Daubert*, 509 U.S. at 596).

The government's main complaint is that the defense expert had never held a position with "a specific emphasis in firearms" and "had no specialized education, training, certification, or specialty courses related to firearms." Brief in Opposition, at 20. That is actually not entirely clear since there was no hearing for the expert to describe more specifically the courses he had taken and the training he had received and provided. In any event, his resume does indicate he had previously testified as an expert on both shooting reconstruction and involuntary firearms discharge in both federal courts and state court. *See* App. A094. He also had 25 years of law enforcement experience and almost 20 years of private investigator and consultant experience in investigating homicides, deaths, and other such serious incidents. *See* App. A092. Finally, he had provided training to "every major police organization in Arizona" and co-authored "the Crime Scene and Investigations chapters in the Arizona Law Enforcement Officers Manual, published by the Arizona Prosecuting Attorneys Advisory Council." App. A093. Perhaps the district court could have disagreed with the other courts that had allowed the expert to testify about shooting reconstruction and involuntary firearms discharge, but that seems unlikely.[3]

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[3] The district court did express concern about some of the expert's proffered testimony, but that was not about the expert's qualifications. It was about the subject matter – and just some of that *See* App. A052 (noting need for *Daubert* hearing on "some of these opinions, for example, his opinion that the holster was grossly inadequate for on-duty law enforcement purposes, . . . and some of his other opinions as to the injuries, the clothing, those sorts of things").

3. The Question of Prejudice.

The government's third argument is that there was no prejudice because the expert's testimony was relevant only to the attempted murder count, which was dismissed when the jury failed to reach a verdict. This argument also fails for multiple reasons.

First, the expert testimony was also directly relevant to the 18 U.S.C. § 924(c) count, which charged knowing discharge of a firearm during and in relation to the assault and added a mandatory 10-year consecutive term of imprisonment to Petitioner's sentence. *See* App. A137-38, A140.[4] *See also* 18 U.S.C. § 924(c)(1)(A)(iii), (D)(ii) (requiring minimum 10-year term of imprisonment and providing term shall not concurrently to any other term of imprisonment). If the firearm discharged involuntarily during Petitioner's effort to simply take it away from the officer, there would have been no basis for finding knowing discharge of a firearm during and in relation to the assault. This would have required acquittal of the 924(c) count and reduced Petitioner's sentence by 10 years.

Second, the government too readily compartmentalizes the firearm discharge evidence. That evidence was also relevant to Petitioner's general claim of self-defense – in two ways. First, the jury may have been less likely to believe Petitioner was acting only to defend himself if he was trying to shoot the gun rather than simply take it away from the officer. Second, the

[4] A supplemental appendix is attached to this reply brief with numbering consecutive to the numbering of the appendix attached to the Petition.

force Petitioner used to defend himself had to be "no more force than appears reasonably necessary under the circumstances." *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* § 6.8 (2010 ed.). A jury might have believed intentionally discharging the firearm was more force than was reasonably necessary even if Petitioner was entitled to use some force.

In sum, the expert's testimony was relevant not just to the attempted murder charge. It was also relevant to the 924(c) charge and the more general claim of self-defense.

III.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: April 30, 2019

s/ Carlton F. Gunn
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A P P E N D I X 12

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CR14-1568TUC CKJ(EJM)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

VICTIM CASE

United States of America,

Plaintiff,

vs.

Jesus Eder Juanni Moreno Ornelas, also known as Jesus Eder Mendivel-Mendivel,

Defendant.

INDICTMENT

Violations:

18 U.S.C. § 111(a)(1) and (b)
(Assault of Federal Officer)
Count 1

18 U.S.C. § 1111(a), 1113, and 1114(3)
(Attempt to Commit Murder)
Count 2

18 U.S.C. § 924(c)(1)(A)(iii)
(Use of Firearm During and in Relation to Crime of Violence)
Count 3

18 U.S.C. § 2112
(Attempted Robbery of United States Property)
Counts 4 and 5

18 U.S.C. § 922(g)(1)
(Possession of Firearm and Ammunition by Convicted Felon)
Count 6

18 U.S.C. § 922(g)(5)(A)
(Possession of Firearm and Ammunition by Illegal Alien)
Count 7

8 U.S.C. § 1326(b)(2)
(Illegal Re-entry of Deported Alien)
Count 8

THE GRAND JURY CHARGES:

COUNT 1

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, did intentionally and forcibly assault United States Forest Service Law Enforcement Officer Devin John Linde, an officer of the United States, while Officer Linde was engaged in and on account of the performance of his official duties, using a deadly or dangerous weapon and inflicting bodily injury; that is, JESUS EDER JUANNI MORENO ORNELAS intentionally assaulted Officer Linde by pulling him to the ground and taking Officer Linde's firearm, causing the firearm to discharge multiple times, and by making physical contact with Officer Linde; in violation of Title 18, United States Code, Section 111(a)(1) and (b).

COUNT 2

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, with malice aforethought, did attempt to kill United States Forest Service Law Enforcement Officer Devin John Linde, an officer of the United States, while Officer Linde was engaged in and on account of the performance of his official duties; that is, JESUS EDER JUANNI MORENO ORNELAS took Officer Linde's firearm and fired several rounds of ammunition at Officer Linde; in violation of Title 18, United States Code, Sections 1111, 1113, and 1114(3).

COUNT 3

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, did knowingly use and discharge a firearm, that is, a Glock, Model 17, 9mm pistol, serial number KHB981; during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault

of a Federal Officer and Attempt to Commit Murder, in violation of Title 18, United States Code, Section 924(c)(1)(A)(iii).

COUNT 4

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, did knowingly and intentionally attempt, by force and violence, to take from the person or presence of United States Forest Service Law Enforcement Officer Devin John Linde, personal property of value belonging to the United States; that is a Glock, Model 17, 9mm pistol, serial number KHB981, a United States Forest Service official duty firearm; in violation of Title 18, United States Code, Section 2112.

COUNT 5

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, did knowingly and intentionally attempt, by force and violence, to take from the person or presence of United States Forest Service Law Enforcement Officer Devin John Linde, personal property of value belonging to the United States; that is a Ford Expedition, VIN # 1FMJU1G5XCEF52401, a United States Forest Service official duty vehicle; in violation of Title 18, United States Code, Section 2112.

COUNT 6

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, that is, Attempt to Transport Marijuana for Sale, Cochise County Superior Court case no. 201000935, on March 11, 2011; did knowingly possess a firearm and ammunition, that is, one Glock, Model 17, 9mm pistol, serial number KHB981; and eighteen rounds of Federal 9mm ammunition; said firearm

and ammunition being in and affecting commerce in that they were previously transported into the state of Arizona from another state or foreign country; in violation of Title 18, United States Code, Section 922(g)(1) and 924(a)(2).

COUNT 7

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, an alien illegally and unlawfully present in the United States, did knowingly possess a firearm and ammunition, that is, one Glock, Model 17, 9mm pistol, serial number KHB981; and eighteen rounds of Federal 9mm ammunition; said firearm and ammunition being in and affecting commerce in that they were previously transported into the state of Arizona from another state or foreign country; in violation of Title 18, United States Code, Section 922(g)(5)(A) and 924(a)(2).

COUNT 8

On or about August 23, 2014, at or near Douglas, Arizona, in the District of Arizona, JESUS EDER JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, an alien, was found in the United States of America after having been denied admission, excluded, deported, and removed therefrom at or near Nogales, Arizona, on or about May 18, 2014, and not having obtained the express consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission thereto; in violation of Title 8, United States Code, Section 1326, enhanced by Title 8, United States Code, Section 1326(b)(2).

A TRUE BILL

/s/

Presiding Juror

SEP 17 2014

JOHN S. LEONARDO
United States Attorney
District of Arizona

/s/

Assistant U.S. Attorney

REDACTED FOR PUBLIC DISCLOSURE

A P P E N D I X 13

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America

v.

Jesus Eder Moreno Ornelas

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

No. CR 14-01568-001-TUC-CKJ(EJM)

Jay Marble and Victoria Brambl, AFPD
Attorney for Defendant

USM#: 18964-308 ICE#: A097 336 950

THERE WAS A verdict of guilty on 7/2/2015 as to Counts 1, 3, 4, 5, 6, 7 and 8 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §111(a)(1) and (b), Assault on a Federal Officer, a Class C Felony offense, as charged in Count 1 of the Indictment; Title 18 U.S.C. § 924(c)(1)(A)(iii), Use of Firearm During and in Relation to Crime of Violence, a Class A Felony offense, as charged in Count 3 of the Indictment; Title 18 U.S.C. § 2112, Attempted Robbery of United States Property, a Class C Felony offense, as charged in Counts 4 and 5 of the Indictment; Title 18 U.S.C. § 922(g)(1) and § 924(a)(2), Possession of Firearm and Ammunition by Convicted Felon, a Class C Felony offense, as charged in Count 6 of the Indictment; Title 18 U.S.C. § 922(g)(5)(A) and 18 U.S.C. § 924(a)(2), Possession of Firearm and Ammunition by Illegal Alien, a Class C Felony offense, as charged in Count 7 of the Indictment; Title 8, U.S.C. §1326(a), Reentry of Removed Alien, with sentencing enhancement pursuant to Title 8, U.S.C. §1326(b)(2), a Class C Felony offense, as charged in Count 8 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a total term of **FIVE HUNDRED TWENTY (520) MONTHS** as follows: **TWO HUNDRED FORTY (240) MONTHS** on Count 1, **ONE HUNDRED TWENTY (120) MONTHS** on Count 3 to run consecutive to Counts 1, 4 and 5, **ONE HUNDRED SIXTY (160) MONTHS ON** Counts 4 and 5 to run concurrent to each other and consecutive to Count 1, and **EIGHTY SEVEN (87) MONTHS** each on Counts 6, 7 and 8 with said Counts to run concurrently to each other and with Counts 1, 4, and 5, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **SIXTY (60) MONTHS** on Count 3, and **THIRTY SIX (36) MONTHS** on Counts 1, 4, 5, 6, 7 and 8 with said counts to run concurrently.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $700.00 **FINE:** Waived **RESTITUTION:** N/A

The defendant shall pay a special assessment of $700.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than $25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of $700.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1, 3, 4, 5, 6, 7 and 8 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **SIXTY (60) MONTHS** on Count 3 and **THIRTY SIX (36) MONTHS** on Counts 1, 4 5, 6, 7 and 8 with said counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

1) You shall not commit another federal, state, or local crime during the term of supervision.
2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
5) You shall support your dependents and meet other family responsibilities.
6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
11) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.

14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:
1. If deported, you shall not re-enter the United States without legal authorization.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

Date of Imposition of Sentence: **Monday, October 19, 2015**

Cindy K. Jorgenson
United States District Judge

DATED this 19th day of October, 2015.

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

_____ By: _____
United States Marshal Deputy Marshal

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 30th day of April, 2019, a copy of Petitioner's Reply Brief was 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,

April 30 , 2019

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