EXHIBIT A

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AO 245B (Rev. 02/18) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA
v.
RONALD RAY HORNER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17-cr-00077-PAB-1

USM Number: 16352-046

Matthew Kyle Belcher
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1542	Making a False Statement in an Application for a Passport	08/09/2016	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

August 31, 2018
Date of Imposition of Judgment

s/Philip A. Brimmer
Signature of Judge

Philip A. Brimmer, United States District Judge
Name and Title of Judge

September 5, 2018
Date

DEFENDANT: RONALD RAY HORNER
CASE NUMBER: 1:17-cr-00077-PAB-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **twenty-seven (27) months;** 21 months as to Count 1 and 6 months consecutive pursuant to 18 U.S.C. 3147, for a total punishment of 27 months, consecutive to the sentence imposed in United States District Court, District of Montana, Docket Number 4:16-cr-00040-001

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RONALD RAY HORNER
CASE NUMBER: 1:17-cr-00077-PAB-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

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

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

DEFENDANT: RONALD RAY HORNER
CASE NUMBER: 1:17-cr-00077-PAB-1

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

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SPECIAL CONDITIONS OF SUPERVISION

1. The defendant's use of computers and Internet access devices must be limited to those the defendant requests to use, and which the probation officer authorizes. The defendant must submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.
2. You must allow the probation officer to install software/hardware designed to monitor computer activities on any computer you are authorized by the probation officer to use. The software may record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software on the computer. You must not attempt to remove, tamper with, reverse engineer, or in any way circumvent the software/hardware.
3. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: RONALD RAY HORNER
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CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

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

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

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

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SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

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

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

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

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

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

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

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

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

FILED
United States Court of Appeal
Tenth Circuit

April 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD RAY HORNER,

Defendant - Appellant.

No. 18-1350
(D.C. No. 1: 17-CR-00077-PAB-1)
(Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **McKAY**, and **O'BRIEN**, Circuit Judges.

On May 4, 2016, Ronald Ray Horner was indicted in the District of Montana for

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R. App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment must be accompanied by an appropriate parenthetical notation – (unpublished). *Id.*

transporting child pornography.[1] *See* 18 U.S.C. § 2252(a)(1) and (b). He was released pretrial and allowed to reside in the District of Colorado. But his release was conditional. Among other things, he promised to (1) surrender his passport to the probation officer no later than June 9, 2016, (2) not obtain a new passport, and (3) submit to location monitoring. His promise was short-lived.

Horner surrendered his passport to the probation officer on June 7, 2016. Then, about two months later, on August 9, 2016, he applied for a new passport at the Walsenburg, Colorado post office. Although the application form required him to truthfully answer the questions and warned him of the consequences for failing to do so (fine and/or imprisonment under 18 U.S.C. §§ 1001 and 1542), he nevertheless falsely claimed: "Passport was left in suitcase after vacation (January 2016). Suitcase had torn seam and was discarded [in a dumpster at the Minute Mart in Walsenburg, Colorado on or about April 10, 2016]. I forgot the passport was in the suitcase." (R. Vol. 5 at 221.) After taking an oath swearing to the truth of its contents, he signed the form under penalty of perjury and paid a fee to have the application expedited.

Shortly thereafter, he received a new passport in the mail.[2] On September 2, 2016,

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[1] We grant the government's request to take judicial notice of the indictment, jury verdict, Presentence Report, Statement of Reasons, and judgment from the District of Montana case. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) ("[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand.").

[2] The government admitted the State Department was mistakenly never notified that Horner was prohibited from having a passport.

he cut off his electronic location monitoring bracelet and fled to Mexico and then South America using his new passport. After five months on the lam, his peripatetic ways abruptly ended. Immigration officials from Guyana notified the State Department of his whereabouts. He was sent back to the United States, where he was taken into custody.

For this conduct, he was indicted in the District of Colorado (the current case) with making a false statement in a passport application in violation of 18 U.S.C. § 1542. At his insistence, Horner represented himself, but was assisted by standby counsel. A jury convicted him after a one-day trial. By then he was also convicted of the child pornography charge in Montana and sentenced to 154 months imprisonment.

The presentence report (PSR) in the current case calculated a base offense level of 8. *See* USSG § 2L2.2(a). Four levels were added because Horner "fraudulently obtained or used . . . a United States passport." *Id.* § 2L2.2(b)(3). Because Horner committed the offense while on pretrial release in the District of Montana, the probation officer determined 18 U.S.C. § 3147 applied. As a result, another 3 levels were added, *see* USSG § 3C1.3, resulting in a total offense level of 15. Not only that, he was subject to an additional consecutive sentence not to exceed 10 years. *See* 18 U.S.C. § 3147 ("A person convicted of an offense committed while released [pretrial] . . . shall be sentenced, in addition to the sentence prescribed for the [underlying] offense to . . . a term of imprisonment of not more than ten years if the offense is a felony. . . . A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment."). With a Criminal History Category of II (resulting from his Montana

conviction), the advisory guideline range was 21 to 27 months imprisonment. The judge sentenced him to 27 months. He divided the sentence into two consecutive terms—21 months imprisonment for the underlying false statement offense and a consecutive 6 months imprisonment under 18 U.S.C § 3147. *See* USSG § 3C1.3, comment. (n.1) ("[I]n order to comply with [18 U.S.C. § 3147], [sentencing courts] should divide the sentence . . . between the sentence attributable to the underlying offense and the sentence attributable to the enhancement."). The sentence was to run consecutive to his Montana sentence.

Discussion

Horner, still proceeding pro se,[3] does not attack the factual basis for his conviction, preferring instead to tilt at windmills.[4] Our review is de novo. *See United States v. Pauler*, 857 F.3d 1073, 1075 (10th Cir. 2017) (reviewing de novo the denial of a

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[3] We have liberally construed Horner's pro se materials, stopping short, however, of serving as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

[4] In addition to the arguments we address below, Horner claims the Seventeenth Amendment, which calls for the election of Senators by the people of the State they are to represent, was not properly ratified because it was not approved by all of the States. As a result, he tells us there has been no legitimate Senate, legislation, or judicial appointments since 1913. Nonsense. On May 31, 1913, Secretary of State William Jennings Bryan certified that the Seventeenth Amendment had been ratified by three-quarters of the States and therefore it "had become valid to all intents and purposes as a part of the Constitution of the United States." https://www.archives.gov/legislative/features/17th-amendment/notification.html. Such certification is "conclusive upon the courts." *See Leser v. Garnett*, 258 U.S. 130, 137 (1922). Moreover, Article V of the Constitution requires Amendments to be ratified by only "three fourths" of the States, not unanimously, as Horner contends.

EXCEPTION CLAUSE OF ART V

FED # 43 # 59

motion to dismiss an indictment based on a question of law); *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004) (reviewing de novo a claim that the exclusion of evidence violated a defendant's constitutional rights); *United States v. Saffo*, 227 F.3d 1260, 1267 (10th Cir. 2000) ("We review de novo questions regarding a statute's constitutionality.").

A. *Constitutionality of 18 U.S.C. § 3231*

The district court's jurisdiction over this case derived from 18 U.S.C. § 3231, which vests federal district courts with jurisdiction over "all offenses against the laws of the United States."[5] Prior to trial, Horner moved to dismiss the indictment for want of jurisdiction. As he would have it, § 3231 is unconstitutional because Congress failed to record the names of the persons voting for and against it in its journals as required by the Bicameralism and Presentment Clause, U.S. Const. art. I, § 7, cl. 2.[6] The judge denied

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[5] In a related argument, he contends Congress impermissibly eliminated the United States' standing in enacting § 3231 because it used the phrase "all offenses against the laws of the United States" rather than the phrase "offenses against the United States," which is utilized in 28 U.S.C. § 547 (requiring the United States Attorney to "prosecute for all offenses against the United States") and in U.S. Const. art. II, § 2, cl. 1 (giving the President the "Power to grant Reprieves and Pardons for Offenses against the United States . . . ."). According to Horner, the latter phrase requires an injury-in-fact, which is necessary for standing, but the former phrase does not. This argument can be resolved in short-order. A violation of its laws injures the United States' sovereignty, which "suffices to support a criminal lawsuit by the Government." *Vt. Agency of Nat. Res. v. U.S. ex rel Stevens*, 529 U.S. 765, 771 (2000).

[6] On appeal, he also claims Congress failed to follow this Clause in enacting Titles 1, 4, 6, 9, and 17 of the United States Code. We decline to address this argument as it was not raised in the district court and Horner's failure to request plain error review on appeal, either in his opening or reply brief, "'surely marks the end of the road for an

the motion, relying on *United States v. Tony*, which rejected the argument that § 3231 was invalid because it failed to pass both Houses of Congress. 637 F.3d 1153, 1158 n.9 (10th Cir. 2011).

Horner claims *Tony* and the cases cited therein are inapposite because they concerned only whether a quorum was present when § 3231 was passed. He concedes a quorum was present but nevertheless contends § 3231 was not validly enacted because Congress failed to comply with the Bicameralism and Presentment Clause. But that Clause is not applicable here.

It provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. Const. art. I, § 7, cl. 2.

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argument for reversal not first presented to the district court.'" *United States v. Lamirand*, 669 F.3d 1091, 1098 n.7 (10th Cir. 2012) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011)); *cf. United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016) (reviewing argument for plain error in criminal appeal where appellant "argued plain error fully in his reply brief").

It plainly requires "Every Bill" to be passed by both Houses of Congress and to be presented to the President for his approval. *Id.* It also sets forth the process for overriding a President's veto: 2/3 of Congress must vote to override it and those votes are to be recorded in each House's journal. In other words, when Congress votes to override a President's veto, the votes must be recorded. *See* Ronald J. Krotoszynski, Jr., *Deconstructing Deem and Pass: A Constitutional Analysis of the Enactment of Bills by Implication*, 90 Wash. U. L. Rev. 1071, 1088-89 (2013). Because § 3231 was not vetoed by the President, a recording of the votes was not required. But Horner is not done, even though he mistakes persistence for persuasion.

According to him, the Bicameralism and Presentment Clause's recording of votes requirement is not limited to only those bills vetoed by the President. That is because its third sentence starts with "But in *all* such Cases" and is not otherwise linked to the second sentence by a comma or semi-colon. U.S. Const. art. I, § 7, cl. 2 (emphasis added). As a result, he tells us the third sentence refers to all bills, not just vetoed bills. To support his reading of the Clause, he points to other bills passed by Congress in which the votes were recorded but were not vetoed by the President. But doing more than is required in some cases does not raise the bar for all.

The relevant term is "in all *such* cases," not "all bills." U.S. Const. art. I, § 7, cl. 2 (emphasis added). "Such" means "of the character, quality, or extent previously indicated or implied." https://www.merriam-webster.com/dictionary/such. The logical reading of this clause is that "such cases" refers to the second sentence, i.e., those bills

vetoed by the President and sought to be overridden by 2/3 vote of each House. In "such cases," the votes must be recorded. This conclusion is bolstered by the Journal Clause, U.S. Const. art. I, § 5, cl. 3, which requires votes to be recorded in the Journals of each House "only if at least one-fifth of the members present and voting request a recorded vote on any question pending before the body." *See* Ronald J. Krotoszynski, Jr., *Deconstructing Deem and Pass: A Constitutional Analysis of the Enactment of Bills by Implication*, 90 Wash. U. Law Rev. at 1088. To read the Bicameralism and Presentment Clause as Horner advocates would improperly render the Journal Clause superfluous. *See Wright v. United States*, 302 U.S. 583, 588 (1938) ("In expounding the Constitution of the United States, . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." (quotation marks omitted)). The Journal Clause also explains why the votes are recorded for some bills even when not vetoed by the President.[7]

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[7] The government relies on the enrolled bill rule to preclude Horner's challenge to the procedure by which § 3231 was enacted. Under that rule:

> It is not competent for a party [challenging the validity of a statute] to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that an enrolled bill differs from that actually passed by Congress. The only evidence upon which a court may act when the issue is made as to whether a bill asserted to have become a law, was or was not passed by Congress is an enrolled act attested to by declaration of the two houses, through their presiding officers. An enrolled bill, thus attested, is conclusive evidence that it was passed by Congress. The enrollment itself is the record, which is conclusive as to what the statute is.

Pub. Citizen v. U.S. Dist. Court for Dist. of Columbia, 486 F.3d 1342, 1350 (D.C. Cir.

B. *Constitutionality of 18 U.S.C. § 1542*

Horner claims Congress had no authority to criminalize making a false statement on a passport application; as a result, he claims 18 U.S.C. § 1542 is unconstitutional.[8] According to him, the United States Constitution gives Congress authority only over four crimes: counterfeiting, piracies and felonies on the high seas, offenses against the law of nations, and treason. *See* U.S. Const., art. I, § 8, cl. 6, 10; U.S. Const. art. III, § 3, cl. 2. Making a false statement on a passport application is not one of them. Moreover, while Congress has the power to enact all laws "necessary and proper" to execute its enumerated powers, *see* U.S. Const. art. I, § 8, cl. 18, power over passports is not and has never been one of Congress's enumerated powers.

Yet he acknowledges that the Constitution gives Congress the power "[t]o regulate

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2007) (citations and quotation marks omitted); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 670, 672–73, 675, 680 (1892); *United States v. Gonzalez-Arenas*, 496 F. App'x 866, 867 (10th Cir. 2012) (unpublished). According to the government, because § 3231 was properly enrolled, it is immunized from judicial inquiry as to whether it was validly passed. For his part, Horner argues the enrolled bill rule, which Congress codified at 1 U.S. § 106, is unconstitutional.

We need not address the enrolled bill rule. We assume each House did not record the yea and nay votes of its members in its journals when § 3231 was passed but conclude such procedure did not violate the Bicameralism and Presentment Clause because it requires the recording of votes only when Congress seeks to override a President's veto, which did not occur with § 3231.

[8] Horner did not raise this argument in a timely manner in the district court. *See* Fed. R. Crim. P. 12(b)(3)(B)(v), (c)(3). As a result, the government claims he has waived the argument or it is subject to, at most, plain error review. Yet the government also suggests the argument may be jurisdictional; if so, our review is de novo. We need not split hairs. "Even applying the stricter de novo standard of review," the argument fails. *See Hjelle v. Mid-State Consultants, Inc.*, 394 F.3d 873, 879 (10th Cir. 2005).

Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3 (Foreign Commerce Clause (FCC)). This includes regulating (1) "the use of the channels of [foreign] commerce," (2) "the instrumentalities of [foreign] commerce," and (3) "those activities that substantially affect [foreign] commerce." *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (setting forth three broad categories of activity that Congress may regulate under its interstate commerce power); *United States v. Durham*, 902 F.3d 1180, 1206 ("The three *Lopez* categories provide a useful starting point in analyzing challenges under the FCC" but "[c]ongressional authority under the FCC is broader than [that] under the ICC."). Because a passport is required for a United States citizen to travel outside the United States, i.e., to use the channels and instrumentalities of foreign commerce, Congress had the authority under the FCC to regulate the obtaining of a passport, including criminalizing those who lie in seeking to obtain one.[9]

C. *Introduction of U.S. Constitution as Evidence*

Horner moved pretrial for permission to introduce the United States Constitution as evidence at trial. The judge did not then definitely decide the issue. However, he informed Horner he would be instructing the jury on the law needed to decide guilt, namely the elements of the charge, and "the Constitution is [not] really relevant to [the jury] figuring out how to determine whether you are guilty or not guilty." (R. Vol. 5 at

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[9] Congress had the authority to enact § 1542 under the FCC but there is another basis for its authority. Because a passport is required for a United States citizen to reenter the United States after traveling abroad, Congressional authority to enact § 1542 also arose under the Naturalization Clause. *See* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . .").

336.) Later, during his opening statement to the jury, Horner began to argue that § 1952 was unconstitutional. The government objected to this legal argument and the judge sustained the objection, telling Horner to confine his opening statement to the facts.

Horner claims the judge's refusal to admit the Constitution as evidence or to otherwise allow him to rely on it interfered with his constitutional right to present a defense. According to him, the jury has a duty to ensure he was not charged with violating an unconstitutional law, especially after the judge refused to so conclude. He is mistaken.

A criminal defendant has a constitutional right to present a defense, including the right to present evidence. *United States v. Pablo*, 696 F.3d 1280, 1295 (10th Cir. 2012). But that right is not absolute. *Id.* The evidence must be both relevant and material. *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005). Relevant evidence is that which "has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence." Fed. R. Evid. 401. "Evidence is material if its suppression might have affected the trial's outcome. In other words, material evidence is that which is exculpatory—evidence that if admitted would create reasonable doubt that did not exist without the evidence." *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) (citation omitted).

Horner did not seek to admit the Constitution to prove or disprove a fact or to create reasonable doubt as to his guilt. He did so to support his legal argument that the statute of conviction was unconstitutional. *See United States v. Evans*, 318 F.3d 1011,

1015 (10th Cir. 2003) ("[T]he constitutionality of a statute is a legal question."). But such arguments are to be decided by the judge, not the jury. *See Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) ("[I]t is axiomatic that the judge is the sole arbiter of the law and its applicability."). The judge decided the constitutionality of § 1542 contrary to Horner's arguments. Horner's remedy did not entitle him to seek a second opinion from the jury but rather to appeal to this Court, which he has done (albeit unsuccessfully).

Because the Constitution was neither relevant nor material evidence in this case, the judge properly excluded it.

D. *Application of 18 U.S.C § 3147*

Horner tells us the judge erred in applying 18 U.S.C. § 3147 to enhance his sentence because it was neither included in the indictment nor presented to the jury. But the judge correctly concluded the argument was foreclosed by our case law, which characterizes § 3147 as a mandatory sentencing enhancement, not a separate offense of conviction.

The Fifth Amendment generally prohibits a person from being "held to answer for a . . . *crime*, unless on presentment or indictment of a Grand Jury." (Emphasis added). But § 3147 is not a separate crime; it "is a self-executing sentence enhancement provision" for those defendants convicted of offenses while free on bond pending other judicial proceedings. *See United States v. Browning*, 61 F.3d 752, 756-57 (10th Cir. 1995) (collecting cases); *see also United States v. Patton*, 708 F. App'x 488, 490 (10th Cir. 2017) (unpublished); *United States v. Mowery*, 694 F. App'x 638, 641 (10th Cir.

2017) (unpublished). As such, there was no need for it to be included in the indictment.

Of course, the Sixth Amendment (in conjunction with the Due Process Clause) requires any fact, other than a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum or minimum to be submitted to a jury and proved beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 102 (2013) (mandatory minimum); *Apprendi v. New Jersey* 530 U.S. 466, 490 (2000) (statutory maximum). But the enhancements to Horner's sentence via § 3147 and USSG § 3C1.3 did not violate *Alleyne* or *Apprendi* because they did not affect the mandatory minimum sentence or increase Horner's sentence beyond the statutory maximum applicable to his underlying offense—making a false statement in a passport application in violation of § 1542. *See* 18 U.S.C. § 1542 (calling for a 10-year maximum term of imprisonment); *United States v. Zar,* 790 F.3d 1036, 1054–55 (10th Cir. 2015) ("The defendants' reliance on *Apprendi* and *Alleyne* is misplaced as none of the defendants were subject to mandatory minimum sentences or sentenced beyond the statutory maximums for their convictions."); *United States v. Fredette*, 315 F.3d 1235, 1245 (10th Cir. 2003) ("*Apprendi* does not apply to sentencing factors that increase a defendant's guideline range but do not increase the statutory maximum"; because defendant's sentence does not exceed the total statutory maximum, he is not entitled to relief under *Apprendi*). In fact, the commentary to § 3C1.3 "ensure[s] that the 'total punishment' (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under § 3147)" falls within the "guideline range for the offense committed while on release."

USSG §3C1.3, comment: (n.1); *United States v. Randall*, 287 F.3d 27, 30–31 (1st Cir. 2002) ("The Sentencing Commission's assimilation of § 3147 in [§3C1.3] effectively moots any *Apprendi* challenge to the application of § 3147. The Application Notes encourage sentencing judges to sentence within the guideline range for the base offense of conviction by using a § 3147 enhancement only for purposes of calibrating where, within the underlying conviction count guideline range, *a sentence below the applicable conviction count maximum* may be imposed." (emphasis added)).

Moreover, whether Horner was previously convicted of a felony offense committed while released pretrial falls within *Apprendi*'s prior conviction exception. *Randall*, 287 F.3d at 30 (fact-finding for purposes of applying § 3147 "may fairly be characterized as literally within the express exception recognized in *Apprendi* for the fact of a prior conviction" (quotation marks omitted)); *cf. United States v. Michel*, 446 F.3d 1122, 1132-33 (10th Cir. 2006) ("[W]hether prior convictions happened on different occasions from one another [for purposes of applying the Armed Career Criminal Act (ACCA)] is not a fact required to be determined by a jury but is instead a matter for the sentencing court.").

E. *Double Jeopardy*

Horner moved to dismiss the indictment claiming he had already been punished for the same conduct in the Montana case and therefore any additional punishment in this case would violate the Fifth Amendment's Double Jeopardy Clause. The judge denied the motion because the punishment meted out in Montana was for conduct different from

that charged here.

The Double Jeopardy Clause protects against, *inter alia*, "multiple punishments for the *same offense*." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (emphasis added), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). Horner is not clear as to how he was punished in the District of Montana for his conduct in this case. He refers to a five-level enhancement he received but that enhancement was for the number of images of child pornography involved there. Although he received a two-level enhancement for obstruction of justice based on his cutting off his ankle monitor and fleeing the United States, that conduct is different than the offense conduct here—making a false statement on a passport application.[10]

AFFIRMED. We **DENY** Horner's Motion to Unseal the Record. The documents he challenges—the transcripts from the grand jury, the verdict form containing the jurors' signatures, and the Presentence Report and related materials—are properly filed under seal. *See* 10th Cir. R. 11.3(C), Fed. R. Crim. P. 6(e)(6).

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

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[10] Even if his Montana sentence was enhanced because of his criminal conduct in this case, such does not violate double jeopardy. *See Witte v. United States*, 515 U.S. 389, 398 (1995) ("[D]ouble jeopardy principles [do not] bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime.").

FILED
United States Court of Appea
Tenth Circuit

May 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD RAY HORNER,

Defendant - Appellant.

No. 18-1350

ORDER

Before **BACHARACH**, **McKAY**, and **O'BRIEN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

United States Court of Appeals
for the Tenth Circuit

Ronald Horner Appellant	)	
v.	)	Case Number: 18-1350
United States of America Appellee	)	

Motion for Rehearining -- En Banc

Comes now Appellant Horner, acting pro se, to respectfully motion this court to rehear Case Number: 18-1350 for the reasons discussed below.

Discussion

In his original brief the Appellant identified eleven (11) issues that he presented for review pursuant to FRAP 28(a)(5). Of those eleven (11) issues the three judge panel (Bacharach, McKay, and O'Brien) only considered seven (7) of the issues that were presented for review. The issues that the three judge panel (Bacharach, McKay, and O'brian) failed to consider are items of "first impression" for the Court of Appeals for the Tenth Circuit and concern jurisdictional and Constitutional questions. Jurisdiction can never be waived and the constitutionallity of a statute must be reviewed de novo (see the Appellant's original brief, the United States Attorney's answer brief, and the Appellant's rebuttal brief).

For clarity, the Appellant now restates **five issues** that the three judge panel (Bacharach, McKay, and O'Brian) overlooked when making their Order and Judgement:

1) Can Congress unilaterally expand it's own legislative power without going through the difficult process of amending the Constitution of the United States of America? (This was issue #3 and #11 in the Appellant's original brief and the very first item in the Appellant's rebuttal brief; it was ignored by both the United States Attorney and the three judge panel (Bacharach, McKay, and O'Brian).

2) Can a Circuit Court modify or nullify Constitutional mandates and requirements? Are the Circuit Courts the Constitutionally authorized institution for amending the Constitution under Article V of the Constitution of the United States of America? (issue # 7-original

brief).

3) House Concurrent Resolution 219 is not a bill and is not a joint resolution (joint resolution -- A legislative resolution passed by both houses - It has the force of law and is subject to executive veto. From Black's Law Dictionary Ninth Edition page 1426) but a concurrent resolution (concurrent resolution -- A resolution passed by one house and agreed to by the other - It expresses the legislature's opinion on a subject but does not have the force of law. From Black's Law Dictionary Ninth Edition page 1426). Since House Concurrent Resolution was neither a bill nor a joint resolution the "enrolled bill rule" is not applicable to H.Con.R. 219. Thus, it remains "impeachable" and is subject to judicial scrutiny. H.Con.R. 219 violated the Supreme Court precedent established in Marshall Field v. Clark 36 LED 294 143 U.S. 649 (1892). As it was used to allow Congress to enroll a bill (several bills actually) outside of an "OPEN SESSION" of Congress. (issues #8 and #9 in the Appellant's original brief).

4) The Appellant claimed in his original brief that the Seventeenth Amendment to the Constitution of the United States of America was not properly enacted. While the three judge panel (Bacharach, McKay, and O'Brian) acknowledged the argument (in a footnote) they ignored the importance of the "EXCEPTION CLAUSE" which reads "...that no State, without its Consent, shall be deprived of its equal suffrage in the Senate." The "exception clause" is called the "exception clause" because it provides an "EXCEPTION" to the two thirds and the three fourths requirements to amend the Constitution of the United States of America. The exception being that if any SINGLE State objects the amendment MUST fail. The three judge panel is correct in saying that Secretary of State William Jennings Bryan certified that three quarters of the States ratified the amendment but because of the "exception clause" and the fact that Delaware and Utah objected (which the three judge panel [Bacharach, McKay, and O'Brian] ignore) the Seventeenth Amendment is null, void, and invalid.

5) On page 14 of the Appellant's original brief the Appellant asked the Court of Appeals for the Tenth Circuit to consider the four (4) factors delineated by the Morrison court (see United States v. Morrison 146 LED 2d 658, 529 US 598 [2000]) with respect to 18 U.S.C. §1542. The three judge panel (Bacharach, McKay, and O'Brian) failed to apply these factors under any standard, let alone the de novo standard required under Morrison.

On page four (4) of the "Order and Judgement" the three judge panel (Bacharach, McKay, and O'Brian) accuse the Appellant of "tilt[ing] at windmills." The Appellant is disinclined to engage the court in adolescent name calling. Instead he would impress upon this court his conviction that his reading of the Constitution, the supreme law of the land, is proper and accurate. The Appellant is prepared to exhaust every available remedy to ensure that his rights, under the Constitution of the United States of America, are honored.

Relief Requested

The Appellant respectfully request that this court convene "en banc" to rehear Case Number: 18-1350 and consider the arguments presented in the original brief paying particular attention to the five (5) items identified in this motion.

Respect fully submitted this 22 day of April, 2019.

Ronald Horner #16352-046
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9595 West Quincy Ave.
Littleton, CO 80123

United States Court of Appeals
for the Tenth Circuit

Ronald Ray Horner Appellant	)	
v.	)	Case Number: 18-1350
United States of America Appellee	)	

Motion to Unseal Record

In his original brief the Appellant asked that if this court ruled to reverse and remand to vacate his conviction with prejudice, in the Appellant's favor, that this court should then, and only then, seal this case. To date, this court has not ruled thus, therefore the case should remain transparent, open, and unsealed (except for portions that would result in a violation of privacy standards, ie Pre-sentence investigation reports etc.). To the Appellant's knowledge, no motion has been presented by the United States, to seal the case and the Appellant had no opportunity to object or present an argument as to why the case should remain unsealed (at this time).

Since the Supreme Court's opinion in Richmond Newspapers Inc. v. Virginia, 488 U.S. 555, 100 S. Ct. 2814 65 L Ed 2d 973 (1980) "The media and general public's Firts Amendment right of access to criminal trial proceedings has been firmly established." In Globe Newspaper Co. v. Superior Court of County of Norfolk, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) the Supreme Court held that when a court "attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." The Appellant objects to sealing this case at this time unless the United States can show why there is a "compelling government interest" that necessitates sealing the case.

Respectfully submitted this 26th day of March, 2019.

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Additional material from this filing is available in the Clerk's Office.