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,

December 29, 2020

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

CARLTON F. GUNN
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Attorney for the Petitioner

QUESTIONS PRESENTED

A. The government failed to overcome the presumption of innocence when the jury could not reach a verdict on an attempted murder count. Did it violate the Due Process Clause and the Sixth Amendment right to trial by jury for the district court to, despite the government's failure to overcome the presumption of innocence at trial, apply the attempted murder sentencing guideline through a cross reference from the guideline for convictions on two firearms counts?

B. Petitioner was convicted of being a felon in possession of a firearm and being an illegal alien in possession of a firearm in violation of 18 U.S.C. § 922(g), but the indictment did not allege, the jury instructions did not require a finding of, and the government did not attempt to prove the knowledge of status required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

1. Does failure to make a specific *Rehaif* argument in a general motion for judgment of acquittal limit review of a sufficiency of evidence claim to review for plain error?
2. To the extent plain error review does apply, is a reviewing court permitted to look to evidence outside the trial record in determining whether there was an effect on substantial rights and/or an effect on the fairness, integrity or public reputation of judicial proceedings?
3. Is a stipulation to the fact of status, as there was in the present case and there is in most 18 U.S.C. § 922(g) cases, sufficient evidence to establish the knowledge of status that *Rehaif* requires?

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

Jesus Eder 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 unpublished opinion of the United States Court of Appeals for the Ninth Circuit, which is also reported at 814 Fed. Appx. 313, 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 transcripts of the relevant portions of the district court's oral rulings at an initial sentencing and a resentencing are attached as Appendix 3. The transcripts of the district court's ruling on a motion for judgment of acquittal are attached as Appendix 4.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 31, 2020, *see* App. A001-05, and a timely petition for rehearing en banc was denied on August 28, 2020, *see* App. A006. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . . .

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Section 2K2.1 of the sentencing guidelines provides in pertinent part:

> **§ 2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**)
>
> . . .
>
> (c) Cross Reference
> (1) If the defendant used or possessed any

firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

. . .

Section 2X1.1 of the sentencing guidelines provides in pertinent part:

§ 2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

. . .

(c) Cross Reference

(1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

. . .

Section 2A2.1 of the sentencing guidelines provides in pertinent part:

§ 2A2.1 Assault With Intent To Commit Murder; Attempted Murder

(a) Base Offense Level

(1) 33, if the object of the offense would have constituted first degree murder; or

(2) 27, otherwise.

. . .

18 U.S.C. § 922(g) provides, in pertinent part:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

> . . .
>
> **(5)** who, being an alien—
>
> **(A)** is illegally or unlawfully in the United States;
>
> . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition; . . . .

18 U.S.C. § 924(a)(2) provides, in pertinent part:

> **(2)** Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.
>
> . . .

Rule 29(a) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> **(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

Rule 52 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> **(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

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. Arrest, Indictment, and Trial.

Petitioner was arrested after a struggle with a United States Forest Service officer during which several shots were fired from the officer's gun. App. A036. Petitioner 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 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. A036.

To support the felon in possession of a firearm count, the illegal alien in possession of a firearm counts, and the illegal reentry count, the government introduced a stipulation. *See* App. A027-32. The stipulation established the elements of the illegal reentry offense and also the status for the unlawful firearm possession counts, i.e., that Petitioner had a prior felony conviction and was in the country illegally. *See* App. A027-32. There was no other evidence introduced about Petitioner's felony conviction, and just some tangential references to his entry and presence in the United States. App. A040.[1]

After lengthy deliberations, several jury notes, and an "*Allen* charge," the jury reached a verdict on most, but not all, counts. *See* App. A041, It found Petitioner guilty on the assault count, the 18 U.S.C. § 924(c) count, the attempted robbery counts, the felon and illegal alien in possession of firearm

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[1] A man who had been with Petitioner testified in a material witness deposition that, "I came illegally through the desert," that Petitioner and others were with him when he came, and that they crossed over with marijuana. App. A040. A sheriff's detective who had participated in a post-arrest interrogation of Petitioner claimed Petitioner admitted in the interrogation that he was in the country illegally, but the actual transcript of the interrogation which was introduced contained no such admission. App. A040. Petitioner did indicate he had crossed the border by using a ladder to go over the fence, but he did not say that was because he could not be in the country legally rather than because his companion could not enter or because of the marijuana. App. A040. Petitioner indicated he had wanted to avoid the Border Patrol, but he did not say that was because of his illegal presence rather than his companion's illegal presence. App. A040-41. He said the reason he resisted when the Forest Service officer tried to handcuff him was that he did not want to go to "the can," but he did not say he thought he could be jailed for being in the country illegally rather than for his non-compliance with the officer's orders. App. A041.

counts, and the illegal reentry count. App. A041. It was unable to reach a verdict on the attempted murder count, and the court declared a mistrial on that count. App. A041.

2. Sentencing.

Despite the failure to convict Petitioner of the attempted murder count, the government sought to apply the sentencing guideline for attempted murder. *See* App. A044. It sought to do this through the guideline for the felon and illegal alien in possession of firearm counts – § 2K2.1. *See* App. A043-44. That guideline has a "cross reference" which requires application of the attempt guideline in § 2X1.1 when the firearm is used in the attempted commission of another offense. *See* U.S.S.G. § 2K2.1(c)(1). The government argued Petitioner had committed attempted first degree murder and the court should use the guideline for that offense under the § 2K2.1 cross reference. *See* App. A044, A048.

Petitioner argued it was improper to apply the attempted murder guideline when the jury had not convicted Petitioner of the attempted murder charge. App. A043. He also argued factually that there was only the assault, not an attempted murder. App. A044. He further argued that any attempted murder which had been committed was second degree rather than first degree. *See* App. A043, A047-48.

The district court rejected the defense arguments and applied the attempted first degree murder guideline. At a first sentencing, the court stated:

> The Court is aware that the jury deadlocked on the

> attempted murder charge. However, in my review of the evidence, the Court finds that there is clear and convincing evidence of that, his relevant conduct.

App. A009. And the court made the same finding at a resentencing following remand after a first appeal:[2]

> I'm adopting my previous analysis that I conducted, after hearing from counsel, last time when I sentenced this defendant. I think there is clear and convincing evidence that this defendant was attempting to commit the crime of murder.

App. A012

This finding – accompanied by a finding that there was premeditation that made the attempted murder first degree, *see* App. A009, A014 – dramatically increased Petitioner's sentencing guidelines offense level and guideline range – to 41[3] and 360 months to life, respectively. *See* App. A044-45. Combining this range with the mandatory consecutive sentence required for the 18 U.S.C. § 924(c) count, the court imposed a total sentence of 520 months. App. A045; *see also* A048.

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[2] The first appeal challenged only Petitioner's convictions. *See United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2638 (2019). The court affirmed the assault conviction, the firearms convictions, and the illegal reentry conviction, but vacated the attempted robbery convictions and remanded, which led to the resentencing. *See id.*

[3] The attempted first degree murder guideline by itself simply increased the "base offense level" to 33, *see* U.S.S.G. § 2A2.1(a)(1), but other enhancements increased the offense level further, *see* App. A043, A045, A048. The base offense level for attempted second degree murder is only 27, *see* U.S.S.G. § 2A2.1(a)(2), and the base offense level for aggravated assault is 14, *see* U.S.S.G. § 2A2.2(a).

3. This Appeal.

Petitioner filed this second appeal, *see supra* p. 8 & n.2, after the resentencing. He persisted in his argument that it was improper to base the guideline calculation on the attempted murder guideline when an attempted murder charge was tried to, but not found by, the jury. *See* App. A058-62. He also raised multiple challenges based on the Supreme Court's intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), in which the Court held 18 U.S.C. § 922(g) requires proof of not just the status that bars possession of a firearm – in this case, having been convicted of a crime punishable by imprisonment for a term exceeding one year, *see* 18 U.S.C. § 922(g)(1), and being present in the country illegally, *see* 18 U.S.C. § 922(g)(5)(A) – but also proof of knowledge of the status. *See* App. A050-57 He argued that, first, there was insufficient evidence to support the convictions because there was insufficient evidence of knowledge of the status, *see* App. A051-55, and, second, the indictment and jury instructions were deficient because they failed to allege and require a finding of such knowledge, *see* App. A056-57. He conceded the indictment and instructions challenges could be reviewed only for plain error, but argued the sufficiency of evidence was reviewed de novo, because he had made a general motion for judgment of acquittal "on each and every count because the Government has failed to carry it's [sic] burden of proving each and every element of those counts." App. A016, A050-51.

The government agreed with Petitioner's statement of the standard of review, *see* App. A083, but argued against Petitioner on the merits. On the

due process sentencing issue, the government argued it is well established that courts can sentence a defendant based on conduct he was not convicted of. *See* App. A092-95. On the *Rehaif* issues, it argued the evidence was sufficient because the stipulation not only established the status but justified an inference of knowledge of the status, *see* App. A084-89.[4] and the deficiencies in the indictment and instructions were not sufficiently prejudicial to satisfy the requirements of the plain error standard, *see* App. A089-92. The government subsequently added an argument – in a supplemental authority letter citing *United States v. Johnson*, 963 F.3d 847 (9th Cir. 2020)[5] – that the court could consider evidence outside the trial record and there was uncontroverted evidence in the presentence report that Petitioner had been sentenced to more than a year in prison. *See* App. A103-04.

The court of appeals rejected Petitioner's claims in a short unpublished opinion. On the sentencing claim, it held the attempted murder conduct could be considered even though there was no conviction, based on *United States v. Watts*, 519 U.S. 148 (1997) (per curiam). *See* App. A004. On the *Rehaif* claims, it held Petitioner "cannot satisfy the third and fourth prongs of the plain error test." App. A003.

> He stipulated to a prior felony conviction, for which he received a 30-month sentence, according to the revised presentence report. *See Johnson*, 963 F.3d at 854 (concluding that uncontroverted evidence that defendant

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[4] For the illegal alien in possession count, it also pointed to some of the additional evidence noted *supra* p. 6 n.1.

[5] This *Johnson* opinion was subsequently withdrawn and replaced by *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020), which reaches the same result based on different reasoning, *see id.* at 636.

> was sentenced to more than a year in prison "will ordinarily preclude" satisfaction of the fourth prong). Moreno also stipulated that he was not a U.S. citizen and was in the country without the Attorney General's consent. There is no reasonable probability that, but for the omission in the indictment, the jury would have reached a different verdict on the possession charges. For this reason, the error did not affect Moreno's substantial rights, nor the fairness, integrity, or public reputation of the trial. (Citation omitted.) And for the same reason, the district court did not plainly err in determining the evidence was sufficient to support Moreno's convictions.

App. A003. The court applied the plain error standard even to the sufficiency of evidence claim because Petitioner "did not raise a *Rehaif* challenge when moving for acquittal in the district court." App. A002. It did add in a footnote that it would reject the challenge even if it were preserved because "a 'rational trier of fact' could find Moreno knew of his prohibited status beyond a reasonable doubt," App. A003-04 n.2, but provided no additional analysis of the evidence to support this.

IV.

REASONS FOR GRANTING THE WRIT

This petition should be granted because it presents multiple issues on which the lower courts are split and on which this Court should clarify the law. First, the petition presents the question of whether a court may directly base a sentence on an offense which was tried to but not found by the jury in the case. There is at least a tension, if not an outright conflict, between the Court's summary per curiam opinion in *Watts*, which considered only double jeopardy concerns, and the Court's more recent opinion on the scope of the presumption

of innocence in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). There are also several state court opinions which create a split in the lower courts.

Second, this petition presents multiple questions regarding the application of this Court's recent holding in *Rehaif* to pre-*Rehaif* trials. These questions include (a) whether a general motion of judgment of acquittal preserves a *Rehaif* sufficiency of evidence challenge so review of such a challenge is not limited to plain error; (b) whether a reviewing court is permitted to look outside the trial record to the extent the plain error standard does apply; and (c) whether, if the reviewing court is limited to the trial record, a stipulation to status is sufficient to support an inference of knowledge of status. The courts of appeals are divided on all of these questions and this petition presents an excellent vehicle for resolving them.

A. THE PETITION SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER A SENTENCE MAY BE ENHANCED FOR AN OFFENSE TRIED TO BUT NOT FOUND BY THE JURY.

1. Whether a Sentence May Be Enhanced for an Offense Tried to But Not Found by the Jury Is an Important Question About Which There Is Uncertainty and on Which this Court Should Clarify the Law.

All of the federal circuits have held that even conduct of which the jury has acquitted the defendant – and, presumably, conduct on which a jury simply could not reach a verdict – can be considered at sentencing. *See United States*

v. White, 551 F.3d 381, 384-86 (6th Cir. 2008) (en banc) (collecting cases).[6] They have so held based on *Watts*, *see White*, 551 F.3d at 385, in which this Court rejected a double jeopardy challenge to the use of acquitted conduct to enhance the sentence, *see Watts*, 519 U.S. at 154-55.

Watts does not bear the weight the courts have placed on it, however. Initially, *Watts* was a per curiam summary reversal, which is "less constrain[ing]" then an opinion rendered with full briefing and argument, *Hohn v. United States*, 524 U.S. 236, 251 (1998). *See also Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) (observing that majority opinion "show[ed] hesitation" in confronting question of acquitted conduct and issue "ought to be confronted by a reasoned course of argument"). Secondly, this Court has itself emphasized the narrowness of the holding in *Watts*. As the Court explained in *United States v. Booker*, 543 U.S. 220 (2005), *Watts* "presented a very narrow question regarding the interaction of the [Sentencing] Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4.

Finally, *Watts* must be read in light of this Court's recent opinion in *Nelson*. *Nelson* considered a different constitutional protection – the presumption of innocence – in a different context. The appellants in *Nelson* were defendants who initially had been convicted of criminal offenses and

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[6] Individual judges within the circuits are not unanimous, however, with a number of judges dissenting from this view. *See, e.g., United States v. Lasley*, 832 F.3d 910, 920-21 (8th Cir. 2016) (Bright, J., dissenting); *White*, 551 F.3d at 392 (Merritt, J., dissenting); *United States v. Mercado*, 474 F.3d 654, 662 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring).

sentenced both to prison and to pay various monetary penalties. *See id.*, 137 S. Ct. at 1253. Some or all of their convictions were reversed on appeal and, in one instance, the appellant was acquitted in a new trial, and, in the other instance, the state chose not to retry the appellant. *See id.* The state nonetheless refused to return the money the appellants had paid to satisfy the monetary penalties because a state statute required the appellants to affirmatively prove their innocence by clear and convincing evidence. *See id.* at 1253-54.

The Court held this violated both due process and the presumption of innocence.

> [O]nce those convictions were erased, the presumption of [the appellants'] innocence was restored. [A]xiomatic and elementary, the presumption of innocence lies at the foundation of our criminal law. Colorado may not retain funds taken from [the appellants] solely because of their now-invalidated convictions, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.

Id. at 1255-56 (citations, footnotes, and internal quotation marks omitted) (emphasis in original).

This reasoning extends to the enhancement of Petitioner's sentence for an attempted murder which the jury expressly considered but on which it could not reach a verdict and which the government thereafter dismissed. Here, there was not even an original conviction and restoration of a previously overcome presumption of innocence when the original conviction was erased. There was no conviction at all, so the presumption of innocence was not overcome even initially. Just as the appellants in *Nelson* were not, "adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions,"

Petitioner, adjudged guilty of no attempted murder, cannot be guilty *enough* for a sentence enhancement. And *Watts* is not to the contrary. Just as the question considered in *Booker* – whether a mandatory sentencing guidelines enhancement based on conduct not found by a jury violates the Sixth Amendment right to trial by jury – "was not presented" in *Watts*, *Booker*, 543 U.S. at 240, the question suggested by *Nelson* and presented in this petition – whether a sentence may be enhanced when the presumption of innocence has not been overcome – was not presented in *Watts*.[7]

Several members of this Court have recognized the need for clarification in this area. Justice Scalia, dissenting from the denial of certiorari and joined by Justices Thomas and Ginsburg, highlighted the need to resolve whether the Due Process Clause and Sixth Amendment permit the consideration of charges not found by a jury in dissenting from the denial of certiorari in *Jones v. United States*, 574 U.S. 948 (2014). He noted "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury

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[7] To the extent *Watts* could be viewed as having sub silentio decided the question, it can and should be reconsidered. First, stare decisis is "at its weakest when [the Court] interpret[s] the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (internal quotation marks omitted). Second, this Court has held itself "less constrained" when an opinion was rendered without full briefing or argument, *Hohn v. United States*, 524 U.S. at 251, as *Watts* was. Third, there is no reliance interest that would be undercut here; if the government wants to use a charged offense on which the jury did not reach a verdict, it can retry the charge. *Cf. Alleyne v. United States*, 570 U.S. 99, 118-19 (2013) (Sotomayor, J., concurring) (noting reliance interest minimal where government has already tried to prove underlying acquitted conduct to jury).

beyond a reasonable doubt.'" *Id.* at 948 (Scalia, J., dissenting from denial of certiorari) (quoting *Alleyne v. United States*, 570 U.S. 99, 104 (2013)). He noted the Court had "left for another day" the question of whether an otherwise unreasonable sentence could be upheld based on judge-found facts and complained "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial fact-finding." *Jones*, 574 U.S. at 949 (emphasis in original). He concluded that the question of considering conduct presented to but not found by a jury was a "particularly appealing" question for the Court to review and the Court should "put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id.* at 949-950.

Justice Gorsuch and Justice Kavanaugh expressed similar concerns while sitting as circuit judges. Then-Judge Gorsuch cited Justice Scalia's dissent in *Jones* and opined that "[i]t is far from certain" that the Constitution allows the enhancement of a sentence based on facts the judge finds without the aid of a jury or the defendant's consent. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.). Then-Judge Kavanaugh opined that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

2. There Is a Split of Authority Created by State Court Decisions Regarding Acquitted Conduct Which Extends to Conduct on Which the Jury Did Not Reach a Verdict.

Review by this Court is also warranted because there is a split of authority created by state court decisions regarding acquitted conduct which extends to conduct on which the jury did not reach a verdict. As acknowledged *supra* pp. 12-13, the federal courts are agreed that acquitted conduct may be used to enhance a sentence. But several state courts have held to the contrary. Those include the Supreme Courts of Michigan, New Hampshire, and North Carolina.

Further, these courts have relied in large part, if not entirely on the presumption of innocence which drove this Court's *Nelson* decision. The New Hampshire Supreme Court, quoting from a nineteenth-century opinion of this Court, explained:

> The concept [of acquittal] is intertwined with the notion, so central to our system of justice, that until guilt is proven beyond a reasonable doubt, a defendant is innocent:
>
> > "[The presumption of innocence] is an instrument of proof created by the law in favor of one accused, whereby *his innocence is established* until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the *legal conclusion of his guilt or innocence is to be drawn*."

State v. Cote, 530 A.2d 775, 784 (N.H. 1987) (quoting *Coffin v. United States*, 156 U.S. 432, 459 (1895)) (emphasis added in *Cote*). The New Hampshire

court then spoke of "charges in which that presumption has not been overcome" and reasoned that "[i]t is a presumption of *innocence* and innocence means "*absence* of guilt."" *Cote*, 530 A.2d at 785 (quoting *Black's Law Dictionary* 708, and adding emphasis).

The North Carolina Supreme Court reasoned similarly. It also noted the presumption of innocence and quoted *Coffin*'s description of the presumption as "an instrument of proof . . . whereby [the defendant's] innocence is established until sufficient evidence is introduced to overcome the proof." *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988) (quoting *Coffin*, 156 U.S. at 459). It also spoke of the presumption of innocence having "not [been] overcome" at trial. *Marley*, 364 S.E.2d at 139.

Finally, the Michigan Supreme Court held similarly in a post-*Watts* decision. *See People v. Beck*, 939 N.W.2d 213 (Mich. 2019), *cert. denied*, 140 S. Ct. 1243 (2020). The Michigan court found *Watts* unhelpful because "[f]ive justices gave it side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context." *Beck*, 939 N.W.2d at 224. It pointed instead to the New Hampshire and North Carolina opinions, which it described as grounded "in the guarantees of fundamental fairness and the presumption of innocence." *Id.* at 225 (citing *Cote* and *Marley*). It quoted the North Carolina court's reasoning that "[t]o allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Beck*, 939 N.W.2d at 225 (quoting *Marley*, 364 S.E.2d at 139). It also noted the extensive criticism of reliance on acquitted conduct by both jurists and commentators. *See Beck*,

939 N.W.2d at 225-26. It then held, "This ends here." *Id.* at 226. *Cf. Jones v. United States*, 574 U.S. at 949 (Scalia, J., dissenting from denial of certiorari) ("This has gone on long enough.").

While the conduct considered by these state courts was conduct the jury had actually acquitted the defendant of, the courts' presumption of innocence reasoning logically extends to conduct on which the jury simply failed to reach a verdict. The presumption of innocence remains standing and is "not overcome" until there is a verdict of guilty. It certainly remains standing and is not overcome if there is an acquittal. But it also remains standing and is not overcome if the jury cannot reach a verdict. As explained by this Court in *Coffin*, "[the defendant's] innocence is established until sufficient evidence is introduced to overcome" the presumption. *Id.*, 156 U.S. at 459, *quoted in Cote*, 530 A.2d at 784, *and Marley*, 364 S.E.2d at 139.[8]

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[8] The New Hampshire and Michigan opinions could be read as suggesting consideration of conduct in which a jury did not reach a verdict might be proper. *See Beck*, 939 N.W.2d at 225 (suggesting no constitutional impediment to enhancement "[w]hen a jury has made no findings (as with uncharged conduct, for example)"); *Cote*, 530 A.2d at 784 ("It is of course well-settled in most jurisdictions that a trial court may consider evidence of pending charges, as well as charges that have fallen short of conviction, in determining sentencing."). But the opinions were, in the case of the New Hampshire opinion, acknowledging the rule "in most jurisdictions," *Cote*, 530 A.2d at 784, and in the case of the Michigan opinion, focusing on the example of "uncharged conduct," not charged conduct on which the jury could not reach a verdict, *Beck*, 939 N.W.2d at 225. The courts did not have before them conduct which was tried to a jury without a verdict being reached. They also suggested no distinction between a failure to overcome the presumption of innocence that produces an acquittal and a failure to overcome the presumption of innocence that produces a hung jury.

3. This Case Is an Excellent Vehicle for Deciding the Question Presented Because the Sentencing Guidelines and the District Court in this Case Directly Relied on the Sentencing Guideline for the Charged Offense on Which the Jury Failed to Reach a Verdict.

This case is an excellent vehicle to decide the question presented because it presents the question in its purest form. It is not just conduct underlying the other offense, or some of the elements of that offense, that the sentencing guideline which was applied here uses. It is the actual offense. The guideline provision the district court applied is a "cross reference" that instructs the court to use the attempt guideline, *see* U.S.S.G. § 2K2.1(c)(1), which in turn instructs the court to use the guideline for the other offense, *see* U.S.S.G. § 2X1.1(a),(c). This means going directly to the attempted murder guideline when that is the offense in which the defendant used the firearm.

And that is exactly what the district court here did. Where the jury failed to reach a verdict and find Petitioner guilty of the attempted murder charge, the district judge did just that. She found "there is clear and convincing evidence that this defendant was attempting to commit the crime of murder." App. A012. *See also* App. A009 (court stating at first sentencing that it was "aware that the jury deadlocked on the attempted murder charge," but "in my review of the evidence, the Court finds that there is clear and convincing evidence of that"). The court thus found the very offense which was tried to, but not found, by the jury. It "convicted" Petitioner and then sentenced him for the very offense for which the government did not overcome the presumption of innocence at trial.

B. THE PETITION SHOULD BE GRANTED TO RESOLVE SPLITS IN THE LOWER COURTS ON MULTIPLE IMPORTANT QUESTIONS REGARDING CONVICTIONS INFECTED BY ERROR UNDER *REHAIF*.

There are also three circuit splits in the application of *Rehaif* that are implicated by Petitioner's convictions for felon in possession of a firearm and illegal alien in possession of a firearm. The petition should be granted to resolve those splits, or, alternatively, held pending this Court's resolution of multiple other cases implicating or potentially implicating these circuit splits.

1. The Question of Whether Failure to Specifically Make a *Rehaif* Argument in a General Motion for Judgment of Acquittal Limits Review of a Sufficiency of Evidence Claim to Review for Plain Error Is an Important Question on Which the Circuits Are Split.

The first issue on which there is a circuit split – and which counsel is not certain is directly raised in another petition – is whether the plain error standard of review fully applies to *Rehaif* claims such as Petitioner's. Petitioner has conceded the plain error standard applies to review of his claims of deficient jury instructions and a deficient indictment, but has not conceded it applies to the sufficiency of evidence claim. And there is a clear split in the circuits on this question. At least the Seventh Circuit and Eleventh Circuit have applied de novo review to sufficiency of evidence claims based on *Rehaif* when there has been only a general motion for judgment of acquittal, as there was in Petitioner's case. *See United States v. Staggers*, 961 F.3d 745, 754 (5th

Cir.), *cert. denied*, 208 L. Ed. 2d 103 (2020); *United States v. Maez*, 960 F.3d 949, 959 (7th Cir. 2020), *petition for cert. pending*, No. 20-6129 (filed Oct. 19, 2020), *and* No. 20-6227 (filed Oct. 28, 2020). *See also United States v. Owens*, 966 F.3d 700, 709 (8th Cir. 2020) ("assum[ing] for the sake of analysis" that general motion sufficient), *petition for cert. pending*, No. 20-6098 (filed Oct. 13, 2020). But the Ninth Circuit – in both this case and the published opinion of *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020) – has held review of a *Rehaif* sufficiency of evidence claim is always limited to review for plain error. *See Johnson*, 979 F.3d at 636; App. A002-03 (panel opinion).

This is an important question that the Court should resolve because it is the first question in the analysis that leads to the other questions. As the Third Circuit recognized in *United States v. Nasir*, ___ F.3d ___, 2020 WL 7041357 (3d Cir. Dec. 1, 2020) (en banc) – discussed in more detail *infra* pp. 25-28 – "no one questions that if [a court was] reviewing a sufficiency-of-the-evidence objection that had been preserved at trial, [its] review would be confined to the trial record." *Id.*, 2020 WL 7041357, at *12. That makes it critical to resolve what must be done to preserve the objection.

And it is the Seventh Circuit and Eleventh Circuit that are correct on this question – in their holdings that a general motion is sufficient – not the Ninth Circuit – in its holding that there had to be a specific *Rehaif* argument. It is hornbook law that "[s]pecificity is not required by Rule 29 [of the Federal Rules of Criminal Procedure]," which is the rule governing motions for judgment of acquittal. 2A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Criminal* § 466 (4th ed. 2009). As explained in an

opinion by then-Judge, later Justice, Minton:

> [A motion for judgment of acquittal] is a challenge to the Government in the presence of the court that the Government has failed in its proof. The motion is not required by the rules to be in writing or to specify the grounds therefor. That in itself would indicate that the defendant is not required to go over the proof for the benefit of the Government or the court, in the absence of some request for more specific objection.

United States v. Jones, 174 F.3d 746, 748 (7th Cir. 1949). Or, as similarly explained in *United States v. Gjurashaj*, 706 F.2d 395 (2d Cir. 1983):

> [T]he very nature of [motions for judgment of acquittal] is to question the sufficiency of the evidence to support a conviction. Thus, when a defendant moves for acquittal, even without specificity as to the grounds, it is incumbent upon the government to review its proof as to the facts required to establish each element of each offense alleged. Its neglect to do so is not a charge upon the defendant.

Id. at 399 (citations and footnotes omitted).

This view is also supported by the language of Federal Rule of Criminal Procedure 29, which, as pointed out by Justice Minton, places no requirements on motions for judgment of acquittal. *See* Fed. R. Crim. Pro. 29(a) (referring to "the defendant's motion" and "a motion," and placing no requirements on form or content of motion). This contrasts with comparable civil rules – such as Federal Rule of Civil Procedure 7(b)(1), which expressly requires motions to "state with particularity the grounds for seeking the order," and Federal Rule of Civil Procedure 50(a)(2), which expressly requires motions for judgment as a matter of law to "specify the judgment sought and the law and facts that entitle the movant to the judgment." *See* Wright and Miller, *supra* p. 22, § 466 (noting that "the Criminal Rules differ from the Civil Rules"). This contrast triggers the principle that omission of language in one provision that

is included in another is presumed to be intentional. *Dean v. United States*, 556 U.S. 568, 573 (2009) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). And the advisory committee's note directly indicates such intent, by describing the criminal rule as "substantially the same" as the civil rule, "except that it . . . does not require that the grounds upon which a motion is made shall be stated 'with particularity.'" Fed. R. Crim. Pro. 47 advisory committee's note.

2. The Question of Whether a Court Is Permitted to Look Outside the Trial Record to the Extent the Plain Error Standard Does Apply Is an Important Question on Which the Circuits Are Split.

Application of the plain error standard to Petitioner's deficient indictment and instruction claims – and to the sufficiency of evidence claim if the lower court below was correct in applying it to that claim as well – leads to another important issue on which the circuits are split. That is whether a reviewing court may look to evidence outside the record in applying the third and/or fourth prongs of the plain error standard. This question, unlike the preceding one, is raised in a number of pending petitions for writ of certiorari. *See* Memorandum for the United States, at 2 n.1 (collecting petitions), *Burden v. United States*, No. 20-5939 (U.S. Nov. 6, 2020).

Most circuits, including the Ninth Circuit in which Petitioner's appeal lay, have held a court is permitted to look outside the record. *See Johnson*, 979 F.3d at 637-38; *Owens*, 966 F.3d at 706-07; *Maez*, 960 F.3d at 961; *United States v. Ward*, 957 F.3d 691, 695 & n.4 (6th Cir. 2020); *United States*

v. Miller, 954 F.3d 551, 560 (2d Cir. 2020); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019), *petition for cert. pending*, No. 19-8679 (filed June 8, 2020). But the Third Circuit, sitting en banc in *Nasir*, held that "basic constitutional principles require us to consider only what the government offered in evidence at the trial, not evidence it now wishes it had offered." *Id.*, 2020 WL 7041357, at *11.

First, *Nasir* rejected some of the other circuits' reliance on *United States v. Vonn*, 535 U.S. 55 (2002), in which this Court looked outside the record of a guilty plea to ascertain whether the plea was knowing and voluntary, *see id.* at 75. It noted that the voluntariness of the guilty plea is in "a procedural posture that is completely unlike the review of a conviction following trial." *Id.*, 2020 WL 7041357, at *14. It then reasoned:

> The question is quite different when reviewing whether the Government has borne at a trial – or even at a plea proceeding – its burden to "convince the trier [of fact] of all the essential elements of guilt." [*In re*] *Winship*, 397 U.S. [358,] 361 [(1970)] (citation omitted). In that procedural setting, due process and Sixth Amendment considerations compel us to focus our inquiry on the information presented to the trier of fact – in this case, the jury. *Vonn* is inapposite where, as here, we are concerned not with the facts possessed by the defendant and their effect on the voluntariness of his plea but with the information presented to the fact-finder to prove an element of the charged offense. Put differently, when there has been a plea rather than a trial, no one is concerned about or mentions the adequacy of the trial record because there is none. Likewise, however, when there has been a trial and an utter failure of proof is at issue, it is simply beside the point to rely on case law dealing with the voluntariness of plea colloquies.

Nasir, 2020 WL 7041357, at *15 (footnotes omitted).

Second, *Nasir* rejected an alternative rationale adopted by other circuits "that the defendant is obviously guilty and the justice system will not appear to

have served justice if, through no fault of the prosecution, the defendant is freed on the technicality that proof of a previously unknown element of the offense was not offered in evidence. (Footnote omitted.)" *Id.* *Nasir* explained this rationale fails for several reasons. Initially, "it treats judicial discretion as powerful enough to override the defendant's right to put the government to its proof when it has charged him with a crime," and "impl[ies] that relief on plain-error review is available only to the innocent." *Id.*, 2020 WL 7041357, at *17. Secondly, the concern about public perception that defendants were being freed on "technicalities" uses a buzzword which "is too often used to denigrate a principal that stands between an advocate and a preferred result." *Id.*

> Given the imperative of due process and "[i]n view of the place of importance that trial by jury has in our Bill of Rights," it should not be supposed that "the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, [can be substituted] for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Id. (quoting *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946)).

Finally, there is a countervailing concern in evaluating the effect on the "fairness, integrity or public reputation of judicial proceedings," prong, *United States v. Olano*, 507 U.S. 725, 736 (1993), of the plain error standard.

> Members of the public know that the government is supposed to prove a defendant's guilt at trial. Everybody acknowledges that that was not done in this case, though it was nobody's "fault." Were we to ignore that breach of due process and then try to explain our choice by saying, "well, we all know he's guilty," it should not sit well with thoughtful members of the public. Nor should our taking over the jury's role, for the sake of efficiency. Disregarding constitutional norms may be taken as tantamount to saying that rules constraining the

> government really don't count when we just know someone is guilty. (Footnote omitted.) That is a message likely to call into question the fairness, integrity, and reputation of the justice system.

Nasir, 2020 WL 7041357, at *23.

While the other circuits presumably disagree with the reasoning in *Nasir*, there is certainly a clear split. And it is a split that likely will affect the vast majority of felon in possession of a firearm defendants. The sentencing record in most defendants' cases will probably show the defendant actually served more than a year of imprisonment, *see, e.g., Nasir*, 2020 WL 7041357, at *33 (Porter, J., dissenting); *Johnson*, 979 F.3d at 638-39, which clearly establishes the required knowledge, and, where that is not the case, there may be other records establishing the knowledge. Such similarly situated defendants should not be treated differently depending on the circuit in which they were convicted.

3. The Question of Whether a Stipulation to the Fact of Status Is Sufficient Evidence to Establish the Knowledge of Status Which *Rehaif* Requires Is an Important Question on Which the Circuits Are Split.

There is then a split in the circuits on a final question which must be reached if evidence outside the trial record cannot be considered – either because the plain error standard does not apply, as argued *supra* pp. 22-24, or because even plain error review does not allow consideration of evidence outside the record, as argued *supra* pp. 25-27. This final question is whether a stipulation to status is sufficient evidence from which a jury could infer

knowledge of the status. That issue is presented here because the stipulation was the only evidence from the trial record to which the lower court pointed.[9]

On one side of the split is a firm and clear position taken in *Nasir*. It held that a stipulation to status "will not, on its own, suffice to prove that, at the relevant time, the defendant had knowledge of his status as a person prohibited to possess a firearm," because "[a]ll the stipulation demonstrates is that [the defendant] knew he was a felon at the time he signed the stipulation." *Id.*, 2020 WL 7041357, at *20. The court explained in rejecting the government's contrary argument:

> *Rehaif* itself blocks that line of reasoning. (Footnote omitted.) The Supreme Court said there that it did not believe "Congress could have expected defendants under § 922(g) . . . to know their own status[ ]." *Rehaif*, 139 S. Ct. at 2197. If one were to conclude otherwise, the Court said, "these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is '*punishable* by imprisonment for a term exceeding one year.'" *Id.* at 2198 (quoting 18 U.S.C. § 922(g)(1)).

Nasir, 2020 WL 7041357, at *20.

On the other side are the Fifth Circuit, Eighth Circuit, and possibly Sixth Circuit. The Fifth Circuit held, in *Staggers* and *United States v. Burden*, 964 F.3d 339 (5th Cir. 2020), *petition for cert. pending*, No. 20-5939 (filed Sept.

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[9] There was other evidence which was arguably suggestive of knowledge of illegal alien status, *see supra* p. 6 n.1, but that evidence was, first, not pointed to by the lower court, *see* App. A003, and, second, ambiguous, *see* App. A054-55 (opening brief argument that evidence could be explained by other concerns). To the extent this other evidence might be sufficient, that is a question that should be considered in the first instance by the lower court. And it affects only the illegal alien in possession of a firearm conviction, not the felon in possession of a firearm conviction.

30, 2020), *and* No. 20-5949 (filed Sept. 30, 2020), that "absent any evidence suggesting ignorance, a jury applying the beyond-a-reasonable-doubt standard could infer that a defendant knew that he or she was a convicted felon from the mere existence of a felony conviction." *Staggers*, 961 F.3d at 757; *see also Burden*, 964 F.3d at 348 (quoting *Staggers*). The Eighth Circuit held, in *Owens* and *United States v. Gilmore*, 968 F.3d 883 (8th Cir. 2020), that "[r]ational jurors, using reason and common sense in light of their own observations and experiences, could infer beyond a reasonable doubt that a felony conviction would be a significant life event that a person would know about when it happened and remember at a later date." *Owens*, 966 F.3d at 709; *see also Gilmore*, 968 F.3d at 888 (citing *Owens*). The Sixth Circuit held, in *Ward*, that a stipulation was enough, at least when accompanied by the defense attorney's statement in closing argument that "[the defendant is] stipulating that he has a felony. So you can check that one off the box." *Id.*, 957 F.3d at 696.

In between these cases and *Nasir* are the Second Circuit and Seventh Circuit. The Second Circuit, in *Miller*, characterized the question as "a difficult one" and "decline[d] to decide whether a properly-instructed jury could have found that [the defendant] was aware of his membership in § 922(g)(1)'s class." *Id.*, 954 F.3d at 559. The Seventh Circuit, in *Maez*, also declined to "go so far as to hold that [a] stipulation standing alone is sufficient to infer, beyond a reasonable doubt, a defendant's knowledge of his status," and found there was sufficient evidence only because there was additional evidence. *Id.*, 960 F.3d at 967.

It is important to resolve this split because the stipulation to status will

be the sole evidence in most pre-*Rehaif* felon in possession of a firearm cases. Challenges will fail in those cases if the stipulation is enough. But the challenges will not fail if the stipulation is not enough.

4. This Case Is an Excellent Vehicle for Addressing the Questions Presented.

This case is an excellent vehicle for addressing all of the questions presented. To begin, the present case may be the only petition which directly presents the question of whether a general motion for judgment of acquittal preserves a sufficiency of evidence challenge. Most of the other petitions, if not all of them, focus on whether, assuming plain error review, the reviewing court can look to evidence outside the trial record. This petition squarely presents the preliminary question of whether plain error review applies in the first place.

This case is also an excellent vehicle for addressing the question of whether it is permissible for a court to look outside the trial record if the plain error standard does apply. The lower court clearly did that here, pointing to the fact that Petitioner "received a 30-month sentence, *according to the revised presentence report*." App. A003 (emphasis added). This case also presents a nuance contained within the question of whether it is permissible for a court to look to evidence outside the trial record, namely, what the strength and quality of that evidence must be. The Ninth Circuit has described the evidence which must exist as "overwhelming and uncontroverted," *Johnson*, 979 F.3d at 638, and the Seventh Circuit has described it as "a narrow category of highly

reliable information," *Maez*, 960 F.3d at 963. In most instances, that will be evidence the defendant has actually served more than a year in prison. In Petitioner's case, there was uncontroverted evidence that there was a sentence *imposed* of more than a year, but not uncontroverted evidence that he *actually served* more than a year in prison, *see* App. A099 (reply brief argument explaining presentence report made clear Petitioner did not serve the full 30 months in prison because he was sentenced on March 11, 2011 and apprehended illegally in the country just a little more than a year later). It is *actually serving* more than a year in prison that makes evidence of a prior sentence "overwhelming and uncontroverted" or "highly reliable" evidence, because it is what a defendant *actually serves* that he will indisputably understand.

Finally, this case is an excellent vehicle for resolving the question of whether a stipulation alone is sufficient evidence, because the stipulation is the only evidence in the trial record to which the court below pointed. This is not a case like *Ward*, where the court also pointed to the defense attorney's closing argument. *See id.*, 967 F.3d at 696. It is not a case like *Maez*, where the court also pointed to evasive behavior at the time of a search. *See id.*, 960 F.3d at 967. It is not a case like *Nasir*, where the government, though not the court, also pointed to furtive behavior and hiding the guns. *See id.*, 2020 WL 7041357, at *21 & n.37.

In the present case, the stipulation is the only trial evidence to which the lower court pointed. This squarely presents the question of whether a stipulation alone can be sufficient evidence.

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: December 29, 2020

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

A P P E N D I X 1

NOT FOR PUBLICATION

FILED

JUL 31 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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. 19-10252 D.C. No. 4:14-cr-01568-CKJ-EJM-1 MEMORANDUM*

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

Argued and Submitted July 13, 2020
San Francisco, California

Before: IKUTA and HURWITZ, Circuit Judges, and TAGLE,** District Judge.

Jesus Eder Moreno Ornelas ("Moreno") appeals his convictions for possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession of a firearm by an illegal alien, in violation of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Hilda G. Tagle, United States District Judge for the Southern District of Texas, sitting by designation.

§§ 922(g)(5)(A) and 924(a)(2).[1] He also appeals his sentence of 520 months of imprisonment to be followed by five years of supervised release. We affirm.

1. Moreno challenges his felon-in-possession and illegal-alien-in-possession convictions in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held that in a prosecution under 18 U.S.C. §§ 922(g) and 924(a)(2), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id*. at 2200.

Because Moreno did not raise a *Rehaif* challenge when moving for acquittal in the district court, we apply plain error review to his sufficiency-of-the-evidence claim. *United States v. Benamor*, 937 F.3d 1182, 1188 (9th Cir. 2019). A claim of defective indictment raised for the first time on appeal is also reviewed for plain error. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002). Under the plain error standard, relief is not warranted unless there has been (1) error, (2) that is plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id*. (citing *United States v. Olano*, 507 U.S. 725, 731 (1993)).

It is undisputed that the indictment did not charge the requisite knowledge of

[1] We previously vacated Moreno's convictions for two counts of attempted robbery. *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018).

status, and that the district court erred by not requiring the government to prove Moreno's knowledge of his statuses as a convicted felon and an unlawful alien. *See United States v. Luong*, --- F.3d ---, 2020 WL 4033847, at *11 (9th Cir. July 17, 2020); *United States v. Johnson*, 963 F.3d 847, 850 (9th Cir. 2020). However, Moreno cannot satisfy the third and fourth prongs of the plain error test. He stipulated to a prior felony conviction, for which he received a 30-month sentence, according to the revised presentence report. *See Johnson*, 963 F.3d at 854 (concluding that uncontroverted evidence that defendant was sentenced to more than a year in prison "will ordinarily preclude" satisfaction of the fourth prong). Moreno also stipulated that he was not a U.S. citizen and was in the country without the Attorney General's consent. There is no reasonable probability that, but for the omission in the indictment, the jury would have reached a different verdict on the possession charges. For this reason, the error did not affect Moreno's substantial rights, nor the fairness, integrity, or public reputation of the trial. *See Luong*, 2020 WL 4033847, at *12. And for the same reason, the district court did not plainly err in determining the evidence was sufficient to support Moreno's convictions.[2]

[2] We would reject Moreno's *Rehaif* challenge to the sufficiency of the evidence even if it were preserved before the district court. Considering the "evidence presented at trial in the light most favorable to the prosecution," a "rational trier of fact" could find that Moreno knew of his prohibited status beyond a reasonable

2. Moreno challenges his sentence on two grounds, which we address in turn. We first reject his argument that *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), overruled *United States v. Watts*, 519 U.S. 148 (1997) (per curiam). *Nelson* held that if a person is not convicted of an offense, the consequences specific to a conviction of that offense cannot be imposed. 137 S. Ct. at 1257–58. This does not contradict *Watts*'s holding that if a defendant is convicted of an offense, the district court can consider all relevant conduct at sentencing. 519 U.S. at 153–54. Accordingly, the district court did not err in considering conduct underlying the attempted murder charge that did not result in a conviction.

We also reject Moreno's argument that the sentencing judge erred in interpreting and applying the attempted first-degree murder guideline, U.S.S.G. § 2A2.1(a)(1). We review a court's interpretation of the guidelines de novo; application of the Guidelines to the facts of a given case for abuse of discretion; and factual findings for clear error. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1174–75 (9th Cir. 2017) (en banc).

The district court correctly interpreted the attempted first-degree murder guideline by distinguishing the requisite elements of "intent to kill" and "premeditation." Further, the district court did not abuse its discretion in applying

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doubt. *United States v. Nevils*, 598 F.3d 1158, 1163 (9th Cir. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

the attempted first-degree murder guideline. Sufficient evidence supports the finding that Moreno contemplated the attempted killing, given Moreno's conduct leading up to the physical altercation (including his initial refusal to comply with the officer's orders); the length of the altercation; Moreno's dominant position during the altercation; the timing and the number of shots fired; the officer yelling "no, no" when the second and third shots were fired towards him; and Moreno's statements suggesting that he was thinking about the consequences of his action.

AFFIRMED.

A P P E N D I X 2

FILED

AUG 28 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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. 19-10252 D.C. No. 4:14-cr-01568-CKJ-EJM-1 District of Arizona, Tucson ORDER

Before: IKUTA and HURWITZ, Circuit Judges, and TAGLE,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judge Ikuta and Judge Hurwitz voted to deny the petition for rehearing en banc, and Judge Tagle has so recommended.

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 petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Hilda G. Tagle, United States District Judge for the Southern District of Texas, sitting by designation.

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 October 19, 2015 10:30 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

BEFORE: THE HONORABLE CINDY K. JORGENSON, DISTRICT JUDGE

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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

to consider that and reject the arguments that he made inappropriate gestures at trial.

And finally, just again, it's not appropriate procedure to consider documents now that the Government had the burden of producing prior to this hearing, and that's in reference to the judicially noticeable documents. That's not appropriate. That's not the procedure. The Court should not even consider that argument.

And just to finalize, again this was a case of aggravated assault, not of attempted first degree or second degree murder. The appropriate guideline is 2A2.2. That's what Mr. Moreno Ornelas should be sentenced under because that's the level -- seriousness of this case, including the weapon was for that conduct, your Honor.

THE COURT: All right. Thank you, Mr. Marble.

All right. This is the Court's guideline calculations. I appreciate the briefing from both sides and the extraordinary efforts of the probation department in calculating the guidelines or giving the Court some guidance in this. This is an unusual case in this District as far as guideline calculations. It's not our normal type of case where we are calculating the guidelines.

In my discretion, obviously I sat through the trial, I heard the evidence. Relevant conduct is something the Court can consider in calculating the guidelines. The guidelines

clearly call for that. The Court is aware that the jury deadlocked on the attempted murder charge. However, in my review of the evidence, the Court finds that there is clear and convincing evidence of that, his relevant conduct.

So the Court finds that the appropriate guideline is 2A2.1, assault with intent to commit murder and attempted murder which has a base offense level of either 33 or 27. In reviewing the evidence, I agree with the Government. I think 33 is the more appropriate number because if the object of the offense would have constituted first degree murder, then the base offense level is 33. I think that's supported by the evidence here.

Obviously, the jury didn't hear -- wasn't aware of everything this Court was aware of. The defendant's statement, I excised a lot of that for the jury because I thought it was very inflammatory; however, that's not the primary thing the Court is relying on but that's something that the jury didn't hear. The defendant's statement indicates to the Court that, although he did say -- he was bragging he could have killed Officer Linde if he had chosen to and he chose not to, the statement clearly shows the Court that he has the capability and ability and perhaps maybe has killed other people for various reasons as outlined in the statement. So that's just one piece of evidence that this Court reviewed that the jury didn't have an opportunity to

review.

This is not a type of case where the defendant was impaired or intoxicated and could argue there was some heat of passion here. There was a struggle. Officer Linde was struggling for his life here. But this defendant had time and reflection from the very start of the incident, his first encounter with Agent Linde as he's walking down the road, he had time to reflect and decide how he was going to interact with Agent Linde. And the trial, I'm not going to go through all the evidence, but clearly you can just see the progression of his conduct.

And the evidence shows that Officer Linde was on the ground, and the defendant took the gun out of the holster and then started to fire it at the agent. That is premeditation. That's intentional conduct. He could have done other things. Things that -- considering what he didn't do, he didn't grab the gun and run away or grab the gun and throw it away, but he grabbed the gun and started firing at Agent Linde. And I'm not going to go through all the details, but that shows me that this was a premeditated attempt to kill Officer Linde. So that would make it a base offense level of 33 instead of 27 which is proposed by the probation office.

We have no dispute as to the plus 6 which is 3A1.2(c)(1).

As to the obstruction of justice, the Court finds

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-CKJ(EJM) Tucson, Arizona July 16, 2019

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RESENTENCING HEARING

BEFORE: THE HONORABLE CINDY K. JORGENSON
UNITED STATES SENIOR DISTRICT JUDGE

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his protection. These are not actions of a man that is concerned about his safety. These are actions of a man who is trying to kill someone else.

And to say that there's not premeditation, he, by his own words, said he took the gun from the officer and fired four shots. Your Honor, I don't know how it could be any more clear and convincing evidence. That has not changed one bit since years -- a couple of years ago before the appeal we were in front of this Court and the Court found such clear and convincing evidence. And I would urge the Court to adopt those -- that base offense level.

THE COURT: All right. Thank you.

So the Court does adopt the base offense level of 33 as proposed in the presentence report. I'm adopting my previous analysis that I conducted, after hearing from counsel, last time when I sentenced this defendant. I think there is clear and convincing evidence that this defendant was attempting to commit the crime of murder based on -- and I do find the testimony of Officer Linde to be credible, truthful, reliable. He affirmatively told the jury that he did pass out on a couple of occasions during this incident, but he has very clear memory of what happened when he was conscious and fighting for his life.

It's very clear that he is an eyewitness to this incident. He saw what this defendant was attempting to do,

which was to shoot him. He was able -- I'm just looking at the transcript. He says, I was able to push the gun up and off of my chest area up into the air.

He was trying to push it back down into my chest area but he wasn't able to do it. I gained my strength back and I was able to keep it up.

That's just part of the transcript.

So it's clear to me that Officer Linde has a good memory as an eyewitness of what was being done to him for most of this encounter.

And the Court finds that Mr. Barkman's opinions are not based on a sound review of all of the evidence and the testimony. For example, he opines that Officer Linde was holding his gun while he was attempting to handcuff the defendant. I'm just not sure where that comes from. I think several of his opinions are not based on the actual evidence presented, and his opinions are finding that this defendant is more credible than the officer in describing the incident.

First of all, we don't have a very detailed description from the defendant in police reports about what actually happened. Officer Linde gives a more detailed account. And believing the defendant means that the Court would need to find that this agent was not credible, and the Court finds that the agent was credible.

So in looking at the credibility, the Court finds

that when Mr. Barkman chooses to rely on the defendant's versions of events which several times he talks about feeling that that version is a more reliable summary of what happened, that's just an example where this Court finds that his opinions are not based on an accurate analysis of the nature of the case.

And I'm just concerned that any tests that he did don't appear to me to be tests that are really probative in this particular case because I think the most important evidence in this case is not so much any forensic testing that could be done, which even Mr. Barkman admits there's not too much that he can do, but is the eyewitness account of what happened.

And Officer Linde has been consistent. I think he's very believable. And I think his testimony supports the finding that this defendant was attempting to kill him with that firearm.

So I'm going to overrule the objection and find that the base offense level is properly a 33 as outlined in paragraph 19 of the presentence report.

And then we have the plus six under 3A1.2(c)(1) because this assault occurred with the defendant knowing that he was assaulting a law enforcement officer as outlined in paragraph 20.

The adjustment for obstruction of justice, I'm going

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) Tucson, Arizona June 30, 2015 9:41 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL DAY FIVE

BEFORE: THE HONORABLE CINDY K. JORGENSON, DISTRICT JUDGE

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1:30. Thank you.

(The jury was excused from the courtroom at 11:40 a.m.)

THE COURT: So the jury is gone. So Mr. Marble, did you want to make your Rule 29 motion?

MR. MARBLE: Yes, your Honor.

THE COURT: Go ahead.

MR. MARBLE: Your Honor, under Rule 29 judgment of acquittal, I move for judgment of acquittal on each and every count because the Government has failed to carry it's burden of proving each and every element of those counts. There's very specific -- there's a couple of very specific arguments I'd like to make to the Court.

The first one regards what would be Count One and Count Two which, in essence, can relate to Count Three. The argument is the Government must prove beyond a reasonable doubt that Agent Linde was acting within his official duties. And the case law I submitted to the Court for the proposed instructions is insightful, the supplemental case authority. From the Ninth Circuit, the cases I submitted are important because in each instance the person is acting under a very specific authority that they're granted by statute or by law. And then the question becomes whether or not that person was in the scope of what they're employed to do. So really it's kind of a two-part -- it's really a two-part test.

In my supplemental jury instructions, I think I

tried to explain that because it is important. Especially I think the Juvenile Female case from 2009 clearly shows the analysis because the first analysis was whether or not Border Patrol had the right to stop this vehicle and search for drugs. So in this case, the facts that we have are this: This is the Forest Service law enforcement agent. He's not on Forest Service land. He's not authorized under Title 8 to make an immigration arrest. He's not cross-certified with Border Patrol. He's not cross-certified with Cochise County because his cross-designation -- I'm sorry, cross-designation had lapsed.

So there must be some authority for this agent to be able to act in order for this case to go to the jury, and I think that there hasn't been evidence presented that the jury could reasonably conclude that this agent was acting within what his authority was. Absent the cross-designation from Border Patrol or being on Forest Service land or maybe even if the Cochise County cross-designation hadn't lapsed, there needs to be some sort of authority for him to act in an area that he's not trained or an area that he's not authorized by law or statute to enact. I think the evidence said that this was suspected illegal aliens as the reason why he responded, so I don't think there's a plausible way for that authority to be authorized.

The evidence that we did have would be -- the

evidence that we did have was a Memorandum of Understanding that essentially gave broader power to Border Patrol acting on Forest Service land. That doesn't authorize the actions. A Trident program, that, again, doesn't provide authorization for immigration. So for that reason, for Counts One and Two both -- it's an element for Counts One and Two that's required.

And Count Three, of course, requires a guilty verdict of either One or Two in order to be the use of the firearm in relation to the crime of violence. So for those three counts, I don't think -- I think that a judgment of acquittal would be appropriate.

The final count is the attempted robbery of the vehicle, your Honor. I know we haven't settled the instructions for attempted robbery, and there's not a model instruction. But I think what's important about the attempted robbery of a vehicle is this: Even the -- I think all -- I forgot to compare this, but I think we each agree the item must be taken by force, intimidation, or threats. That might be not be the exact language, but that's the essence of there -- that's an element that has to be shown.

I don't think there's been any testimony that Mr. Moreno Ornelas went to the vehicle, using the weapon to gain control of the vehicle, throwing the agent out. It was he just went to the vehicle. Essentially, that's not

attempted robbery because there was no use of force or threats to obtain possession of that vehicle. He just simply walked over to it and got inside. The door was still open I believe is what we heard. So I don't think under any theory that element has established for the jury to conclude that by struggling with the officer -- clearly the attempted robbery of the weapon would be a question for the jury, but not the vehicle.

So I submit that those very specific arguments in addition to my general judgment for acquittal, your Honor.

THE COURT: Thank you, Mr. Marble.

Government response.

MS. WOOLRIDGE: Thank you, your Honor. Briefly.

With regard to the counts that weren't mentioned, and I won't go into detail, the illegal reentry and unlawful possession of firearm charges, I would also point to the stipulation that's been entered into by both parties and entered and admitted into evidence that establishes many of the elements of these offenses.

But going specifically to the counts that the defendant has argued, with regard to Counts One, Two and Three and the argument of official duties, first of all I think it's important to point out that the official duty element requires that some -- that the officer is assaulted or attempted to be murdered while engaged in or on behalf of his official duties.

The case law that has been submitted by the defendant, although perhaps in some of these cases the victim in that case was acting on authority granted to them by statute, those cases don't stand for the conclusion that that authority granted by statute is necessary. Just because a fact exists in one case doesn't result in that being required for every case. And every case is analyzed open a case-by-case basis.

And what is required and what's clear by Ninth Circuit law is that official duties is what an officer is employed to do as opposed to on a personal frolic. Here the evidence is very clear. Officer Linde was not on a personal frolic. He was on duty that day. He was on duty at the time that this occurred. He was getting paid for being on duty at that time. He was going from one area that he was acting within the scope of his duties to another. He was not at all off duty at the time. He wasn't eating lunch. He wasn't -- he hadn't already clocked off for the day. He was being paid and he was doing things that he was not only required to do but approved to do. He did not make an immigration arrest. At the very most with regard to immigration, he made a detention for another agency that is the Border Patrol.

There are grounds for finding that he was engaged in his official duties on a number of respects. First of all, it's the concept of nexus with the United States Forest Service land. The incident itself happened just outside of

Forest Service land, but the first report of these individuals was while the individuals -- the defendant and the material witness -- were on Forest Service land. The couple that saw that and reported that to Mr. Canez, that occurred on Forest Service land.

Then the second report from Mr. Soto, they were seen on Fish and Wildlife land. That's also federal land and that's another agency that Officer Linde is cross-designated to enforce on. The road where they were ultimately found is the main road in and out of the Coronado Forest, so the main road in and out of Forest Service land and is accessed on a regular basis as the main access point to that land and often transversed during the course of an officer's duty when working in that area.

Officer Linde has Title 21 authority. Therefore, if there's just even suspicion of drug trafficking activity, it doesn't have to be proven -- this concept that an offense need to be proven before an officer can investigate it is really nonsensical. Obviously, that's why they investigate; to prove or disprove suspicion of an activity. And there certainly was suspicion of drug trafficking activity as confirmed by the material witness statements that had in fact been what was going on.

The officer is required by statute, Title 16, Section 55 -- sorry, 559c and d, admitted as exhibits 96 and

97, he's required by statute to assist other agencies, and that's exactly what he was doing in this case by assisting Border Patrol. And we would ask that the Court take judicial notice of these two exhibits, these two statutory exhibits.

THE COURT: Let me ask, I'm just curious, is it trespassing on Forest Service land for an undocumented person to be there? Is that a violation of Forest Service regulations, or is that just a violation of Title 8, if you know?

MS. WOOLRIDGE: I don't know, your Honor. I'll be honest, I am not prepared to answer that question.

THE COURT: Okay. So 96 and 97 were admitted.

MS. WOOLRIDGE: That's correct.

THE COURT: Those statutes have been admitted. But the MOU was not?

MS. WOOLRIDGE: No, your Honor.

THE COURT: Okay. So go ahead.

MS. WOOLRIDGE: We also heard the testimony of Captain Cheri Bowen who is the officer's supervisor and who testified that what he was doing is exactly what she would expect and require of her employees. So when we look at the jury instruction, what an officer was employed to do, he was doing exactly what he was employed to do that day and was certainly not engaged in any sort of personal frolic. So I think the official duty aspect, that he was engaged in

official duties, certainly has been proven beyond any reasonable doubt.

Also, your Honor, he was assaulted and attempted to be murdered by the defendant on account of his official duties. The defendant knew that Officer Linde was a law enforcement officer. He may not have known the exact agency, but knew that he was a law enforcement officer trying to make a stop of him. And that is why he did that. The defendant's own words, he didn't want to get caught. Well, he wasn't worried about getting caught by a civilian. He wasn't worried about getting caught by an off-duty officer. He was worried about getting caught from an on-duty law enforcement agency and facing the consequences for his criminal activity. That's exactly why the defendant did what he was doing -- did what he did to get away. So we have satisfied both prongs as charged in this case, while engaged and on account of, prongs of the official duty element.

With regard to robbery of a vehicle, your Honor, and I'm not -- I believe that it's Count Four of the Indictment, there was force used that was necessary for the defendant to attempt to take the vehicle. Had the defendant not used force against the officer, he would have been handcuffed at the time. He would not have been able to access that vehicle. He would not have been able to get in that vehicle. So it was through the defendant's use of force against the officer that

he was able to attempt to take that vehicle. And that force was necessary. He never would have been able to get in that vehicle had he not used an extreme amount of force against the officer. Knocking him on the ground, almost knocking him out, able to just take his weapon away from him, all that force used was essential to allow him to then attempt to get into that vehicle. And by his own words he wanted and was considering taking that vehicle to Mexico. So your Honor, that force was an essential part of that chain of events that allowed him to, again, attempt to take the vehicle.

THE COURT: All right. Thank you. I'm going to deny the Rule 29 motion for judgment of acquittal on the counts that Mr. Marble is asking for. I don't think it was for all counts, Mr. Marble, just the particular ones. I think there is sufficient evidence of the various elements of each of these crimes for the jury -- the Government has presented sufficient evidence for the jury to make the decision. So that motion is denied.

And let's just start -- go ahead, Mr. Marble.

MR. MARBLE: Sorry. One other -- I'm sorry. I apologize. On our stipulation of -- I knew we were stipulating to 318, 319. I made a mistake. We never really had a ruling whether or not we were going to admit the statutes. And I'm sorry, I think Exhibit 96 and 97 are the statutes, and actually I need to.

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(EKM) Tucson, Arizona July 1, 2015 11:05 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL DAY SIX

BEFORE: THE HONORABLE CINDY K. JORGENSON, DISTRICT JUDGE

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may not consider his assistance to Border Patrol as a basis to find that he was acting within the scope of his official duties.

THE COURT: All right. So let's see, Mr. Marble, anything else?

MR. MARBLE: Two other. Yes, your Honor.

THE COURT: Go ahead.

MR. MARBLE: Quickly. Just to make sure, I know that my Rule 29 was denied at the close of the Government's evidence. I know the law requires at the close of all evidence, just to make certain that since we rested without evidence, I just wanted to make sure that the record -- if I can just --

THE COURT: Renew that?

MR. MARBLE: -- without arguing, request my Rule 29 again without argument at the close of evidence just to make sure that it's not omitted.

THE COURT: Not waived. Yes, certainly. The record may reflect that Mr. Marble has renewed his Rule 29 motion after the close of evidence, and the Court will deny that motion.

MR. MARBLE: And the final point, your Honor, is I failed to object in a timely manner during the Government's second closing. I believe that they misstated the law, and that was -- I'll paraphrase. When talking about the official

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 JUANNI MORENO ORNELAS, also known as JESUS EDER MENDIVEL-MENDIVEL, Defendant.	CR 14-1568-TUC-CKJ (EJM) STIPULATIONS OF FACT

It is hereby STIPULATED by the defendant Jesus Eder Juanni Moreno-Ornelas and the United States that the following facts and elements are uncontested in the above-captioned case, and shall be considered by the Court to have been proven, beyond a reasonable doubt, within the trial of this case:

1. The defendant, Jesus Eder Juanni Moreno-Ornelas, was born in Mexico, and is not, nor has he ever been, a national or naturalized citizen of the United States.

2. The defendant, Jesus Eder Juanni Moreno-Ornelas, was deported and removed from the United States on May 18, 2014.

3. The defendant, Jesus Eder Juanni Moreno-Ornelas, admits that he has not at any time obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission to the United States.

4. The defendant, Jesus Eder Juanni Moreno-Ornelas, was illegally or unlawfully present in the United States on August 23, 2014.

5. On March 11, 2011, the defendant, Jesus Eder Juanni Moreno-Ornelas, had been previously convicted of a crime punishable by imprisonment for a term exceeding one year.

The content of this stipulation is true and correct. Further, it has been explained to the defendant, and he is in agreement with its content. These facts and elements shall be considered uncontested and proven by the government, beyond any reasonable doubt.

JESUS MENDIVAL MORENO ORNELAS
Jesus Eder Juanni Moreno-Ornelas
Defendant

Jay Marble, Esq.
Attorney for Defendant

Respectfully submitted this 22nd day of June, 2015.

JOHN S. LEONARDO
United States Attorney
District of Arizona

6/22/15
Date

CARIN C. DURYEE
ANGELA W. WOOLRIDGE
Assistant U.S. Attorneys

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 22, 2015 9:02 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL DAY ONE

BEFORE: THE HONORABLE CINDY K. JORGENSON, DISTRICT JUDGE

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that his intention was never to kill Agent Linde.

THE COURT: Thank you, Mr. Marble.

Do counsel want to read the stipulation of facts to the jury at this point or later in the case?

MS. WOOLRIDGE: Your Honor, it may be best to do it now.

THE COURT: All right. And did you want the stipulation marked as an exhibit or actually go back to the jury?

MS. WOOLRIDGE: Sure, your Honor. We can mark that as Exhibit - I believe it will be 92.

THE COURT: Exhibit 92.

MS. WOOLRIDGE: And if I may approach the clerk, I have --

THE COURT: Sure. So I will return that to you and you can read that to the jury.

And members of the jury, a stipulation is an agreement between both sides that certain facts do exist so you can consider these facts as true. Ms. Woolridge is going to read the stipulation which has been signed by the defendant, his attorney, and Government's attorney. And there will also be a hard copy, an exhibit, for you when you start your deliberation.

So Ms. Woolridge, you may read the stipulation.

MS. WOOLRIDGE: Thank you, your Honor.

Ladies and gentlemen of the jury, it is hereby stipulated by the defendant, Jesus Eder Juanni Moreno Ornelas, and the United States that the following facts and elements are uncontested in this case and shall be considered to have been proven beyond a reasonable doubt within the trial of this case:

First, the defendant, Jesus Eder Juanni Moreno Ornelas was born in Mexico and is not, nor has he ever been, a national or nationalized citizen of the United States.

Two. The defendant, Jesus Eder Juanni Moreno Ornelas, was deported and removed from the United States on May 18th, 2014.

Three. The defendant, Jesus Eder Juanni Moreno Ornelas, admits that he has not at any time obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission to the United States.

Four. The defendant Jesus Eder Juanni Moreno Ornelas was illegally or unlawfully present in the United States on August 23rd 2014.

Fifth. On March 11th, 2011, the defendant, Jesus Eder Juanni Moreno Ornelas, had been previously convicted of a crime punishable by imprisonment for a term exceeding one year.

The parties agree that the content of the

stipulation is true and accurate and that these facts and elements shall be considered uncontested and proven by the Government beyond any reasonable doubt. Thank you.

THE COURT: Thank you. And Exhibit 92 is admitted into evidence.

(Exhibit 92 entered into evidence.)

And the Government may call its first witness.

MS. DURYEE: Your Honor, may we have a few minutes to get some evidence out of the box?

THE COURT: Yes.

And while the Government is doing that, let me just explain to you some of the logistics here. At times the attorneys may use these screens to show exhibits to the witnesses and the big screen there for the people in the audience. Until the exhibit is actually admitted into evidence, you won't see it on your screen. So sometimes the lawyers and I might see the exhibit and the witness, but you will not see it until it's admitted into evidence.

Further, if the screens are used and the computer system is used, that doesn't mean that you won't have a hard copy of the exhibit when you start your deliberations. For example, if a photograph is shown to you on the screen and admitted into evidence, you will have a hard copy of that photograph when you start your deliberations.

So, all right. Mr. Duryee.

A P P E N D I X 6

CA NO. 19-10252

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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CA NO. 19-10252

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 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. The appeal is timely because judgment was entered on July 16, 2019, ER 96-100, and a notice of appeal was filed on July 26, 2019, ER 95.

* * *

II.

STATEMENT OF ISSUES PRESENTED

A. MUST FELON IN POSSESSION OF A FIREARM AND ILLEGAL ALIEN IN POSSESSION OF A FIREARM CONVICTIONS BE VACATED BECAUSE THE GOVERNMENT FAILED TO PROVE, THE INDICTMENT FAILED TO ALLEGE, AND THE INSTRUCTIONS FAILED TO REQUIRE, THAT MR. MORENO *KNEW* HE HAD BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR IN PRISON AND/OR HE WAS IN THE COUNTRY ILLEGALLY OR UNLAWFULLY, AS REQUIRED BY *REHAIF V. UNITED STATES*, 139 S. Ct. 2191 (2019)?

B. WAS IT ERROR TO USE AN ALLEGED ATTEMPTED MURDER TO ENHANCE THE SENTENCE BECAUSE THE JURY FAILED TO REACH A VERDICT ON A CHARGE OF ATTEMPTED MURDER, AND *UNITED STATES V. WATTS*, 519 U.S. 148 (1997), PERMITTING CONSIDERATION OF CONDUCT OF WHICH THE DEFENDANT WAS NOT CONVICTED, HAS BEEN UNDERMINED BY *NELSON V. COLORADO*, 137 S. Ct. 1249 (2017)?

C. WAS THERE AN ABUSE OF DISCRETION IN THE DISTRICT COURT'S APPLICATION OF A FIREARMS GUIDELINE CROSS REFERENCE – IN USING THE GUIDELINE FOR ATTEMPTED FIRST DEGREE MURDER RATHER THAN THE GUIDELINE FOR ATTEMPTED SECOND DEGREE MURDER – BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF PREMEDITATION AND THERE IS SOME INDICATION THE DISTRICT COURT APPLIED

INCORRECT LEGAL STANDARDS?

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 fired from the officer'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 472-75.

B. TRIAL.

Trial began on June 22, 2015. *See* 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 was on patrol in a mountainous area in southern Arizona on the day of the incident. ER 287-88. A Forest Service technician told him there was a report of three illegal aliens in the area, one of whom was injured. ER 288. Another Forest Service employee subsequently informed Officer Linde he had just passed the individuals in a nearby wildlife preserve. ER 290.

Officer Linde called the Border Patrol, which asked him to assist, and he said he would. ER 290, 294. He drove toward the wildlife preserve and observed two men walking on a road. ER 294-95. Officer Linde stopped and asked the two men if they needed water, and they said no. ER 295.

Officer Linde then ordered the men to put their hands on the front of his vehicle. ER 295. One of the men complied. ER 297. The other man, who was Mr. Moreno, did not comply. ER 297. Officer Linde testified Mr. Moreno "wasn't standing still, was moving around, and was very agitated." ER 297. He clenched his fists, squared his shoulders, and looked angry – which Officer Linde labeled "pre-assault indicators" – and then started "charging" Officer Linde. ER 297-98.

Officer Linde testified he pulled out his pistol and told Mr. Moreno to get back. *See* ER 298. He testified Mr. Moreno put his hands up and walked back to

the front of the vehicle. *See* ER 298-99. Officer Linde told the other man to prone out and walked up to Mr. Moreno. ER 299-300. 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 300. He handcuffed the right hand and almost had the second handcuff on the left hand when Mr. Moreno pulled away. ER 428-29. *See also* ER 315.

Officer Linde testified he had a blank in his memory at this point, and "[t]he next thing I knew he was in my area and we were fighting." ER 315. He testified he remembered Mr. Moreno "going for my pistol on my holster," "used my hands to retain the pistol," and at that time, "I went to the ground." ER 316. Mr. Moreno ended up on top of him and was punching him in the face. ER 317. The officer testified there was then another blank in his memory until he felt "the sensation of my pistol being pulled out of my holster." ER 318.

Officer Linde then testified about several shots. He remembered two shots being fired as the pistol was coming out of the holster and he was trying to retain it. *See* ER 318-19. He felt the pistol was being pushed into his chest, at which time he pushed it to the side, and another shot fired, which he testified "went to my right," "by my chest, by my ear, my head." ER 320. He kept both of his hands on Mr. Moreno's left wrist and was able to keep the gun up and pointed away from his chest. ER 321.

Mr. Moreno then tried to get off of Officer Linde, ER 321, but Officer Linde locked his legs around Mr. Moreno's neck in a "tactical fighting" "MMA move" called "a modified triangle." ER 322. He squeezed Mr. Moreno's neck as hard as he could, and Mr. Moreno fired "a bunch of rounds up into the air," which was where the gun was pointed, ER 322-23. Mr. Moreno dropped the pistol, and Officer Linde picked it up and tried to shoot Mr. Moreno. ER 323-24. The gun

would not fire, so Officer Linde "kicked myself out of there," backed up, and did a "tactical reload." ER 324-25. While Officer Linde was pointing the gun at Mr. Moreno, Mr. Moreno, who was on his knees, put his hands in the air and "started yelling no, no, no, no, no." ER 324, 441. When Officer Linde did the tactical reload, Mr. Moreno ran toward Officer Linde's truck. ER 325.

Officer Linde did not fire at this point because there were no weapons in the vehicle and it had a security system that prevents it from being driven away even if the engine is running. ER 327. Mr. Moreno got into the vehicle when he reached it. ER 328. Officer Linde followed Mr. Moreno, put the gun to Mr. Moreno's chest, and told Mr. Moreno he would kill him if he moved. *See* ER 329.

2. Mr. Moreno's Statement.

Mr. Moreno presented a different version of events in a videotaped interview, most of which came into evidence under the rule of completeness when the government sought to introduce just short excerpts, *see* RT(6/29/15) 25-26, 29; RT(6/29/15) 82-83. Mr. Moreno admitted he did not comply with Officer Linde's initial commands and was going to leave, but was afraid Officer Linde was going to shoot him. *See* ER 207. Mr. Moreno 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 216-19. 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. *See* ER 217-19, 252. He stated he wanted to empty the weapon and then throw it away, so he fired more shots into the air until the gun stopped firing after he got it out of the officer's hand. *See* ER 221, 255. His intention when he ran to the

officer's truck was to take the car, drive it to the border, leave it there, and "jump," but he realized that was "stupidity" after he got into the truck. ER 228-29.

3. Evidence of Felon and Illegal Alien Status.

To support the felon in possession of a firearm and illegal alien in possession of a firearm counts and the illegal reentry count, the government introduced a stipulation which it read into evidence at the beginning of trial. *See* ER 466-71. The stipulation established the elements of the illegal reentry offense and also the status for the unlawful firearm possession counts, i.e., that Mr. Moreno had a prior felony conviction and was in the country illegally. *See* ER 466-71.

There was no other evidence introduced about Mr. Moreno's felony conviction, but there were some passing references to his entry and presence in the United States. The man who had been with Mr. Moreno testified in a material witness deposition introduced into evidence that, "I came illegally through the desert," that Mr. Moreno and others were with him when he came, and that they crossed over with marijuana. ER 137. A sheriff's detective who had participated in the post-arrest interrogation of Mr. Moreno claimed Mr. Moreno admitted in the interrogation that he was in the country illegally, *see* RT(6/26/15) 211, but the actual transcript of the interrogation which was introduced contained no such admission, *see* ER 109-24, 193-275. Mr. Moreno did indicate he had crossed the border by using a ladder to go over the fence, *see* ER 195, but he did not say that was because he could not be in the country legally rather than because his companion could not enter or because of the marijuana his companion said they were bringing. Mr. Moreno indicated he had wanted to avoid the Border Patrol,

see ER 199, 201, but he did not say that was because of his illegal presence rather than his companion's illegal presence. He said the reason he resisted when Office Linde tried to handcuff him was that he did not want to go to "the can," ER 259; *see also* ER 248, 253-54, but he did not say he thought he could be jailed for being in the country illegally rather than for his non-compliance with Officer Linde's initial orders.

C. JURY DELIBERATIONS AND VERDICT.

The jury had difficulty reaching verdicts. During the first day of deliberations, the jury sent out a note asking whether the force for attempted robbery had to be concurrent with the act of taking possession, but the court simply referred it back to the jury instructions, the argument, and the evidence. *See* CR 101, at 2. Deliberations continued into the next day, when the jury 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, the 18 U.S.C. § 924(c) count, the attempted robbery counts, the felon and illegal alien in possession of firearm counts, and the 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 count, and the court declared a mistrial on that count. *See* RT(7/2/15 p.m.) 7.

D. THE FIRST SENTENCING.

The probation office prepared a presentence report in which it calculated an offense level under the sentencing guidelines. It applied the Part 3D "grouping" rules to "group" all of the counts other than the 18 U.S.C. § 924(c) count and the illegal reentry count. *See* PSR, ¶¶ 13-15.[1] It then applied the guideline that produced the highest offense level, as required by § 3D1.3(a) of the guidelines. *See* PSR, ¶ 16. That was the guideline for the felon and illegal alien in possession of firearm counts – § 2K2.1. *See* PSR, ¶ 17.

This guideline produced the highest offense level because it contains a cross reference requiring application of the attempt guideline in § 2X1.1 when the firearm is used in the attempted commission of another offense. *See* PSR, ¶ 17 (citing U.S.S.G. § 2K2.1(c)(1)). The presentence report opined there was such an offense in the present case because "clear and convincing evidence would appear to establish that the defendant did attempt to use the firearm in question to commit second degree murder." PSR, ¶ 17. The report then calculated a base offense level of 38 based on the second degree murder guideline, in apparent reliance on subsection (a) of § 2X1.1, which makes the base offense level for an attempt offense "[t]he base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that

[1] There were multiple presentence reports filed, including an initial presentence report, a revised presentence report with an addendum responding to objections by the parties, and a further revised presentence report with a second addendum filed prior to resentencing after remand, *see infra* p. 14. The reports are cited as "PSR," "Revised PSR," and "Remand PSR," respectively, and are each being filed under seal pursuant to Interim Circuit Rule 27-13(d).

can be established with reasonable certainty." U.S.S.G. § 2X1.1(a).[2] It also added 6 levels for "official victim" under § 3A1.2(c)(1), based on the fact Officer Linde was a law enforcement officer, *see* PSR, ¶ 19, and 2 levels for obstruction of justice under § 3C1.1, based on the government's claim Mr. Moreno had made threatening gestures during witnesses' testimony, *see* PSR, ¶¶ 11, 21.

The defense objected to the base offense level calculation on two grounds. First, the defense pointed out there is a specific guideline for attempted murder – in § 2A2.1 – and § 2X1.1(c)(1) requires the specific guideline to be used when one exists. *See* CR 112, at 2-4. Second, the defense objected to the consideration of conduct which had not been found by the jury, though it acknowledged Ninth Circuit authority allowing consideration of such conduct. *See* CR 112, at 5-6. The defense agreed the clear and convincing evidence standard applied, *see* CR 112, at 5, and agreed any murder which was attempted was second degree murder, *see* CR 112, at 6-7, which would produce a base offense level of 27 under § 2A2.1, *see* U.S.S.G. § 2A2.1(a)(2).[3]

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[2] Subsection (b)(1) of § 2X1.1 adds a 3-level reduction "unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control." U.S.S.G. § 2X1.1(b)(1). The presentence report recommended against this reduction because "circumstances demonstrate the defendant would have committed all acts necessary for the successful completion of the substantive offense but for apprehension or interruption by some event beyond the defendant's control." PSR, ¶ 18.

[3] The defense also objected to the obstruction of justice adjustment and an enhancement under the illegal reentry guideline for the illegal reentry count, *see* CR 112, at 10-12, 13-14, but those objections are not pertinent to the issues raised in this appeal.

The government agreed the cross reference should be to § 2A2.1, but asserted the court could consider relevant conduct and Mr. Moreno had attempted a first degree murder rather than a second degree murder, arguing there had been premeditation in addition to intent to kill. *See* CR 117, at 10-11.[4] This made the base offense level 33 rather than 27, *see* CR 117, at 11; U.S.S.G. § 2A2.1(a)(1), and produced a total offense level of 41 after the official victim and obstruction of justice enhancements, *see* CR 117, at 17-18.

The probation office prepared a revised presentence report in response to the objections. *See* Revised PSR. It accepted the objection that the cross reference should be to § 2A2.1 and modified the recommended base offense level to 27, *see* Revised PSR, ¶ 17 & Addendum, at 22, without addressing the government argument that the attempted murder was first degree rather than second degree. This produced a total offense level of 35 when the official victim and obstruction of justice enhancements were added, *see* Revised PSR, ¶¶ 21, 34, and a guideline range of 262 to 327 months, plus 120 months, when combined with Mr. Moreno's criminal history category of V and a mandatory consecutive sentence on the 18 U.S.C. § 924(c) count, *see* Revised PSR, ¶ 60.

The parties then appeared for sentencing. Defense counsel argued the court should not apply any attempted murder guideline, but should apply the aggravated assault guideline, without further addressing the question of premeditation. *See* ER 41-42. The prosecutor reiterated the government's position that the court should apply the attempted murder guideline and that Mr. Moreno had attempted first degree murder because there was premeditation. *See* ER 51-58. The court

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[4] The government did not object to the clear and convincing evidence standard, but simply summarized Ninth Circuit case law on the question and asserted there was sufficient evidence under either standard. *See* CR 117, at 7-8.

agreed with the government and found a base offense level, total offense level, and guideline range of 33, 41, and 360 months to life, respectively. *See* ER 65-67. Combining this range with the mandatory consecutive sentence required for the 18 U.S.C. § 924(c) count, the court imposed a total sentence of 520 months. *See* ER 77-78.

E. THE FIRST APPEAL.

Mr. Moreno appealed after judgment was entered. The appeal focused on his convictions rather than his sentence. *See United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2638 (2019). He challenged multiple instructions, including the instruction on self defense, the instruction on the "official duty" requirement in the assault on a federal officer statute, and the instructions on attempted robbery. *See id.* at 1142-49. He also challenged the district court's exclusion of a defense expert for untimely disclosure of the expert's testimony. *See id.* at 1149-51. The expert's testimony would have explained how the gun could have fired accidentally during the struggle. *See id.* at 1150.

This Court rejected the challenge to exclusion of the expert and most of the instructional challenges, *see id.* at 1146-51, but agreed the attempted robbery instructions were erroneous, *see id.* at 1142-45. It further found the error was plain so the attempted robbery convictions must be vacated. *See id.* at 1145-46. The opinion concluded:

> 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.

Id. at 1151-52.

F. PROCEEDINGS ON REMAND.

The government chose not to retry the attempted robbery counts on remand. *See* RT(1/22/19) 3. The parties then discussed how Mr. Moreno should be resentenced. *See* RT(1/22/19) 3-12. Defense counsel noted that "the Ninth Circuit cases that we're looking at talk about how the sentencing package has become unbundled and that a new sentencing should occur under the circumstances." RT(1/22/19) 5. Counsel then filed a memorandum of law reiterating this:

> Ninth Circuit case law indicates that once some counts, among multiple, are remanded, the sentencing package has become "unbundled," and a completely new analysis should occur as if no sentencing had previously occurred. [*United States v.*] *Ruiz-Alvarez*, 211 F.3d [1181,] 1184 (9th Cir. 2000) (citing *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998)). The District Court has authority to re-examine the sentence and carefully consider a new judgment based on counts for which a defendant is still actually convicted. *Id.*

CR 175, at 2. The defense memorandum further argued this was particularly appropriate in the present case because "expert testimony, precluded previously due to a timing issue, would greatly assist the Court in fully analyzing the nature and circumstances of the incident before a new sentencing." CR 175, at 3. The government filed a memorandum of law arguing the defense was not entitled to a full resentencing and it was not appropriate to revisit factual issues. *See* CR 179, at 4.

The court responded with an order that took a middle ground. On the one hand, it stated, "Contrary to Ornelas' argument, the Ninth Circuit did not state that a new analysis should occur as if no sentencing had previously occurred," though it did not suggest the Ninth Circuit had affirmatively stated the contrary, as Ninth Circuit case law requires, *see United States v. Pimentel*, 34 F.3d 799 (9th Cir. 1994) (noting failure to raise guideline issue in first appeal does not preclude

defendant from arguing issue on remand, "as a general proposition," and argument precluded in instant case only because first opinion "expressly limited" scope of remand); *United States v. Caterino*, 29 F.3d 1390, 1394-95 (9th Cir. 1994) (explaining "general practice" is "to vacate *entire sentence* and remand for resentencing" and "we presume that this general practice was followed unless there is clear evidence to the contrary" (emphasis in original)). The district court then stated it nonetheless *could* allow such a full resentencing and would do so in this case.

> However, while the Ninth Circuit has not determined that the Court should "start the sentencing process on a clean slate," [quoting CR 175, at 2], the Court is not aware of any authority that prohibits such a process. Indeed, in *Ruiz-Alvarez*, the court stated a new sentencing package reflects a district court's considered judgment as to the punishment a defendant deserves. *Ruiz-Alvarez*, 211 F.3d at 1184. The court finds it is appropriate to allow the parties to submit additional information at the resentencing.

CR 180, at 1-2.

The probation office prepared a new presentence report following this order. *See* Remand PSR. It made revisions to reflect the district court's findings at the first sentencing. *See* Remand PSR, Second Addendum, at 25. This made the base offense level 33, based on attempted first degree murder; made the total offense level 41; and made the guideline range 360 months to life, plus the 120-month consecutive sentence for the 18 U.S.C. § 924(c) count. *See* Remand PSR, Second Addendum, at 25.

The court then held a full resentencing hearing. It first heard lengthy testimony from the defense expert it had excluded at trial, who opined the gun had been accidentally fired during the struggle. *See* RT(7/16/19) 5-62. It then heard argument on the various sentencing issues, including the question of whether there had been premeditation in addition to any intent to kill. *See* ER 2-15. This time,

defense counsel vigorously argued the middle ground of intent to kill but no premeditation. *See* ER 9-11. The prosecutor argued there was premeditation. *See* ER 11-15.

The court again agreed with the prosecutor. It stated it was "adopting my previous analysis." ER 15. It also stated it found Officer Linde credible and the defense expert not credible. *See* ER 15-17. It stated, when defense counsel asked for clarification:

> I really think premeditation can occur very quickly. There's no set time.
>
> And given the way this incident occurred, I think Mr. Ornelas had plenty of time and was clearheaded. I don't think he was dehydrated. There's no evidence that he was suffering from any mental deficiencies. He had incredible strength that day. He was absolutely determined not to be taken into custody. And I think he had an abundance of time to figure out what he was going to do and how he was going to behave. And he made choices and I think one of his choices was to attempt to kill this agent with the agent's firearm so that he wouldn't be apprehended.

ER 19-20. It then again imposed a 520-month sentence. *See* ER 31-32, 96-97.

V.

SUMMARY OF ARGUMENT

Initially, the unlawful firearm possession *convictions* which drove the guideline calculation must be vacated, because of a change in the law worked by the Supreme Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* held the statute making it unlawful for felons and illegal aliens to possess firearms requires proof that the defendant is a felon or illegal alien *and* that he *knew* he was a felon or illegal alien. That knowledge was neither charged in the indictment here, required to be found by the jury instructions here, or proven beyond a reasonable doubt here. The convictions must be vacated as a result.

Mr. Moreno's sentence must be vacated even if the convictions are not, moreover. Initially, the jury's failure to reach a verdict on the attempted murder charge made it error to consider the alleged attempted murder at all. *United States v. Watts*, 519 U.S. 148 (1997), did hold that a court may enhance a guidelines sentence based on conduct the defendant was not convicted of, but *Watts* has been undermined by the intervening Supreme Court decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). *Nelson* relied upon the presumption of innocence to invalidate a statute requiring a defendant to prove innocence to recover monetary penalties imposed for a conviction which was subsequently vacated. The Court explained the appellants were not, "adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Id.* at 1256. Similarly, Mr. Moreno, adjudged guilty of no attempted murder, cannot be guilty *enough* for a sentencing enhancement. *Watts* is not controlling because it considered only statutory law, historical practice, and double jeopardy principles, and did not consider the presumption of innocence.

If the Court feels *Watts* remains controlling, there remains a second reason the sentence must be vacated. There was an abuse of discretion in the district court's application of the firearms guideline cross reference – in its use of the guideline for attempted first degree murder rather than the guideline for attempted second degree murder. It was an abuse of discretion both because the evidence was insufficient to support a finding of the premeditation required for attempted first degree murder and because there is some indication the district court applied incorrect legal standards.

The evidence was insufficient because this Court's cases finding premeditation have relied upon evidence such as planning activity rather than spontaneous action; calm, calculated behavior rather than agitated, rushed

conduct; and an existing relationship which provides a motive for premeditated murder. Here, there was no existing relationship, Officer Linde described Mr. Moreno as "agitated" multiple times, and there was no evidence of planning, but an attempted detention which erupted into a dangerous struggle.

There also was some indication the district court applied incorrect legal standards, which is enough to require remand. First, both the district court and the government appeared to conflate the premeditation required for first degree murder and the intent required for both degrees of murder by speaking far more of intent and lack of self defense than premeditation. Second, both the government and court overly minimized the time necessary for premeditation.

VI.
ARGUMENT

A. THE FELON IN POSSESSION OF A FIREARM AND ILLEGAL ALIEN IN POSSESSION OF A FIREARM CONVICTIONS MUST BE VACATED BECAUSE THE GOVERNMENT FAILED TO PROVE, THE INDICTMENT FAILED TO ALLEGE, AND THE INSTRUCTIONS FAILED TO REQUIRE, THAT MR. MORENO *KNEW* HE HAD BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR IN PRISON AND/OR HE WAS IN THE COUNTRY ILLEGALLY OR UNLAWFULLY, AS REQUIRED BY *REHAIF*.

1. Reviewability and Standard of Review.

Defense counsel made a motion for judgment of acquittal "on each and

every count because the Government has failed to carry it's [sic] burden of proving each and every element of those counts," ER 86, which motion the district court denied, *see* ER 94. *See also* ER 82 (renewal of motion to assure no waiver). Rulings on such motions are reviewed de novo. *United States v. Niebla-Torres*, 847 F.3d 1049, 1054 (9th Cir. 2017). The test is whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Defense counsel did not object to the sufficiency of the indictment or the instructions. Those claims are therefore reviewable for plain error. *See United States v. Pelisaman*, 641 F.3d 399, 404 (9th Cir. 2011); *United States v. Arnt*, 474 F.3d 1159, 1162 (9th Cir. 2007).[5]

2. There Was Insufficient Evidence to Support the Convictions Because There Was Insufficient Evidence of the Knowledge Required by *Rehaif*.

18 U.S.C. § 922(g) provides "it shall be unlawful" for certain individuals to possess firearms. *Rehaif*, 139 S. Ct. at 2194 (quoting § 922(g)). Mr. Moreno was charged under two subsections of this statute. The first was subsection (g)(1), which includes "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). *See* ER 474. The second was subsection (g)(5)(A), which includes "any person . . . who, being an alien . . . , is illegally or unlawfully in the United

[5] That the claims were not raised in Mr. Moreno's first appeal does not preclude review because they are based on an intervening change in the law. *See United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009).

States." 18 U.S.C. § 922(g)(5)(A). *See* ER 475.

A separate provision – 18 U.S.C. § 924(a)(2) – establishes the mens rea and maximum penalty for the possession and other acts[6] made unlawful by § 922(g). It provides that anyone who "*knowingly* violates" § 922(g), shall be fined or imprisoned for up to 10 years. *Rehaif*, 139 S. Ct. at 2194 (quoting § 924(a) and adding emphasis). The question considered in *Rehaif* was

> the scope of the word "knowingly." Does it mean that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in the country, or the like)?

Rehaif, 139 S. Ct. at 2194.

The Court's holding – overruling the law of this and every other circuit, *see* Brief for the United States at 32-33, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (No. 17-9560) (collecting circuit cases) – was:

> [T]he word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

Rehaif, 139 S. Ct. at 2194. The Court's reasons included what "ordinary English grammar" suggests, *id.* at 2196; the importance of requiring scienter, or a "vicious will," for criminal offenses, *id.* at 2196-97; and the need to separate innocent from wrongful conduct, *id.* at 2197. The specific subsection of § 922(g) that the Court considered was possession by an alien unlawfully in the United States, *see id.* at 2194, but its reasoning extends to possession by a person convicted of a crime punishable by imprisonment for a term exceeding one year, as evidenced by the Court's use of that as an example, *see id.* at 2198; *see also United States v.*

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[6] Section 922(g) also applies to shipping or transporting and receiving of firearms by the listed categories of persons. *See id.*

Benamor, 937 F.3d 1182, 1188 (9th Cir. 2019) (holding absence of instruction requiring the jury to find defendant knew he was felon "was clear error under *Rehaif*").

This means a defendant can be convicted of being a felon in possession of a firearm and/or being an illegal alien in possession of a firearm only if there is evidence establishing beyond a reasonable doubt that he knows he is a felon – in the technical language of the statute, that he has been "convicted of . . . a crime punishable by imprisonment for a term exceeding one year" – and/or knows that he is illegally or unlawfully in the United States. The evidence in the present case did not establish this knowledge beyond a reasonable doubt.

To begin, the stipulation which was offered to support the unlawful firearm possession counts and the illegal reentry count did not establish Mr. Moreno's knowledge of his status. That stipulation read in full as follows:

> 1. The defendant, Jesus Eder Juanni Moreno-Ornelas, was born in Mexico, and is not, nor has he ever been, a national or naturalized citizen of the United States.
>
> 2. The defendant, Jesus Eder Juanni Moreno-Ornelas, was deported and removed from the United States on May 18, 2014.
>
> 3. The defendant, Jesus Eder Juanni Moreno-Ornelas, admits that he has not at any time obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission to the United States.
>
> 4. The defendant, Jesus Eder Juanni Moreno-Ornelas, was illegally or unlawfully present in the United States on August 23, 2014.
>
> 5. The defendant, Jesus Eder Juanni Moreno-Ornelas, had been previously convicted of a crime punishable by imprisonment for a term exceeding one year.

ER 466-67.

Glaringly absent from the stipulation is an agreement Mr. Moreno *knew* the crime he was convicted of was punishable by imprisonment for a term exceeding

one year. Also absent from the stipulation is an agreement Mr. Moreno knew he was in the country illegally or unlawfully. There was an agreement Mr. Moreno was deported and removed on May 18, 2014, and was present in the country again on August 23, 2014. But unlawful presence at the time of deportation does not establish knowledge that presence three months later is unlawful; a person might go back to his home country, do what he thinks he needs to do to return to the United States, and then think he can return lawfully. There was also the agreement Mr. Moreno "has not at any time obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission in the United States," but that also does not establish knowledge that return is unlawful; a person might not know the consent of the Attorney General or Secretary of the Department of Homeland Security is required for a lawful return.

On the felon in possession count, the stipulation was the *only* evidence about Mr. Moreno's status, so the government did come even close to establishing the knowledge of status required by *Rehaif*. On the illegal alien count, there was some additional evidence. This included an interrogating officer's claim that Mr. Moreno had directly admitted he was in the country illegally. *See supra* p. 7. In most instances, this would defeat a sufficiency of evidence claim because a jury has "wide latitude" in deciding whether to accept a witness's testimony. *United States v. Clevenger*, 733 F.2d 1356, 1359 (9th Cir. 1984). But in this instance, there was an actual transcript of the interrogation which showed what was actually said, and it showed no such admission. *See supra* pp. 7-8.

The transcript did include other admissions that could raise suspicion, including admissions that Mr. Moreno had crossed the border by climbing over the fence on a ladder, that he wanted to avoid the Border Patrol, and that the reason he resisted being handcuffed was that he did not want to go to "the can." *See supra*

pp. 7-8. But there are explanations other than illegal status for each of these. Crossing by climbing the fence could be explained by the companion's deposition testimony that *he* was coming illegally and that the men crossed with marijuana, which they could not bring through a port of entry. Wanting to avoid the Border Patrol could be explained by a concern about the companion being in the country illegally and Mr. Moreno being accused of aiding him. Concern about going to "the can" could have been a concern that Mr. Moreno might go to jail for his non-compliance with Officer Linde's initial orders.

This additional evidence does make it a closer question than for the felon in possession count. But "[r]eview of the evidence in the light most favorable to the government must still meet the requirement of proof beyond a reasonable doubt." *United States v. Recio*, 258 F.3d 1069, 1072 n.2 (9th Cir. 2000), *rev'd on other grounds*, 537 U.S. 270 (2003). *See also United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc) (acknowledging evidence construed most favorably to government "may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt"). This is a high hurdle that the ambiguous evidence here does not quite clear.

In sum, the felon in possession count clearly must fall, because the government did even come close to establishing beyond a reasonable doubt the knowledge of status required by *Rehaif*. On the illegal alien in possession count, it is a closer question, but, on balance, the evidence is too ambiguous to rise to the level of proof beyond a reasonable doubt. The Court should therefore order judgments of acquittal on both counts.

3. The Indictment and Jury Instructions Were Deficient Because They Failed to Allege and Require a Finding of the Knowledge Required by *Rehaif*.

In addition to insufficient evidence, there were a deficient indictment and deficient jury instructions. The only knowledge the indictment alleged was that Mr. Moreno "did knowingly possess a firearm and ammunition." ER 474, 475. All it said about the prior conviction and unlawful presence was that they existed, to wit, that Mr. Moreno "ha[d] been previously convicted of a crime punishable by imprisonment for a term exceeding one year," ER 474, and that Mr. Moreno was "an alien illegally and unlawfully present in the United States," ER 475. The instructions also modified only the "possessed a firearm and/or ammunition" element with "knowingly" and required no finding of knowledge of the felon or illegal alien status. *See* ER 102, 103.

These deficiencies were indisputably clear error that satisfies the first two prongs of the plain error standard. *See United States v. Benamor*, 937 F.3d at 1188. The only question remaining is whether there was prejudice, i.e., whether the error affected Mr. Moreno's substantial rights and the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 734, 736 (1993).

In the case of a deficient indictment, "[t]he key question . . . is whether an error or omission in an indictment worked to the prejudice of the accused." *United States v. Arnt*, 474 F.3d at 1162 (internal quotation marks omitted). There is no prejudice rising to the level of plain error "where [the defendant's] counsel has notice of the omitted element and the jury is properly instructed regarding the missing element." *Id.* Neither of these saving facts was present here. Mr. Moreno's counsel could not have had notice of the omitted element because

Rehaif had not been decided and Ninth Circuit case law, as well as that of all other circuits, was to the contrary, *see supra* p. 19. And the jury was not properly instructed on the knowledge element, as noted *supra* p. 23.

In the case of deficient jury instructions, the question is whether there is a "reasonable probability" that the error "affected the jury's verdict," *United States v. Ornelas*, 906 F.3d 1138, 1145 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2638 (2019), and whether "the 'instructions improperly deprived [the defendant] of his right to have a jury determine an essential element' of the offense: 'mental state,'" *id.* at 1146 (quoting *United States v. Paul*, 37 F.3d 496, 501 (9th Cir. 1994)). The latter requirement is satisfied here because an essential "mental state" element, namely, the knowledge of status required by *Rehaif*, is precisely what the instructions omitted. There is also a reasonable probability the error affected the verdict. On the felon in possession count, there was no evidence at all of Mr. Moreno's knowledge because the only evidence was the one sentence about his prior felony conviction in the stipulation, with nothing at all about his knowledge. On the illegal alien in possession count, there was the additional evidence discussed *supra* pp. 21-22, but that was ambiguous for the reasons there discussed. The evidence arguably did not satisfy even the "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" standard for sufficiency of the evidence, *supra* p. 18, and that leaves it far short of the "reasonable probability" standard for evaluating prejudice from instructional error. A new trial is required if judgments of acquittal are not entered.

B. IT WAS ERROR TO USE THE ALLEGED ATTEMPTED MURDER TO ENHANCE THE SENTENCE BECAUSE THE JURY FAILED TO REACH A VERDICT ON THE ATTEMPTED MURDER CHARGE, AND *WATTS*, PERMITTING CONSIDERATION OF CONDUCT OF WHICH THE DEFENDANT WAS NOT CONVICTED, HAS BEEN UNDERMINED BY *NELSON*.

1. Reviewability and Standard of Review.

Defense counsel at both the original sentencing and the resentencing objected to consideration of the alleged attempted murder on which the jury was unable to reach a verdict. *See* CR 112, at 4-5; CR 193. This question of the constitutionality of a sentence is reviewed de novo. *See United States v. Mercado*, 474 F.3d 654, 656 (9th Cir. 2007).

2. While *Watts* Allowed Consideration of Conduct of Which the Defendant Has Not Been Convicted, It Has Been Undermined by the Subsequent Supreme Court Decision in *Nelson*.

This Court held near the beginning of the sentencing guidelines that conduct of which a defendant had been acquitted could not be used to enhance the defendant's sentence. *See United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996); *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995). The Supreme Court granted certiorari and reversed those opinions in its *Watts* opinion. *See id.*, 519 U.S. at 157. It pointed to 18 U.S.C.§ 3661, which speaks generally of placing "[n]o limitation" on a court's consideration of "information concerning the background,

character, and conduct of a person convicted of an offense," *Watts*, 519 U.S. at 151 (quoting § 3661); historical practice, *Watts*, 519 U.S. at 151-52 (citing *Williams v. New York*, 337 U.S. 241 (1949)); and the Ninth Circuit's "erroneous views of [Supreme Court] double jeopardy jurisprudence," *Watts*, 519 U.S. at 154. Regarding the last point, the Supreme Court explained:

> [S]entencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. In *Witte* [*v. United States*, 515 U.S. 389 (1995)], we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Id.* at 401. Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment . . . ." *Id.* at 402; (additional citation omitted).

Watts, 519 U.S. at 154-55 (emphasis in original). This Court has fallen into line and followed *Watts* in multiple subsequent opinions. *See, e.g., United States v. Barragan*, 871 F.3d 689, 716 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1572(2018); *United States v. Scott*, 642 F.3d 791, 800 (9th Cir. 2011); *Mercado*, 474 F.3d at 656-57.

Nelson considered a different constitutional protection – the presumption of innocence – in a different context. The appellants in *Nelson* were defendants who initially had been convicted of criminal offenses and sentenced both to prison and to pay various monetary penalties. *See id.*, 137 S. Ct. at 1253. Some or all of their convictions were reversed on appeal and, in one instance, the appellant was acquitted in a new trial, and, in the other instance, the state chose not to retry the appellant. *See id.* The state nonetheless refused to return the money the appellants had paid to satisfy the monetary penalties because a state statute required the

appellants to affirmatively prove their innocence by clear and convincing evidence. *See id.* at 1253-54.

The Supreme Court held this violated both due process and the presumption of innocence. Regarding the latter, it said:

> [O]nce those convictions were erased, the presumption of [the appellants'] innocence was restored. [A]xiomatic and elementary, the presumption of innocence lies at the foundation of our criminal law. Colorado may not retain funds taken from [the appellants] solely because of their now-invalidated convictions, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.

Id. at 1255-56 (citations, footnotes, and internal quotation marks omitted) (emphasis in original).

This reasoning extends to the enhancement of Mr. Moreno's sentence for an attempted murder which the jury expressly considered but could not reach a verdict on and which the government thereafter dismissed. Here, there was not even an original conviction and restoration of a previously rebutted presumption of innocence when that original conviction was erased. There was no conviction at all, so the presumption of innocence was not rebutted even initially. Just as the appellants in *Nelson* were not, "adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions," Mr. Moreno, adjudged guilty of no attempted murder, cannot be guilty *enough* for a sentence enhancement.

Watts did reason that "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Supra* p. 26 (quoting *Watts*, 519 U.S. at 154). This reasoning is a viable argument in response to assertion of the Double Jeopardy Clause protection against being placed twice in jeopardy for the same offense. The reasoning does not extend to the right to be presumed innocent, however, because that right protects a defendant from being

punished at all until the presumption is rebutted. The presumption of innocence is violated no matter what offense the punishment is imposed for.

3. *Watts* Is Not Controlling Because *Watts* Considered Only Statutory Law, Historical Practice, and Double Jeopardy Principles, and Did Not Consider the Presumption of Innocence.

This Court must consider whether *Watts* is controlling. On the one hand, there is the Supreme Court's admonition – acknowledged by this Court – that, "[i]f a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *In re Grand Jury Subpoenas*, 908 F.3d 525, 529 (9th Cir. 2018) (quoting *Rodriguez de Quijas* and *Agostini v. Felton*, 521 U.S. 203, 237 (1997)), *cert. denied*, 205 L. Ed. 2d 195 (2019). On the other hand, there is another principle also repeated by both the Supreme Court and this Court – that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). *See also United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004) (quoting *Webster*). *Watts* considered only 18 U.S.C. § 3661 and historical practice – both of which must give way to a constitutional protection like the presumption of innocence – and the Double Jeopardy Clause – which is a different constitutional protection. *Accord Mercado*, 474 F.3d at 661 (B. Fletcher, J., dissenting) (quoting explanation in *United States*

v. Booker, 543 U.S. 220, 240 n.4 (2005), that *Watts* "presented a very narrow question regarding the interaction of the guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument"). *Watts* did not consider the presumption of innocence, so this Court may rely on *Nelson* in considering that constitutional protection.[7]

C. THERE WAS AN ABUSE OF DISCRETION IN THE DISTRICT COURT'S APPLICATION OF THE FIREARMS GUIDELINE CROSS REFERENCE – IN ITS USE OF THE GUIDELINE FOR ATTEMPTED FIRST DEGREE MURDER RATHER THAN THE GUIDELINE FOR ATTEMPTED SECOND DEGREE MURDER – BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF PREMEDITATION AND THERE IS SOME INDICATION THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS.

1. Reviewability and Standard of Review.

Defense counsel argued, as noted above, that there was insufficient evidence of premeditation even if there was an intent to kill, so the court should apply the subsection for attempted second degree murder it if applied the attempted murder guideline. *See* ER 6-10. As also noted above, the district court found there was premeditation and applied the attempted first degree murder

[7] Other courts of appeals, though only in unpublished opinions, have rejected the argument that *Nelson* undermines *Watts*, but without considering the distinction between the double jeopardy argument considered in *Watts* and the presumption of innocence argument suggested by *Nelson*. *See United States v. Burg*, 764 Fed. Appx. 836, 837 (10th Cir. 2019) (unpublished) (collecting cases).

A P P E N D I X 7

C.A. No. 19-10252

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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Date Electronically Filed: February 3, 2020

III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant/appellant, Jesus Eder Moreno Ornelas ("the defendant"), was charged with federal crimes. (CR 12; ER 472-75.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on July 16, 2019. (CR 197; ER 96-100.)

C. Timeliness of Appeal

Following the entry of the judgment on July 16, 2019, the defendant filed a notice of appeal on July 26, 2019. (CR 199; ER 95.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

The defendant is currently in custody, serving his sentence, and is expected to be released on August 23, 2052, according to the Bureau of Prisons.

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

IV. ISSUES PRESENTED

A. WHETHER *REHAIF V. UNITED STATES*, 139 S.CT. 2191 (2019), REQUIRES THE DEFENDANT'S CONVICTIONS FOR FELON IN POSSESSION OF A FIREARM AND ILLEGAL ALIEN IN POSSESSION OF A FIREARM BE VACATED WHEN THE DEFENDANT DID NOT OBJECT AT TRIAL AND CANNOT DEMONSTRATE THAT ANY ERROR AFFECTED HIS SUBSTANTIAL RIGHTS.

B. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN CONSIDERING THE DEFENDANT'S CONDUCT OF ATTEMPTED MURDER IN SENTENCING THE DEFENDANT FOR HIS OFFENSES OF CONVICTION.

C. WHETHER, IN CALUCULATING THE SENTENCING GUIDELINES, THE DISTRICT COURT ABUSED ITS DISCRETION IN USING THE CROSS-REFERENCE TO THE GUIDELINE FOR ATTEMPTED FIRST DEGREE MURDER IN SENTENCING THE DEFENDANT FOR HIS FIREARM OFFENSES.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

On September 17, 2014, the defendant was charged by Indictment with one count of assault of a federal officer, one count of attempt to commit murder, one count of use of a firearm during and in relation to a crime of violence, two counts of attempted robbery of United States property, one count of possession of a firearm and ammunition by a convicted felon, one count of possession of a firearm and ammunition by an illegal alien, and one count of illegal re-entry of a deported alien. (CR 12; ER 472-75.)

A jury trial commenced on June 22, 2015, and on July 2, 2015, the defendant was convicted of all charges except Count Two, attempt to commit murder. (CR 81, 102.) The jury was unable to reach a verdict on Count Two. The district court granted the government's motion to dismiss that count. (CR 102, 105, 106.) The defendant was sentenced to a total term of 520 months imprisonment on October 19, 2015. (CR 124; RT 10/19/15 42; ER 78.)

The defendant appealed his convictions, and this Court vacated his convictions for the two counts of attempted robbery based on its finding that the jury instruction given by the district court for these counts was erroneous. *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), *cert. denied*, 139 S.Ct. 2638 (2019). This Court affirmed the remaining counts of conviction. *Id*.

On remand, the government elected not to re-try the defendant for the attempted robbery counts, and the district court held a resentencing hearing on July 16, 2019. (CR 171, 196.) At the hearing, the court heard testimony from a witness for the defendant and arguments from the parties. (CR 196; RT 7/16/19 65-91; ER 2-28.) The court then made findings of fact, calculated the applicable advisory sentencing guideline range, discussed the statutory sentencing factors, and again sentenced the defendant to 520 months prison. (CR 197; RT 7/16/19 91-98; ER 96-100, 28-35.)

B. Statement of Facts

1. Defendant's Crimes

On August 23, 2014, the victim in this case, United States Forest Service Officer Devin Linde was on duty in uniform on and near the Coronado National Forest, near Douglas, Arizona. (ER 277, 287; RT 6/22/15 155, 165.) On that day, as usual while on duty, his official responsibilities included responding to reports regarding individuals who may have committed criminal offenses on, near, or impacting National Forest land or Fish and Wildlife land. (ER 281-86; RT 6/22/15 159-64.) Officer Linde's duties also included ensuring that any individuals requiring assistance in the area receive the help they need. (ER 283-84; RT 6/22/15 161-62.) Additionally, consistent with the responsibilities of any law enforcement officer, Officer Linde's duties included assisting other law enforcement in the area –most

notably in this case, Border Patrol – as needed or requested. (ER 285-86; RT 6/22/15 163-64.) As a United States Forest Service officer, Officer Linde is expected by his agency and his supervisor to comply with requests for assistance from Border Patrol. (ER 284; RT 6/26/15 162.)

The area of Officer Linde's responsibility is vast, rugged, and notorious for criminal activity – primarily illegal drug trafficking and human smuggling. (ER 282-85; RT 6/22/15 160-63.) In connection with his Forest Service duties, Officer Linde not only routinely encounters individuals dropping off loads of illegal drugs in the area, but also commonly encounters illegal aliens/border crossers who are exhausted, dehydrated, and in need of assistance; often, these individuals "give up" and ask for transportation back to Mexico. (ER 282-84; RT 6/22/15 160-62.) On a near-daily basis, Officer Linde and other Forest Service officers work closely with Border Patrol to apprehend and/or assist the individuals they find in the area. (ER 285-86, 291; RT 6/22/15 163-64, 169.)

On August 23, 2014, Officer Linde received a report that three people appearing to be undocumented aliens, one of whom was possibly in distress, had been seen on Forest Service land. (ER 288; RT 6/22/15 166.) Shortly thereafter he received another notification that the group was seen in nearby Leslie Canyon preserve, which is on Fish and Wildlife land. (ER 289-90; RT 6/22/15 167-68.) Officer Linde called the Border Patrol Douglas station and relayed the report of three

possible undocumented aliens, one of whom was injured, and advised he (Officer Linde) was in the area. (ER 290; RT 6/22/15 168.) Border Patrol asked Officer Linde if he could assist them, and he said yes. (ER 290, 294; RT 6/22/15 168, 172.)

Not long thereafter, Officer Linde saw two individuals (the defendant, Jesus Eder Moreno Ornelas, and Aaron Trinidad Abril-Moreno) heading south on Leslie Canyon Road, which is adjacent to the Coronado National Forest and which he and other Forest Service officers utilize on a daily basis as part of their jobs to access Forest land. (ER 293-95; RT 6/22/15 171-73.) One individual appeared to be injured, and both looked like they had been in the desert for some time. (ER 295-96; RT 6/22/15 173-74.)

When Officer Linde pulled over in his marked patrol unit, the individuals approached Officer Linde, and he asked if they were okay and whether they needed water. (ER 295; RT 6/22/15 173.) After they declined his offer of assistance and water, Officer Linde asked them to go to the front of his vehicle. (*Id*.) Officer Linde spoke in English, but both individuals appeared to understand him, and Aaron Trinidad Abril-Moreno ("Abril") complied. (ER 296-97; RT 6/22/15 174-75.) However, even after Officer Linde gave repeated commands to go to the front of the car, the defendant refused and said "no." (ER 297-98; RT 6/22/15 175-76.) He instead appeared to be very agitated and unhappy with the situation, and started

walking toward Officer Linde with clenched fists and squared-off shoulders. (ER 297; RT 6/22/15 175.)

Noticing the defendant to be agitated and non-compliant, Officer Linde radioed Border Patrol to report that the defendant was uncooperative, and requested help. (ER 297-98; RT 6/22/15 175-76.) Shortly thereafter, the defendant came toward Officer Linde, who at that point pulled his service firearm and again radioed Border Patrol to report that he was dealing with a combative subject and needed back-up. (ER 298-99; RT 6/22/15 176-77.) Officer Linde then ordered the defendant and Abril to the ground for safety purposes. (ER 299; RT 6/22/15 177.) Abril complied immediately. (*Id*.) The defendant did not comply, and told Officer Linde "no." (ER 299; RT 6/22/15 177.) The defendant continued to appear agitated and angry, with clenched fists and squared shoulders. (ER 315; RT 6/22/15 193.) Officer Linde walked toward the defendant and told the defendant to put his hands on his head. (ER 180; RT 6/22/15 178.) The defendant began to comply, so Officer Linde holstered his firearm to handcuff the defendant. (ER 300, 315; RT 6/22/15 178, 193.) As Officer Linde was placing the first cuff on one of the defendant's wrists, however, the defendant pulled away. (ER 315; RT 6/22/15 193.)

Officer Linde next recalled being face to face with the defendant and struggling. (ER 315-16; RT 6/22/15 193-94.) The defendant was reaching for Officer Linde's pistol, which was in its holster, and Officer Linde put his hands over

the holster to prevent the defendant from grabbing the pistol. (ER 316; RT 6/22/15 194.) While Officer Linde was trying to prevent the defendant from taking his pistol, the defendant threw him to the ground. (ER 316-17; RT 6/22/15 194-95.)

Officer Linde and the defendant rolled on the ground, and when they stopped the defendant was on top of him, violently punching him in the face. (ER 317; RT 6/22/15 195.) Officer Linde tried to stop the defendant but could not; the defendant was fast and stronger than Officer Linde. (ER 317-18; RT 6/22/15 195-96.) While the defendant was beating him, Officer Linde began to lose consciousness. (ER 318; RT 6/22/15 196.) He felt the sensation of his pistol being pulled out of his holster, and tried again to retain it with his hands but was unsuccessful. (*Id*.)

As the defendant was pulling Officer Linde's pistol out of the holster, Officer Linde heard two shots fired and thought he was shot in the leg. (ER 318-19; RT 6/22/15 196-97.) Officer Linde believed he was going to die and began frantically flailing his arms in attempt to find his pistol. (ER 319; RT 6/22/15 197.) Officer Linde felt the pistol being pushed into his chest, and saw the defendant holding the pistol and pointing it down toward his (Officer Linde's) chest and head. (ER 319-20; RT 6/22/15 197-98.) Officer Linde pushed the defendant's hand to the side, deflecting the barrel of the pistol just as the defendant fired another shot at him. (ER 320; RT 6/22/15 198.) Officer Linde heard the shot just to the left of his head. (ER 320-01; RT 6/22/15 198-99.)

Officer Linde continued to struggle for his life, and the defendant continued to try to point the pistol at Officer Linde's chest. (ER 321; RT 6/22/15 199.) Officer Linde grabbed the defendant's wrist, and the defendant tried to get away from Officer Linde. (*Id*.) Fearing that the defendant would kill him, Officer Linde attempted to put the defendant in a "modified triangle" hold with his legs around the defendant's neck. (ER 322; RT 6/22/15 200.) The defendant fired several more shots until the firearm malfunctioned and stopped firing. (ER 322-03, 226; RT 6/22/15 200-01; RT 6/25/15 10.) At that point the defendant, with Officer Linde's legs still around him, dropped the firearm next to Officer Linde. (ER 323; RT 6/22/15 201.)

Officer Linde recovered his firearm and tried to fire it, but it had jammed. (ER 324; RT 6/22/15 202.) He distanced himself from the defendant, cleared his firearm, and reloaded his spare magazine. (*Id*.) At the same time the defendant ran to Officer Linde's patrol vehicle and got into the front seat in an attempt to escape. (ER 325, 327; RT 6/22/15 203, 205.) However, the defendant was unable to get away due to the operation of a toggle switch that shuts down the vehicle if the brake is pressed. (ER 328; RT 6/22/15 206.) Officer Linde approached the vehicle, pointed his firearm at the defendant, and again called the Douglas Border Patrol Station for help. (ER 329; RT 6/22/15 207.) Officer Linde pulled the defendant out of his vehicle,

put him on the ground, and stood with his pistol pointed at the defendant until other law enforcement arrived to help him. (ER 351; RT 6/25/15 15.)

Border Patrol Agent Rashon McCall received Officer Linde's initial call for Border Patrol assistance, and was the first law enforcement officer to respond. (SER 5-7, RT 6/25/15 136-38.) Agent McCall also heard Officer Linde's subsequent calls reporting that the defendant was being combative and uncooperative, and recalled that Officer Linde seemed to be in distress during these subsequent calls. (SER 8-9, RT 6/25/15 143-44.) Concerned for Officer Linde's safety, Agent McCall turned on his emergency lights of his patrol vehicle and accelerated to get to Officer Linde as soon as possible. (SER 10, RT 6/25/15 145.) While he was en route to assist Officer Linde, Agent McCall heard Officer Linde report "shots fired." (SER 11, RT 6/25/15 146.)

When he arrived at the scene, Agent McCall saw Officer Linde standing over the defendant, who was handcuffed on the ground. (SER 12, RT 6/25/15 151.) Officer Linde immediately asked Agent McCall to check if he had been shot, and Agent McCall verified that Officer Linde had not been shot. (SER 13, RT 6/25/15 153.) Agent McCall did observe that Officer Linde's uniform was ripped, dirty, and bloody, and that Officer Linde was perspiring and out of breath, and had some lacerations on his hands and face. (SER 13-14, RT 6/25/15 153-54.) Agent McCall observed a firearm magazine on the ground a few feet from Officer Linde's vehicle,

and also noticed that the dirt around the vehicle was disturbed. (SER 14, RT 6/25/15 154.) Officer McCall recalled that the defendant appeared calm, said he was thirsty and asked where his cousin was, but did not say anything else or express any other concerns. (SER 15, RT 6/25/15 156.)

Cochise County Sheriff's Department Deputy John Monroe also responded to the scene and assisted with the investigation. (SER 16-18, RT 6/25/15 186-88.) Deputy Monroe took photographs of the scene and recovered several items of evidence, including five spent shell casings and one live round of ammunition. (SER 19, RT 6/25/15 201.) The shell casings were found on the ground in a linear fashion near Officer Linde's vehicle, in the area where the dirt had been disturbed. (SER 20-22, RT 6/25/15 203-05.)

The defendant was arrested and interviewed that evening. In a recorded interview, he admitted Officer Linde had told him numerous times to stop and get down to the ground, and that he understood what the officer was saying. (CR 165 105-06; ER 208-09.) The defendant stated that from the beginning he knew he had to listen to the officer. (CR 165 135; ER 238.) The defendant admitted that instead of complying, he tried to take Officer Linde's gun away from him. (CR 165 156; ER 259.) He stated that he pushed Officer Linde to the ground with all the force he had. (CR 165 116; ER 219.) The defendant ultimately admitted he fired as many as six or seven shots until the firearm was empty. (CR 165 152-54; ER 255-57.)

The defendant described his actions as "attempted homicide" and stated, "I knew beforehand it will be attempted homicide" when describing his actions against Officer Linde. (CR 165 145-46; ER 248-49.) The defendant lamented that even though he could have complied and served just a few months in prison, he wasn't even willing to do that much time and instead "did all the stupidities I did and shouldn't have." (CR 165 150-51; ER 253-54.)

During the interview, the defendant also stated that when he crossed into the United States from Mexico, he used a ladder to jump over the border at night. (CR 165 91-93; ER 194-96.) He described walking in the desert and avoid Border Patrol agents and checkpoints, and expressed fear of being caught by Border Patrol and "get[ting] a lot of time." (CR 165 95-98; ER 198-201.) During his initial encounter with Officer Linde, the defendant became concerned because he believed the officer had called Border Patrol to come get him. (CR 165 100-01; ER 203-04.) The defendant also described that when he was refusing to comply with Officer Linde, he challenged the officer's authority to apprehend him by saying, "You no Border Patrol" and "Me, Mexico!" (CR 165 106; ER 209.)

Aaron Trinidad Abril-Moreno gave a videotaped deposition in which he described the events he witnessed. He stated that the defendant immediately became combative with Officer Linde and refused to cooperate. (CR 165 44; ER 147.) He observed the defendant hit Officer Linde when Officer Linde tried to handcuff him,

and punch Officer Linde repeatedly in the face and elsewhere with his fist. (CR 165 47-49; ER 150-52.) While Abril did not see who fired the shots, he described hearing two distinct occasions of gunfire. First, Abril heard one shot and turned to see Officer Linde on the ground with the defendant on top of him, continuing to hit him while Officer Linde yelled, "no, no." (CR 165 50; ER 153.) Abril then took off running, and after he ran off into nearby mountains he heard a second and third shot while Officer Linde to kept screaming, "no, no." (CR 165 50-51, 59-60; ER 153-54, 162-63.)

2. Trial

Trial commenced on June 22, 2015. (CR 81.) The government presented the testimony of Officer Linde, Rashon McCall, John Monroe, Nelson Moreno, Zachary Weller, Heather Cox-McClain, Cheri Bowen, Bryan Bowen, Roger Clark, and the videotaped deposition testimony of Aaron Trinidad Abril-Moreno. (SER 2, 4, 24, 35, 37.) The government also played the video recording of the defendant's statement. (CR 165; ER 104-07.)

Additionally, the government introduced a stipulation which had been entered into by the parties with regard to elements of the counts of illegal reentry of a deported alien, felon in possession of a firearm, and alien in possession of a firearm. ((RT 6/22/15 152-54; ER 466-67, 469-71.) The stipulation stated:

1. The defendant, Jesus Eder Juanni Moreno-Ornelas, was born in Mexico, and is not, nor has he ever been, a national or naturalized citizen of the United States.

2. The defendant, Jesus Eder Juanni Moreno-Ornelas, was deported and removed from the United States on May 18, 2014.

3. The defendant, Jesus Eder Juanni Moreno-Ornelas, admits that he has not at any time obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission to the United States.

4. The defendant, Jesus Eder Juanni Moreno-Ornelas, was illegally or unlawfully present in the United States on August 23, 2014.

5. The defendant, Jesus Eder Juanni Moreno-Ornelas, had been previously convicted of a crime punishable by imprisonment for a term exceeding one year.

(*Id*.)

On June 30, 2015, after the government rested, the defendant moved for a judgment of acquittal on every count. (RT 6/30/15 54, 56; ER 86.) The district court denied the motion for judgment of acquittal, finding that the government presented sufficient evidence of all the elements of each crime for the jury to make its decision. (RT 6/30/15 64; ER 94.)

3. Verdicts

Following trial, on July 2, 2015, the defendant was convicted of all counts except the attempt to commit murder count, which the government dismissed. (CR 102, 105, 106.)

4. Sentencing

On October 19, 2015, the district court sentenced the defendant to a total term of 520 months imprisonment on October 19, 2015. (CR 124; ER 347-49.)

5. First Appeal

The defendant appealed his convictions, and this Court vacated his convictions for the two counts of attempted robbery based on its finding that the jury instruction given by the district court for these counts was erroneous, but rejected the other arguments raised by the defendant and affirmed the remaining counts of conviction. *Ornelas*, 906 F.3d 1138.

6. Resentencing

On remand, the government elected not to re-try the defendant for the attempted robbery counts, and the district court dismissed those counts without prejudice. (CR 171.) The district court discussed the parameters of the resentencing with counsel for the parties, and allowed the parties for file written memoranda regarding the scope of resentencing. (CR 178.) The court held a resentencing hearing on July 16, 2019, and permitted the defendant to call Weaver Barkman as a witness at the hearing. (CR 196.) Mr. Barkman testified that it was his opinion the defendant discharged the firearm accidentally. (RT 7/16/19 75; ER 12.)

After hearing testimony of Mr. Barkman, the district court addressed the advisory sentencing guidelines. (RT 7/16/19 66; ER 3.) It heard argument from the

parties regarding the guidelines. (RT 7/16/19 68-78; ER 5-15.) The defendant objected to the base offense level of 33 and the enhancement for obstruction of justice as calculated in the presentence report. (RT 7/16/19 67; ER 4.) The government concurred with the guidelines as calculated in the presentence report. (RT 7/16/19 78; ER 15.) The court agreed with the government and the probation department, and overruled the defendant's objections. (*Id*.)

In finding the correct base offense level to be 33, the district court found that clear and convincing evidence proved that the defendant was attempting to commit the crime of murder. (*Id*.) Specifically, the court found the testimony of Officer Linde to be "credible, truthful, reliable" and "very believable." (RT 7/16/19 78-80; ER 15-17.) It also found that Mr. Barkman's opinions were "not based on a sound review of all the evidence" or "an accurate analysis of the nature of the case." (RT 7/16/19 79-80; ER 16-17.) The court noted that Mr. Barkman did not conduct any tests probative to the case, and that the most important evidence was the eyewitness account of what happened. (RT 7/16/19 80; ER 17.) The court concluded that Officer Linde's testimony supported the finding that the defendant was attempting to kill him with a firearm. (*Id*.)

The district court calculated the applicable advisory sentencing guideline range and adopted the calculations in the presentence report, finding the base offense level to be 33, with a six-level enhancement for official victim and a two-level

enhancement for obstruction of justice, for a total offense level of 41. (RT 7/16/19 80-81; ER 17-18; PSR ¶¶ 19-37.) With the defendant's Criminal History Category of V, this resulted in an advisory guideline range of 360 months to life imprisonment plus a mandatory consecutive 120 months imprisonment for Count Three. (RT 7/16/19 81; ER 18; PSR ¶ 63.)

Finally, the district court heard allocution from counsel for the defendant, the defendant, and counsel for the government with regard to the appropriate sentence. (RT 7/16/19 85-91; ER 22-28.) The court then discussed the statutory sentencing factors, the facts of the offense, and the individual history characteristics of the defendant, and again sentenced the defendant to 520 months prison. (RT 7/16/19 91-95; ER 28-32.)

VI. SUMMARY OF ARGUMENTS

A. In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), decided after the trial in this case, the Supreme Court held that in a prosecution pursuant to 18 U.S.C. §922(g), the defendant must have knowledge of the circumstance that causes him to be prohibited from possessing firearms and ammunition. *Rehaif* does not require that the defendant's convictions for possession of a firearm and ammunition by a convicted felon and possession of a firearm and ammunition by an illegal alien be vacated because the defendant cannot meet the requirements for establishing plain error. Sufficient and uncontroverted evidence was introduced at trial to prove that the defendant knew both that he was a convicted felon and an alien illegally in the United States at the time he possessed a firearm in this case. Any error in not instructing the jury that the defendant must have knowledge of his prohibiting circumstance was harmless.

B. The district court did not abuse its discretion in considering the defendant's conduct of attempting to murder the victim in sentencing the defendant for his offenses of conviction. It is clearly established that a district court may consider all relevant conduct of the defendant at sentencing, including conduct of which a defendant has been convicted at trial. Here, sufficient evidence established that the defendant attempted to murder the victim.

C. The district court did not abuse its discretion in using the cross-reference to the sentencing guideline for attempted first degree murder in sentencing the defendant for his firearm offenses. The evidence proved that the defendant intended to kill the victim, was fully conscious of his intent, and considered the killing.

VII. ARGUMENTS

A. REVERSAL OF THE DEFENDANT'S FIREARM CONVICTIONS IS NOT REQUIRED.

1. Standard of Review

This Court reviews a district court's denial of a motion for acquittal based on sufficiency of the evidence de novo. *United States v. Stewart*, 420 F.3d 1007, 1014 (9th Cir. 2005). In evaluating a sufficiency of the evidence claim, the Court uses a two-step inquiry. "First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution." *United State v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow '*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt.'" *Id*. (quoting *Jackson*, 443 U.S. at 319) (emphasis in original).

Where a defendant fails to object to a particular jury instruction, the instruction is reviewed for plain error. *United States v. Pelisaman*, 641 F.3d 399, 404 (9th Cir. 2011); *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012). The plain error review applies to unpreserved errors even when the error arises from intervening authority that was unavailable during the foregoing proceedings. *See Henderson* v. *United State*s, 568 U.S. 266, 272 (2011).

To establish plain error, a defendant must meet four prongs: first, there was a deviation from a legal rule that was not affirmatively waived; second, the error was clear or obvious rather than subject to reasonable dispute; third the error must have affected his or her substantial rights – that is, affected the outcome of the district court proceedings; and the error seriously affected the fairness, integrity, or pubic reputation of judicial proceedings. *Puckett v. United States*, 556 U.S. 129, 135 (2009).

Where a defendant fails to object to the sufficiency of an indictment, the indictment is also reviewed for plain error. *United States v. Arnt*, 474 F.3d 1159, 1162 (9th Cir. 2007); *Pelisaman*, 641 F.3d at 404.

2. Argument

a. Sufficiency Of The Evidence

At trial, the defendant moved for a judgment of acquittal on every count. (RT 6/30/15 54, 56; ER 86.) The district court denied the motion for judgment of acquittal, finding that the government presented sufficient evidence of all the elements of each crime for the jury to make its decision. (RT 6/30/15 64; ER 94.)

The defendant argues that, in light of the subsequent Supreme Court decision in *Rehaif*, the evidence presented at trial was insufficient to support his convictions for possession of a firearm and ammunition by a convicted felon and possession of a firearm and ammunition by an illegal alien. (Op. Br. at 18.) The defendant is

incorrect. Sufficient and uncontroverted evidence was presented at trial to prove that the defendant knew both that he had been convicted of a crime punishable by a term of imprisonment exceeding one year, and that he was an alien unlawfully present in the United States, at the time he possessed the firearm and ammunition in this case.

i. Possession Of Firearm And Ammunition By Convicted Felon

The stipulation entered into by the parties stated: "The defendant [] had been previously convicted of a crime punishable by imprisonment for a term exceeding one year." (RT 6/22/15 153; ER 466-67, 470.) The district court instructed the jury that it was to consider this fact as true, and the stipulation provided that this fact was uncontested and must be considered to have been proven beyond a reasonable doubt. (RT 6/22/15 152-54; ER 467, 469-71.) While the stipulation did not state that the defendant knew he had been previously convicted of a crime punishable by imprisonment for a term exceeding one year, such knowledge can reasonably be inferred from the fact of such a conviction. It is highly unlikely for an individual to be convicted of a felony offense without having any knowledge it.

Viewing the evidence in the light most favorable to the government, a rational jury could find that an individual who has in fact been convicted of a crime punishable by imprisonment for a term exceeding one year knew of the fact of his

conviction. The district court did not err in denying the defendant's motion for judgment of acquittal on this count.

This Court recently rejected the defendant's argument under the same circumstances in *United States v. Benamor*, 937 F.3d 1182 (9th Cir. 2019). In *Benamor*, this Court found that the parties' stipulation at trial that, on the date the defendant was found in possession of a firearm, he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, relieved the government of its burden to prove the defendant's felon status. *Id*. at 1188. This Court also found that any insufficiency in the stipulation in light of the *Rehaif* decision was not plain error because there was no probability that but for the error the outcome of the trial would have been different. *Id*. at 1188-89.

Specifically, this Court found the fact that the defendant had actually been sentenced to more than one year for some of his convictions sufficient to prove beyond a reasonable doubt he had the knowledge required by *Rehaif*, even though no evidence of these sentences was presented at trial in light of the stipulation. *Id*. at 1185-86, 1188-89. This Court appears to have recognized that, had *Rehaif* been decided before the defendant's trial, the government could have presented irrefutable proof of the requisite knowledge and the outcome of the trial would have been the same. *Id*. at 1188-89.

Here, the defendant also served a term of imprisonment exceeding one year before possessing a firearm and ammunition in the instant case; he was sentenced to 2.5 years custody for his marijuana trafficking conviction in 2011. (PSR ¶ 40.) Just as in *Benamor*, any error with regard to the knowledge required by *Rehaif* "did not affect Defendant's substantial rights or the fairness, integrity, or public reputation of the trial." 937 F.3d at 1189.

ii. Possession Of Firearm And Ammunition By Illegal Alien

The stipulation entered into by the parties stated that the defendant was born in Mexico and has never been a citizen of the United States. (RT 6/22/15 153; ER 466, 470.) It also stated that the defendant had been deported from the United States on May 18, 2014. (*Id*.) It further stated that the defendant admits he has never obtained consent to reapply for admission to the United States, and that he was illegally present in the United States on August 23, 2014. (RT 6/22/15 153; ER 467, 470.) The district court instructed the jury that it was to consider this fact as true, and the stipulation provided that this fact was uncontested and must be considered to have been proven beyond a reasonable doubt. (RT 6/22/15 152-54; ER 467, 469-71.) These facts alone are sufficient to support the defendant's conviction for possession of a firearm and ammunition by an illegal alien.

While the stipulation did not state that the defendant knew he was an alien illegally present in the United States, such knowledge is readily inferred from the

facts that the defendant was born in Mexico, was never a citizen of the United States, was deported just three months before his offenses in this case, never obtained consent to reapply for admission, and was illegally present in the United States on the date of his offenses.

Additionally, the defendant's statements indicate he knew he was illegally present in the United States at the time of his offenses. During his interview, the defendant stated that he crossed into the United States from Mexico using a ladder to jump over the border at night. (CR 165 91-93; ER 194-96.) He walked in the desert to avoid Border Patrol agents and checkpoints, and expressed fear of being caught by Border Patrol and "get[ting] a lot of time." (CR 165 95-98; ER 198-201.) The defendant became concerned because he believed the Officer Linde had called Border Patrol to come get him. (CR 165 100-01; ER 203-04.)

Finally, the defendant's actions corroborate his statements and the stipulated facts regarding the defendant's illegal status. The extreme measures the defendant took in attempt to avoid apprehension by law enforcement are consistent with his statements that he knew he faced punishment for being unlawfully present in the United States. The evidence of the defendant's knowledge of his illegal alien status was overwhelming and uncontroverted. Viewing the evidence in the light most favorable to the government, a rational jury could certainly find this element proven

beyond a reasonable doubt. The district court did not err in denying the defendant's motion for judgment of acquittal on this count.

b. Indictment

The defendant concedes he did not raise an objection to the sufficiency of the indictment. (Op. Br. at 18.) He now argues that the indictment in this case was deficient for its failure to allege the knowledge element subsequently required pursuant to *Rehaif*. (Op. Br. at 23.) The defendant is incorrect. While the indictment in this case did not specifically allege the defendant knew that he had been convicted of an crime punishable by a term of imprisonment exceeding one year or that he was illegally present in the United States at the time be possessed the firearm and ammunition, the defendant fails to show he suffered any prejudice as a result of this omission.

When the sufficiency of the indictment is challenged after trial, it is only required that the necessary facts appear in any form or by fair construction can be found within the terms of the indictment. *United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019). In *Read*, 918 F.3d at 719, the indictment's express reference to 18 U.S.C. § 113(a) put the defendant on notice of the jurisdictional element. *See also United States v. Arnt*, 474 F.3d 1159, 1162 (9th Cir. 2007) (counsel "had notice" of the element "from the statute itself, specifically cited in the indictment[ ]"); *United States v. James*, 980 F.2d 1314, 1317-18 (9th Cir. 1992) (indictment alleging a rape

on an Indian Reservation which did not allege that defendant was an Indian was sufficient when challenged after trial because "the necessary elements appear in the indictment by reference to the relevant statutes").

The defendant does not (and cannot logically) argue that his approach to the case was influenced by any deficiency in the indictment. Nor does the defendant show he was prejudiced in any other way. To the extent that the defendant may claim he was somehow prejudiced at trial by the indictment's omission of the post-*Rehaif* knowledge element, this claim fails in light of the evidence and the defendant's strategy at trial. The defendant stipulated to each and every element of both the possession of a firearm and ammunition by a convicted felon and possession of a firearm and ammunition by an illegal alien counts, except for the element that he knowingly possessed a firearm. (RT 6/22/15 152-54; ER 466-71.) As discussed, uncontroverted evidence at trial proved that the defendant knew that he was a convicted felon and illegally present in the United States. It is inconceivable that had the indictment alleged such knowledge, the result in this case would have been different.

c. Jury Instructions

The district court gave this Court's model jury instructions for the offenses of possession of a firearm and ammunition by a convicted felon and possession of a firearm and ammunition by an illegal alien. (CR 90; ER 101-03); Model Crim. Jury

Instr. 9th Cir. 8.65 (2010). The defendant concedes he did not object to these instructions. (Op Br. at 18.) The defendant now argues that the district court plainly erred by not instructing the jury that the government must prove the defendant knew he had been convicted of a crime punishable by a term of imprisonment exceeding one year, and was an alien illegally present in the United States, at the time he possessed the firearm and ammunition. (Op. Br. at 23.)

No plain error occurred with regard to these jury instructions. The defendant was not prejudiced by the omission of this post-*Rehaif* knowledge requirement from the jury instructions in this case. As discussed, the evidence of his prohibited status was significant and uncontroverted. The stipulation entered into by the parties, the defendant's extreme actions in attempting to avoid apprehension, and the defendant's own statements conclusively established that the defendant knew that he was both a convicted felon and illegally present in the United States. There is no reasonable probability that any error in the jury instructions affected the jury's verdict.

As this Court found under the same circumstances in *Benamor*, "any error in not instructing the jury to make such a finding [of the knowledge required by *Rehaif*] did not affect Defendant's substantial rights or the fairness, integrity, or public reputation of the trial." 937 F.3d at 1189. Here, just as in *Benamor*, the parties' stipulation relieved the government of its burden to prove the defendant's prohibited

status. *Id*. at 1188. And even in light of *Rehaif*, where the government could have easily proven the defendant's knowledge of such status, any deficiency in the jury instructions did not prejudice the defendant. *See id*. at 1188-89.

Finally, with regard to the alien in possession charge, any error for failure to instruct the jury on the knowledge element subsequently required by *Rehaif* was harmless in light of the evidence. Even if the district court had given the instruction, substantial and uncontroverted evidence – including the stipulation and the defendant's statement – was presented at trial to prove the defendant knew he was illegally present in the United States. There is thus no substantial likelihood that if the jury was given an instruction containing the post-*Rehaif* knowledge element, its verdict on the alien in possession count would have been different.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONSIDERING THE DEFENDANT'S CONDUCT OF ATTEMPTED MURDER IN SENTENCING THE DEFENDANT.

1. Standard of Review

This Court reviews a district court's application of the sentencing guidelines to the facts for abuse of discretion, and its factual findings for clear error. *United States v. Crowe*, 563 F.3d 969, 977 (9th Cir. 2009).

2. Argument

The defendant argues that the district court erred in considering at sentencing his attempt to murder the victim because the jury was unable to reach a verdict as to

the count of attempted murder. (Op. Br. at 25.) However, the court is not bound at sentencing by the jury's verdict and may consider conduct for which the defendant has been acquitted in arriving at an appropriate sentence. *United States v. Watts*, 519 U.S. 148, 153-54 (1997); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007).

Recognizing this clearly established sentencing tenet, the defendant conflates the matter with a wholly separate and distinguishable context in contending that the presumption of innocence should prevent a district court from considering conduct for which the defendant has not been convicted at trial. (Op. Br. at 26-27.) The defendant relies on *Nelson v. Colorado*, 137 S.Ct. 1249 (2017) (Op. Br. at 26-27, 29), wherein the defendants were convicted of crimes that required payment of a fine upon sentencing, their convictions were subsequently overturned and the defendants were either acquitted at a second trial or not retried, and the state refused to return the fines paid by the defendants. *Id*. at 1253. The Supreme Court found that the state "may not retain funds taken from [the defendants] *solely* because of their now-invalidated convictions," and stressed the fact that the defendants were "adjudged guilty of *no* crime." *Id*. at 1255-56 (emphasis added).

Unlike in *Nelson*, the defendant here was convicted of several crimes and was sentenced pursuant to the sentencing guidelines for his offenses of conviction, consistent with principles of statutory authority and the case law of both the Supreme

Court and this Court. The defendant's contention that the Supreme Court did not consider the presumption of innocence when holding in *Watts* that a district court may considered acquitted conduct (Op. Br. at 28-29) misses the mark. To accept this contention, this Court would have to conclude that the Supreme Court ignored one of the most fundamental concepts of criminal law and created case law in direct violation of this principle.

Supreme Court decisions remain binding precedent until the Supreme Court sees fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). Moreover, A subsequent panel must follow a prior panel opinion except when a decision of "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Contrary to the defendant's contention, *Nelson* in no way undermines the holding of *Watts*.

In fact, following the Supreme Court decision in *Nelson*, this Court continues to apply the still-controlling precedent set forth in *Watts* that a district court may consider conduct underlying an acquitted charge at sentencing. *See, e.g., United States v. Krum*, 698 Fed.Appx. 524 (9th Cir. 2017) (unpublished). Other circuits have joined this Court in adhering to *Watts* following the *Nelson* decision. *See, e.g,*

United States v. Ruelas-Carbajal, 933 F.3d 928, 930 (8th Cir. 2019); *United States v. Fields*, 932 F.3d 316, 320-21 (5th Cir. 2019); *United States v. Wandahsega*, 924 F.3d 868, 887-888 (6th Cir. 2019). The defendant's reliance on *Nelson* is simply unfounded.

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN USING THE CROSS-REFERENCE TO THE GUIDELINE FOR ATTEMPTED FIRST DEGREE MURDER IN SENTENCING THE DEFENDANT FOR HIS FIREARM OFFENSES.

1. Standard of Review

This Court reviews a district court's application of the sentencing guidelines to the facts for abuse of discretion, and its factual findings for clear error. *Crowe*, 563 F.3d at 977. "[W]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *United States v. Awad*, 371 F.3d 583, 591 (9th Cir. 2004), quoting *Hernandez v. New York*, 500 U.S. 352, 369 (1991).

2. Argument

a. Evidence of Premeditation

The district court applied U.S.S.G. § 2A2.1(a)(1), the sentencing guideline for attempted first-degree murder, pursuant the cross-reference in § 2K2.1, the guideline for the defendant's firearm and ammunition offenses. (RT 7/16/19 66, 80; ER 3, 17; PSR ¶ 19.) The cross-reference provides:

A P P E N D I X 8

CA NO. 19-10252

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

APPELLANT'S REPLY BRIEF

I.

ARGUMENT

A. THE FELON IN POSSESSION OF A FIREARM CONVICTION AND ILLEGAL ALIEN IN POSSESSION OF A FIREARM CONVICTION MUST BE VACATED.

1. The Convictions Must Be Vacated Because the Evidence Was Insufficient to Support Them.

a. The felon in possession conviction.

The government makes two arguments about why the evidence is sufficient

to support the felon in possession conviction. First, it argues knowledge of felon status can be reasonably inferred from the fact of conviction. Second, it argues information in the presentence report establishes the required knowledge, because it shows Mr. Moreno was sentenced to 2.5 years of custody for his felony conviction.

Both these arguments fail. That knowledge cannot be inferred from the fact of conviction was recognized in the Supreme Court case establishing the knowledge requirement – *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* recognized there easily could be "a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is '*punishable* by imprisonment for a term exceeding one year.'" *Id.* at 2198 (quoting 18 U.S.C. § 922(g)(1), and adding emphasis). There is also the Ninth Circuit opinion in *United States v. Benamor*, 937 F.3d 1182 (9th Cir. 2019), *cert. denied*, 205 L. Ed. 2d 502 (2020), which "assum[ed] . . . that the stipulation [to felon status] does not end the discussion as to Defendant's *knowledge* of his status as a felon." *Id.* at 1188 (emphasis in original).

The argument that the information in the presentence report establishes the required knowledge also fails – for two reasons. First, a court cannot look to sentencing evidence in judging the sufficiency of evidence to convict. As stated in the case of *United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010) (en banc), which the government itself cites, *see* Govt. Brief, at 20, a court reviewing the sufficiency of evidence to convict "must consider the evidence *presented at trial*." *Id.* at 1164 (emphasis added). *Benamor* did rely on the number of the defendant's prior convictions and the time he had served in prison on those convictions, but did not indicate that evidence was not trial evidence. *See id.* at 1189. If the evidence had been sentencing evidence, its consideration would have conflicted

with the test set forth in the Court's en banc *Nevils* opinion.

Second, even if sentencing evidence could be considered, the sentencing evidence in the present case is far more ambiguous than the evidence in *Benamor*. The presentence report does indicate that Mr. Moreno was *sentenced* to more than a year in prison, but it does not indicate he *served* more than a year in prison. *Compare Benamor*, 937 F.3d at 1189 (noting defendant spent more than nine years in prison on his various felony convictions). It is clear Mr. Moreno did not serve the full 2.5 years in prison, because he was sentenced on March 11, 2011, *see* Revised PSR, ¶ 40, and apprehended illegally in the country just a little more than a year later, on May 21, 2012, *see* Revised PSR, ¶ 42. He may well have served less than a year in prison, which could leave him with the same lack of knowledge as the probationary defendant hypothesized in *Rehaif*.

b. The illegal alien in possession conviction.

The evidence cited by the government in support of the illegal alien in possession conviction is all addressed in Appellant's Opening Brief. First, the fact that a defendant's presence *is* illegal does not mean he *knows* his presence is illegal. *See* Appellant's Opening Brief, at 21. Second, entering by climbing over the fence rather than through an official border crossing, showing a desire to avoid law enforcement officers, and showing a concern about going to jail are explainable by other illegal activity, namely, smuggling marijuana into the country and helping Mr. Moreno's illegally present companion. *See* Appellant's Opening Brief, at 21-22.

2. The Convictions Must Be Vacated Because the Indictment and Jury Instructions Were Deficient.

Initially, the government is wrong in arguing the indictment is saved by its citation of the felon in possession and illegal alien in possession statutes. Citation of the statute is sufficient only if it "give[s] adequate knowledge of the missing elements . . . ; otherwise, reference to a statute will not cure the defect in the indictment." *United States v. James*, 980 F.2d 1314, 1318 (9th Cir. 1992). The citation did not give notice here because this Court's long-standing precedent held that the mens rea element in the statutes applied only to the possession element, *see United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003).

The government is also incorrect in suggesting notice of the knowledge element could not have affected trial counsel's approach to the case. Trial counsel could have argued there was no direct evidence Mr. Moreno knew he was in the country illegally. If the government pointed to Mr. Moreno's seemingly evasive conduct described above, defense counsel could have responded with the counterargument made above – that this was because Mr. Moreno had been smuggling marijuana and providing assistance to his illegally present companion.

The government does also argue there is no plain error because the strength of the evidence precludes a finding of effect on substantial rights. That fails for some of the same reasons the government's sufficiency of evidence argument fails. Most of what is said about why the evidence is insufficient to support a conviction can be said about why the evidence is insufficient to preclude a finding of effect on substantial rights, which is an even lower bar than the sufficiency of evidence bar. If the evidence was not insufficient to support one or both of the convictions, it was at least weak enough for the deficient indictment and jury instructions to

affect substantial rights.

B. IT WAS ERROR TO USE THE CHARGED ATTEMPTED MURDER TO ENHANCE THE SENTENCE BECAUSE THE JURY FAILED TO REACH A VERDICT ON THE CHARGED ATTEMPTED MURDER.

There is *United States v. Watts*, 519 U.S. 148 (1997), and there is *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). The question is how to reconcile the two opinions and the respective reaches of the two opinions.

It is an overstatement for the government to argue that "[t]o accept [the defense] contention, this Court would have to conclude that the Supreme Court [in *Watts*] ignored one of the must fundamental concepts of criminal law and created case law in direct violation of this principle." Govt. Brief, at 31. The Supreme Court itself characterized *Watts* as "present[ing] a very narrow question regarding the interaction of the guidelines with the Double Jeopardy Clause [without] the benefit of full briefing or oral argument." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). It declined to treat *Watts* as controlling on the issue presented in *Booker* because "[t]he issue . . . was simply not presented" in *Watts*. *Booker*, 543 U.S. at 240.

The issue presented here – whether the presumption of innocence allows a court to rely on conduct which was tried to a jury, but not found by the jury – was similarly not presented in *Watts*. In addition, there is reasoning in *Nelson* which suggests the presumption of innocence does not allow a court to base a sentence on conduct which was tried to a jury, but not found by the jury. This Court can and should hold the presumption of innocence does not allow this. Mr. Moreno should not be sentenced for the charged attempted murder when the jury did not

convict him of the charged attempted murder.

C. EVEN IF THE CHARGED ATTEMPTED MURDER COULD BE CONSIDERED, THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THERE WAS PREMEDITATION.

The government complains the defense "fails to cite any authority suggesting the facts of this case are insufficient to support a finding of premeditation." Govt. Brief, at 36. If the government is saying there is no case with facts just like the present one, that is true. That is probably because no other trier of fact has found premeditation on such evidence.

Appellant's Opening Brief does cite the cases which have upheld findings of premeditation and describe how much stronger the facts were in those cases. Appellant's Opening Brief also discusses the factors that show premeditation. Finally, Appellant's Opening Brief explains how those factors are not even close to being present in this case.

The government fails to offer any discussion at all of case law. First, it fails to cite any case which is factually similar. Second, it completely ignores the factors established by the premeditation cases. It offers no explanation of how the evidence here comes even close to establishing premeditation under those factors.

What was described by Officer Linde, who is the witness whose testimony the district court expressly accepted, was a struggle which spontaneously erupted when Officer Linde tried to handcuff Mr. Moreno, an attempt by Mr. Moreno to take the gun, a struggle over the gun during which Mr. Moreno attempted to use it to shoot Officer Linde, and the firing of shots during the struggle, over a period that lasted perhaps a minute. There was no time for the sort of planning and

A P P E N D I X 9

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July 9, 2020

Molly S. Dwyer
Clerk of Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Re: ***United States of America v. Jesus Eder Moreno Ornelas***
C.A. No. 19-10252

Dear Ms. Dwyer:

Pursuant to Fed. R. App. P. 28(j), the United States provides the following supplemental citation of legal authorities:

First, this Court's decision in *United States v. Johnson*, No. 17-10252, --- F.3d ---, 2020 WL 3458969 (9th Cir. June 25, 2020), further supports affirming the defendant's convictions on plain error review. (Ans. Br. at 20-26.) The defendant claims insufficient evidence existed to prove his knowledge of his felon and alien status, and that only trial evidence may be considered. (Op. Br at 20-22; Rep. Br. at 2-3.) However, in *Johnson*, this Court found that because the government's evidence was sufficient to sustain the felon in possession conviction at the time of trial, but was subsequently rendered insufficient due to an intervening change in the law (*Rahaif*), this Court could "review the entire record on appeal – not just the record adduced at trial – in assessing whether [the defendant] has satisfied the fourth prong of plain error review." *Id.* at **3-4. "[U]ncontroverted evidence that a defendant was sentenced to more than a year in prison," including from the presentence report, "will ordinary preclude a defendant from satisfying the fourth prong of plain-error review when challenging the sufficiency of the evidence that he knew of his status as a convicted felon." *Id.* at *5. After reviewing the entire record,

including the unconverted information in the presentence report, this Court found that Johnson "cannot show that refusing to correct the . . . error would result in a miscarriage of justice." *Id*. Such is the case at bar. (Ans. Br. at 22-24.)

Second, the defendant argues that *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), undermines *United States v. Watts*, 519 U.S. 148 (1997) (Op. Br. at 26-29; Rep. Br. at 5-6), the case supporting the district court's decision to consider at sentencing the defendant's attempted murder conduct for which he was not convicted (Ans. Br. at 30-32). The Sixth Circuit has rejected the defendant's argument. *United States v. Rankin*, 929 F.3d 399, 408 (6th Cir. 2019) ("*Nelson* did not curtail courts' ability to sentence based on uncharged conduct."). This Court should do the same.

Sincerely,

MICHAEL BAILEY
United States Attorney
District of Arizona

s/ Angela W. Woolridge

Angela W. Woolridge
Attorneys for Plaintiff-Appellee

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 29th day of December, 2020, 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 was served on the Solicitor General of the United States, by electronic mail, at supremectbriefs@usdoj.gov, as consented to by the Solicitor General's office and authorized by this Court's order issued April 15, 2020 in light of the ongoing public health concerns relating to COVID-19.

Respectfully submitted,

December 29, 2020

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