CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

==========

NICKIE NATHANIAL RICO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

==========

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

==========

Respectfully submitted,

J. Lance Hopkins
219 W. Keetoowah
(918) 456-8603

Counsel for Petitioner
Nickie Nathanial Rico

a. The Questions Presented for Review Expressed in the Terms and Circumstances of the Case.

Whether the District Court erred in overruling Defendant's Objection to the Attempted Murder Enhancement in the Presentence Report.

b. List of All Parties to the Proceeding.

United States of America vs. Nickie Nathanial Rico.

c. Table of Contents and Table of Authorities.

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Petitioner, by and through his attorney, J. Lance Hopkins, respectfully submits this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On Petitioner's behalf, counsel has submitted a Motion to Proceed In Forma Pauperis, a Proof of Service, and a copy of the Order and Judgment from the appellate court.

This petition has been arranged in the order specified by Rule 14.1 of this Court. The individual sections have been lettered to correspond with the subparagraphs of Rule 14.1. Pursuant to Rule 39.2 of this Court, ten copies of this petition are being submitted for filing.

d. Reference to the Official and Unofficial Reports of Any Opinions.
U.S. v. Rico, 10th Cir. No. 20-1050.

e. Concise Statement of Grounds on Which Jurisdicition of this Court is Invoked.

i. Date of Judgment sought to be reviewed: July 7, 2021

ii. Date of any order regarding rehearing: None

iii. Cross-Petition: None

iv. Statutory Provision Believed to Confer Jurisdicition:

This case involves review of a count of conviction involving a United States Criminal Statute, and this Court has jurisdiction over such interpretation and application of United States Statutes.

f. Constitutional Provisions, Statutes and Rules Which this Case Involves.

i. Constitutional provisions:

ii. Statutes involved: U.S.S. G. §2K2.1(c)(1) and §2X1.1(c)(1),

g. Statement of the Case:

The Petitioner, Nickie Nathanial Rico, was charged in a Superseding Indictment with Possession of Firearm/Ammunition by a prohibited person, in violation of 18 U.S.C. §922(g)(1), to which he subsequently pled guilty pursuant to a plea agreement.

The plea agreement contained the following statement of stipulated facts:

> "The parties stipulate that these are the facts the government would prove at trial beyond a reasonable doubt:
>
> 'On September 26, 2018, the defendant and his co-defendant, Armando Rogelio Durete ('Durete') were in the parking lot of P.F. Chang's at 15th Street and Market Street. Shortly before 2:25 a.m., the defendant and Durete got into an argument with another group of men. Witnesses described hearing 'Compton Crip,' and 'Fuck the

Eastside,' along with more general language, such as 'What are you going to do?' The defendant paced throughout the parking lot, throwing up his hands in a manner consistent with a gesture for 'CCR,' or 'Compton Crip Rider.'"

"Shortly after the verbal altercation, a security guard working at a nearby business saw a man matching the defendant's physical description kneel behind the taco truck parked on Market Street next to the P.F. Chang's parking lot. As the defendant kneeled, the security guard saw him display a firearm and fire several shots across Market Street. Gerald Wright was on the eastside of Market Street and he returned fire at the defendant and Durete. The defendant fired four shots; Durete fired seven shots. The defendant was shot twice: once in the thumb and once in his arm. Gerald Wright was shot in the leg. An innocent bystander on the eastside of Market Street was also shot in her back."

"After the shooting, the defendant and Durete ran to the defendant's vehicle, which was parked in the P.F. Chang's parking lot. The defendant ultimately placed his firearm on the front passenger seat. This firearm was subsequently tested and the defendant's DNA was on the firearm."

After the plea agreement had been entered into, Counsel for the Defendant, Mr. Rico, filed a document entitled Notice of Disputed Facts .

The Notice of Disputed Facts stated the following:

Defendant Nickie Rico, through undersigned appointed counsel, hereby provides notice of disputed facts as follows:

1. Despite having received and reviewed the plea agreement and its stipulated facts, Mr. Rico overlooked two facts he does not agree with.

2. Mr. Rico is not moving to withdraw his plea.

3. Mr. Rico requests to dispute two facts outlined in the plea agreement:

a. Mr. Rico disputes paragraph 12 of the plea agreement that he made gang gestures or said gang related statements.

b. Mr. Rico disputes paragraph 13 of the plea agreement that he shot first.

4. The disputed facts are not material to elements of the offense.

In addition, the presentence report included *verbatim* a Sentencing Statement prepared by the Government for Appellant's co-defendant, Durete, who also was found guilty of one count of Possession of Firearm/Ammunition by a prohibited person, in violation of 18 U.S.C. §922(g)(1).

The sentencing statement stated the following:

"The defendant [Durete] was convicted for possessing a firearm or ammunition on September 16, 2018. That offense arose out of a

shooting in downtown Denver, in which three people were shot and an innocent bystander was nearly killed."

"In the early morning hours of September 16, 2018, the defendant, his brother and co-defendant Nickie Rico ('Rico'), and their associate, Emmanuel Adams, walked to the parking lot of P.F. Chang's at 15th Street and Market Street. Many other individuals had congregated near a taco truck that was parked near that corner. The intersection and surrounding area was busy, filled with people leaving the nearby clubs and bars."

"Shortly before 2:25 a.m., the defendant and Rico got in an argument with another group of men. Witnesses described hearing 'Compton Crip,' and 'Fuck the Eastside,' along with more general language, such as 'What are you going to do?' Rico, at times followed by the defendant [Durete], paced throughout the parking lot, throwing up his hands in a manner consistent with a gesture for 'CCR,' or 'Compton Crip Rider.'"

"During this altercation, Candace Thompson saw a man matching the defendant's [Durete's] description – braids in his hair, a little shorter than her, athletic build – holding a black gun in his hand and asking, 'Who wants to get painted?' She also saw another man

lift up his shirt to expose a firearm tucked into his waistband. Ms. Thompson's ex-boyfriend was punched in the back of his head, seemingly by the man with the gun. So she pushed her ex-boyfriend across Market Street in order to avoid a confrontation."

"Shortly after crossing Market Street, Ms. Thompson heard gunfire and ran for her life. She only took a few steps before she felt a burning sensation in her back and fell to the ground: she had been shot. Ms. Thompson's ex-boyfriend carried her to her vehicle where she awaited an ambulance. She was taken to the hospital in critical condition, where she was resuscitated at least twice and underwent several life-saving operations. Although the bullet could not safely be removed from Ms. Thompson's body – and thus, could not be matched to any particular gun – a bullet fragment found on the sidewalk where Ms. Thompson was shot came from the defendant's [Durete's] gun."

"Investigation later determined, based on shell casings and bullet fragments, that at least three individuals fired shots. The defendant [Durete] and Rico were near the taco truck at 15th and Market and fired their guns diagonally across Market Street, northbound toward 16th Street. Another man returned fire from the

eastside of Market Street. A nearby security guard, Dylan Despain, testified that a man matching Rico's description fired the first shots from near the taco truck. Seven shell casings found near that taco truck matched the defendant's [Durete's] gun, indicating that the defendant [Durete] shot seven times."

"After the shooting, the defendant [Durete] and Rico ran across the P.F. Chang's parking lot to Rico's car, followed by Adams. Rico entered the driver's seat, the defendant [Durete] entered the front passenger seat, and Adams entered the rear passenger seat. Seconds later, the defendant [Durete] got out of the car and went behind the car to the P.F. Chang's patio where he bent over near a pillar, appearing on video to place an object behind it. He then turned and ran across the parking lot, toward the Market Street exit."

"Just as the defendant [Durete] bent over near the pillar, another security guard, Luke Kroener, pointed at him. Mr. Kroener had seen a gun before the shooting and had run to the corner of 15th and Market, where he was gesturing to arriving officers. When the defendant [Durete] began to run across the parking lot, Mr. Kroener chased after him and tackled him, near the entrance to the P.F. Chang's parking lot. Mr. Despain testified that the man Mr. Kroener tackled was

wearing a black shirt with a firearm-related insignia on the back – a description consistent with the defendant's [Durete's] clothing that night."

"Officer Mejia arrived minutes after the shooting and saw Mr. Kroener pointing his firearm at the defendant [Durete]. Officer Mejia quickly determined Mr. Kroener was a security guard and observed Mr. Kroener commanding the defendant [Durete] to the ground. Mr. Kroener exclaimed that the man on the ground was one of the men with a gun. Officer Mejia gave Mr. Kroener his handcuffs to detain the man while Officer Mejia assisted in securing the scene and obtaining medical attention for Ms. Thompson. Officer Mejia later returned and identified the man who was detained as the defendant [Durete]."

"As other officers entered the P.F. Chang's parking lot, Rico walked toward them from his vehicle. Rico was wearing a royal blue t-shirt that was stained with blood, as he had been shot twice – once in his thumb and once in his arm. Officers detained Rico and called for medical assistance. Another man, Sean McCaleb, was detained next to the vehicle. Minutes later, Adams got out of the back seat of the vehicle. Adams was on his phone and Rico shouted at Adams to lock

the car doors. Adams was also ordered to the ground and detained. Officers looked into the vehicle to ensure no one else was inside and they observed a firearm with apparent blood stains on the front passenger seat of the car. This car was towed and searched pursuant to a search warrant. The car belonged to Rico and the firearm observed on the front seat of the vehicle was collected and determined to be a .45 caliber firearm."

"The defendant [Durete], Adams, and McCaleb were taken to Denver Police Headquarters after the shooting. Crime scene personnel explained to each of the men that they were going to collect gunshot residue samples from their hands and faces, and that each man would be photographed. The defendant [Durete] was uncooperative with this entire process; he continuously opened and clenched his hands while a technician was trying to swab his hands and the defendant tried to hide his face from being photographed."

"Video surveillance was obtained and analyzed as part of the investigation. The shooting itself was not captured on camera, but both the HALO video from 15th and Market Street, as well as the video from Go Spot Check, located on the eastside of Market Street, captured the parking lot before and after the shooting. Detective Kari

Johnson testified as to the hours she spent analyzing these videos in an effort to ascertain the chain of events. She knew the defendant [Durete] was arrested in the corner of the parking lot, where he was initially detained by Mr. Kroener, so she used this information to track the defendant's [Durete's] movements. She viewed the video backward from when Mr. Kroener tackled the defendant [Durete] and was able to track the defendant's [Durete's] movements both before and after the shooting, as described herein.

"Officers secured the parking lot as they continued to investigate the shooting. Officer Lutkin walked to the P.F. Chang's patio and observed a firearm behind the pillar on the P.F. Chang's patio where the defendant [Durete] was seen on video bending over and seemingly placing an object. This firearm was a 9mm M&P Shield; the magazine was empty and the slide was locked back, indicating that it had been fired until it was empty of ammunition. This firearm was tested for DNA and it was determined that the defendant [Durete] was the source of the major male profile developed from the firearm."

"The third shooter – the man who returned fire at the defendant [Durete] and Rico – is believed to be a man who was observed on

video seconds before the shooting, wearing a jean jacket and jeans. After the shooting, this man fled the scene, and Detective Johnson tracked his movements via HALO cameras from the scene of the shooting to his vehicle, parked at 14th and Larimer Streets. Approximately 45 minutes after the shooting, Gerald Wright ('Wright') went to the hospital for a gunshot wound to his leg. Wright was dropped off at the hospital by a vehicle that did not stay at the hospital."

"Wright reported that he was shot at a nearby house party. But no witnesses reported a shooting in the location at the time Wright claimed to have been shot, nor did Shotspotter report a discharge during that time period. Crime scene personnel told Wright they were going to swab his hands for gunshot residue and he immediately wiped his hands on the hospital blanket. Wright is a documented Tre Crip (an eastside set) and is known to have issues with west side Crips, including Compton Crips, of which both the defendant [Durete] and Rico are members. The firearm used to shoot at the defendant [Durete] and Rico was recovered from Larry Green, a Tre Crip, on March 6, 2019. Based on all of this evidence, it is believed that

Wright is the individual who returned fire at the defendant [Durete] and Rico on Market Street on September 16, 2018."

While the guideline offense level for a violation of 18 U.S.C. §922(g)(1) is generally determine by applying USSG §2K2.1, the probation office used the cross-reference provision of §2X1.1 (Attempt, Solicitation, or Conspiracy) to enhance the guideline range, on the basis that Mr. Rico shot the firearm he possessed at Gerald Wright in an attempt to murder him. The guideline for attempted murder is §2A2.1, which produced a base offense level of 27 under §2A2.1. The probation office also imposed a two-level increase pursuant to §2A2.2(b)(1)(B), on the basis that Gerald Wright sustained serious bodily injury as he was shot in the leg and required medical attention. The base offense level was 29, and deducting three levels for acceptance of responsibility, the adjusted offense level was 26. With a criminal history category of III, the guideline imprisonment range was 78 to 97 months.

At paragraphs 35 and 36 of the presentence report, the U.S. probation officer explained his decision to apply the cross-reference guideline provision for attempted murder:

> **"Probation Officer Coleman contacted Assistant United States Attorney (AUSA) Celeste Rangel to discuss**

evidence of the defendant and co-defendant Durete shooting their firearms intentionally at Mr. Wright. She directed Probation Officer Coleman to Government Exhibit Numbers 008, 009, and 015. These exhibits display markers of shell casings and bullet fragments recovered from the exchange of gunfire between the defendant, codefendant Durete and Mr. Wright. The location of the shell casings and bullet fragments reflect a direct exchange of gunfire between the defendant and codefendant Durete toward Mr. Wright (shooting diagonally across to street), and vice versa. The defendant fired five rounds and Durete fired seven rounds. Mr. Wright fired approximately four to five rounds. The exchange of gunfire ensued following a verbal confrontation by the parties.

"Based on the information provided by AUSA Rangel, the Probation Officer believes the defendant and Durete were not shooting their firearms indiscriminately but rather intentionally aiming their shots toward Mr. Wright, attempting to kill him."

Through Counsel, the Petitioner/Defendant, Mr. Rico, objected to the application of the cross-reference provision to apply the attempted murder guideline of §2A2.1, on the basis that Rico shot at Mr. Wright in self-defense.

Rico argued that Gerald Wright's actions after being shot were consistent with him being the initial aggressor. Mr. Wright was shot in the right thigh. As with any gunshot wound, the injury could have been life threatening. Mr. Wright did not call 911. He did not wait at the scene for an ambulance or

medical treatment. He did not report the shooting to law enforcement. It would be expected from an innocent victim to remain at the scene, report the crime, and seek medical attention. Instead, Mr. Wright was driven by at least two other males to Rose Medical Center, which is almost five miles from the shooting location. He arrived at the hospital 45 minutes after the shooting. There are hospitals far closer to the downtown area including Denver Health.

The Petitioner/Defendant noted that Denver Police Officer James Sandoval was dispatched to Rose Medical Center and interviewed Mr. Wright. Mr. Wright stated he was at a concert at the Summit Hall that night. He said he went with a group of friends to a house party near Rose Medical Center. At this house party, he claimed he was shot. Officer Sandoval contacted dispatch and was informed there were not any reports of shots fired or heard in the time frame Mr. Wright claimed he was shot. Mr. Wright stated he was taken to the Hospital by friends, but he refused to give the officer their names. Officer Sandoval bagged Mr. Wright's hands to preserve any gunshot residue evidence.

Rico argued that flight itself is a reliable indicia of guilt. Mr. Wright's behavior was far more than just leaving the scene. He risked his own life by leaving the scene and traveling a far distance to be treated. He made up a story of how he was shot, when he was shot, and where he was shot. He refused to give the names of the people who drove him to the hospital for police to verify any of Mr. Wright's assertions of events. Rico contended that if Mr. Wright were truly a victim, his actions would not reflect the actions of an initial aggressor.

At sentencing, the District Court adjudicated the issue of whether the attempted murder cross-reference enhancement should apply. After hearing argument, the Court overruled Defendant's objection to the attempted murder enhancement, finding the Petitioner/Defendant was the initial aggressor and self-defense was not applicable. The Petitioner appealed the District Court ruling to the United States Court of Appeals for the Tenth Circuit. Following briefing and oral argument, the Tenth Circuit affirmed the District Court's ruling on July 7, 2021.

h. Review of the Judgment of a State Court: Not Applicable

i. Review of the Judgment of a Federal Court:

The Petitioner was convicted in the United States District Court for Colorado. The Conviction was affirmed by the United States Court of Appeals for the Tenth Circuit.

j. Direct and Concise Argument Amplifying the Reason Relied on for Allowance of the Writ.

PROPOSITION ONE: *Whether the District Court erred in overruling Defendant's objection to the Attempted Murder Enhancement.*

The District Court erred in applying the guidline enhancement for attempted murder. The Government did not establish by a preponderance of the evidence that Mr. Rico was not acting in self-defense when he fired shots at Mr. Wright.

Mr. Rico was shot at multiple times by Mr. Wright, which resulted in bullet wounds to Mr. Rico's thumb and his arm. Mr. Rico contends Mr. Wright drew his firearm first.

Gerald Wright's actions after being shot are consistent with him being the initial aggressor. Mr. Wright was shot in the right thigh. As with any gunshot wound, the injury could have been life threatening. Mr. Wright did not call 911. He did not wait at the scene for an ambulance or medical treatment. He did not report the shooting to law enforcement. It would be expected from an innocent victim to remain at the scene, report the crime, and seek medical attention. Instead, Mr. Wright was driven by at least two other males to Rose Medical Center, which is almost five miles from the shooting location. He arrived at the

hospital 45 minutes after the shooting. There are hospitals far closer to the downtown area including Denver Health. Accordingly, the Government did not prove that Rico was the initial aggressor. Therefore, the District Court erred when it applied the cross-referenced provisions of USSG §2X1.1 (Attempt, Solicitation, or Conspiracy). And the Tenth Circuit erred in affirming the District Court.

In the matter at bar, applying the attempted homicide-related cross reference dramatically increased the Defendant's guideline sentencing range. With the attempted-murder enhancement, the base offense level was 29. A three-point reduction for acceptance of responsibility resulted with an adjusted offense level of 26. With the criminal history category of III, the resulting guideline range was 78 months to 97 months. But as noted by the Probation Officer in a dialogue with the Court at sentencing, without the attempted murder enhancement, the adjusted offense level would have been 15. With an offense-level of 15 and a criminal history category of III, the resulting guideline range would have been 24-30 months. Accordingly, the attempted-murder enhancement increased the guideline range from 24-30-months to 78-97 months, and therefore had an extremely disproportionate effect on the sentence relative to the offense of conviction.

Mr. Rico was shot multiple times by Mr. Wright, with Rico suffering bullet wounds in his thumb and arm. Wright drew his gun first.

Gerald Wright's actions after being shot are consistent with him being the initial aggressor. Despite receiving life-threatening gun-shot wounds, Wright did not call 911. He did not call at the scene for an ambulance or medical treatment. He did not report the shooting to law enforcement. Wright was driven to Rose Medical Center, which is almost five miles from the shooting location. He arrived at the hospital 45 minutes after the shooting. There are hospitals far closer to the downtown area including Denver Health. Accordingly, the Government did not prove that Rico was the initial aggressor.

Mr. Wright stated that he went with a group of friends to a house party near Rose Medical Center. At this house party, he claimed he was shot. But there were no reports of shots fired or heard in the time frame Wright claimed he was shot. Wright stated he was taken to the Hospital by friends, but he refused to give the officer his friends' names.

A shooting committed in self-defense is not unlawful. *See Toledo*, *Id., at* 739 F.3d at 562 (self-defense is a defense to second-degree murder under 18 U.S.C. §1111(a)). "Malice is not satisfied simply by killing with an intentional or reckless mental state; instead, malice specifically requires committing the wrongful act without justification, excuse, or mitigation." *Id.*, at 664. Mr. Rico did not act with malice aforethought because his conduct was justified, excused, and

mitigated by Mr. Wright's conduct. Rico did not act with general intent to kill, a specific intent to do serious bodily injury, or depraved heart recklessness.

In *Toledo, Id.*, the defendant, Toledo, was convicted of involuntary manslaughter. Although the District Court instructed the jury on second degree murder and voluntary manslaughter, it denied Toledo's request for a self-defense instruction.

Trial testimony and evidence showed that following a heated argument between Toledo and his uncle, Arvin Sanders, with a fence between them, the two began to walk away from one another. Toledo then told Sanders to quit calling him racial slurs, Sanders responded by turning around, rushing toward the fence, yelling racial slurs at Toledo, with his face coming close to Toledo's face. Toledo responded by stabbing Sanders, fatally.

On appeal, Toledo contended that he District Court erred in not issuing a self-defense jury instruction. The Tenth Circuit agreed and reversed and remanded.

The Court of Appeals stated the following:

> **Self-defense only requires the defendant's reasonable belief that deadly force was necessary, not that he exercise a duty to retreat or recognize the unavailability of reasonable alternatives. *See Visinaiz,* 428 F.3d at 1311; *Greschner,* 802 F.2d at 384; *cf.* 10th Cir.Crim. Pattern Jury Instructions No. 1.28 (2011). Additionally, Mr. Sanders testified that the fence was "like a rubber band" and might not have allowed for Mr. Toledo's sure retreat. 3 R. 123. And while this testimony was**

> **contradicted by Agent Fortunato, *id.*, at 219, factual contradictions are the essence of trial. Stated another way, though a defendant's testimony may be contradicted to some degree by other evidence or even by his prior statements, a defendant is entitled to an instruction if the evidence viewed in his favor could support the defense. *See United States v. Brown,* 287 F.3d 965, 976–77 (10th Cir.2002); *see also United States v. Scout,* 112 F.3d 955, 960 (8th Cir.1997). Likewise, Mr. Toledo's testimony that he feared his uncle—although contradicted by his at-the-scene statement, "I'm not afraid of you," 3 R. 484–85—should be taken into account when deciding the propriety of a certain jury instruction. *See Brown,* 287 F.3d at 976–77.**

United States v. Toledo, Id., at 568.

Another case in which the Tenth Circuit addressed the issue of self-defense was *United States v. Benally*, 146 F.3d 1232 (10th Cir. 1998).

Jonathan Benally, Arvin Benally, Rodrick Benally, Cheryl Largo and Christina Talk gathered near Arvin's home to talk, drink, and listen to music. After Jonathan and Arvin left to purchase a half pint of whiskey, Russell John joined the group. Following Jonathan and Arvin's return, Russell offered them $20 to purchase additional beer. Told the liquor stores were closed, Russell offered to obtain marijuana instead and left. According to Rodrick Benally, Jonathan then proposed that "if he doesn't come back with the marijuana ... we should take that $20 from him," and Arvin agreed.

Accounts differed as to what transpired when Russell returned without the marijuana. Rodrick testified that Jonathan and Arvin were upset, and that Jonathan refused to accept Russell's excuses and threw him to the ground "for no reason."

According to Rodrick, Russell then knocked Jonathan to the ground and suddenly punched Arvin in the face, knocking his glasses off and drawing blood. Arvin testified that he was struck as he attempted to break up the fight between Jonathan and Russell. He also stated that Russell's blow caused him to black out momentarily.

The testimonies of Rodrick and Arvin conflicted in their account of the subsequent melee. According to Rodrick, Jonathan tackled Russell, sat on him, and punched him repeatedly in the face. Arvin kicked Russell in the head and side and was restrained by Rodrick. Jonathan then renewed his attack, "kicking [Russell] side to side and ... in the groin area." Pulling down Russell's pants, Jonathan again kicked him in the groin. Arvin then hit Russell in the face, and was restrained once more. During cross-examination, Rodrick testified that Arvin had struck Russell no more than four times during the fight. As Arvin and Rodrick were looking for Arvin's glasses, Jonathan cut and stabbed Russell's buttocks and kicked him again. The group then abandoned Russell and agreed to lie about their whereabouts that night. Later that night when Arvin and Rodrick returned to search for the missing glasses, Arvin stated he wanted to strike Russell because "[t]hat son of a bitch hit me," but he was stopped by Rodrick.

By Arvin's account, his role in the fight was minimal. After being struck by Russell as he attempted to break up the fight, he could not see because his glasses

had been knocked from his face and it was dark. He then "pushed and shoved" Jonathan and Russell to keep them away from him, and began looking for his glasses before retreating to a pickup truck. He could not see what transpired in the fight between Jonathan and Russell. Though he admitted striking Russell in response to Russell's punch, Arvin stated that he only did so because he "didn't want to get hit again." He denied intent to hurt or kill anyone.

Russell's body was discovered the next morning. Arvin was charged with first degree murder in violation of 18 U.S.C. §§11533 and 1111(a). He was also charged with aiding and abetting first degree murder in violation of 18 U.S.C. §2. The District Court instructed the jury as to first degree murder and the lesser included offenses of second-degree murder and voluntary manslaughter. Over defense objection, the court refused to instruct on either self-defense or involuntary manslaughter. The jury returned a verdict of guilty as to voluntary manslaughter.

On appeal, Arvin Benally contended that the District Court erred in not giving a self-defense jury instruction. The Tenth Circuit agreed and reversed his conviction and remanded

The Court of Appeals stated the following:

> **Defendant appeals the district court's decision denying his requested instruction on self-defense. It is well established that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States,* 485 U.S. 58, 63, 108 S.Ct. 883, 99**

L.Ed.2d 54 (1988). Had the jury credited Arvin's account of the fight, they could properly have concluded that Arvin acted in self-defense. By his account, Russell struck him first, causing him to black out momentarily. He further testified that from that point on, his actions were solely intended to prevent being hit again. If Arvin's testimony were credited, the jury could reasonably have believed that the force Arvin used in self-defense was reasonable in light of the threat presented. Consequently, the district court erred in denying the requested instruction.

United States v. Benally, Id., at 1235-1236.

The Second Circuit addressed the issue of the applicability of the second degree murder enhancement in *United States v. Stroman,* 420 Fed.Appx. 100 (2nd Cir. 2011)(unpublished). Stroman was convicted of felon-in-possession of ammunition. His conviction arose out of a shooting at a neighborhood grocery store in Brooklyn, New York, during which the suspect discharged a firearm while chasing two individuals in the store, which resulted in no injuries but damage to the glass door of a refrigerated beverage case. He was sentenced to 96 months' imprisonment, as his guideline range was enhanced on the basis of a finding that Stroman discharged the firearm at his intended victim with the specific intent to kill.

On appeal, Stroman argued that it was clearly erroneous for the district court to conclude that Stroman had the specific intent to kill necessary to justify imposition of the base offense level for second-degree murder under section 2A2.1(a)(2). The Second Circuit agreed and reversed and remanded his sentence.

The Court of Appeals stated the following:

> **The Supreme Court has held that "[a]lthough a murder may be committed without an intent to kill, an *attempt* to commit murder requires a specific intent to kill." *Braxton v. United States,* 500 U.S. 344, 351 n. *, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) (internal quotation marks omitted) (emphasis supplied); *see also United States v. Kwong,* 14 F.3d 189, 194 (2d Cir.1994) (requiring specific intent to kill to convict for attempted murder). Therefore, the district court must have concluded, by a preponderance of the evidence, that Stroman actually attempted or intended to kill his victim. The district court found that Stroman had deliberately fired his weapon:**
>
> > **[l]ooking at that videotape, it was obvious Mr. Stroman was running into this bodega for the very specific purpose of shooting whoever it was he was aiming his gun at and had he hit him, he might very well have killed him. So, that was not an accident. It wasn't a fortuitous event. It was obviously something he clearly intended to do.**
> > **You don't run into a bodega, running after somebody, pointing a gun at him and shooting at him, unless this is something you intended to do. I have no difficulty with that.**
>
> **This statement does not directly address whether Stroman intended to kill his victim. Although the district court further stated that it "look[ed] like" Stroman was "attempt[ing] to kill someone," *id.* at 341, this statement does not support a finding of specific intent, and therefore we conclude that the district court committed procedural error. Accordingly, we vacate Stroman's sentence and remand the case to the district court for resentencing.**

United States v. Stroman, Id., at 105 (unpublished).

Comparing the ruling in *Stroman* to the matter at bar, the Government did not establish by a preponderance of evidence that the Defendant, Mr. Rico, was not acting in self- defense, and the Government did not establish by a preponderance

of the evidence that Rico fired the shots at Wright with a specific intent to kill. The Government did not prove by a preponderance of the evidence that Rico was the initial aggressor.

The Sixth Circuit addressed the cross-reference, murder-enhancement issue in *United States v. Turner,* 436 Fed.Appx. 631 (6th Cir. 2011)(unpublished).

Turner—while under the influence of alcohol, prescription medication, and crack cocaine—came out of his home wielding a shotgun. There he met his wife, Bonnie Ruffin, and two others. Turner fired the shotgun once into the air and then pointed it at Ruffin and the others, but did not fire. Another man, James Gates, attempted to wrestle the gun away from Turner. In the ensuing struggle, the gun went off and severely injured Ruffin. The District Court found at sentencing that Turner's actions were extremely reckless, but that Turner did not intend to kill Ruffin (or anyone else).

Turner pled guilty to being a felon in possession of a firearm. His presentence investigation report calculated a base offense level of 33 based on a cross reference to attempted first-degree murder under §2A2.1(a)(1) of the Guidelines. The District Court rejected that cross reference in light of its finding that Turner did not intend to kill Ruffin. At the Government's urging, however, the court applied a cross reference to attempted second-degree murder under §2A2.1(a)(2), on the theory that Turner acted with a depraved heart.

Turner appealed the application of the attempted second-degree murder enhancement. While the appeal was pending, the Government changed its mind, and conceded that Turner should not have received the cross reference to §2A2.1(a)(2). The Sixth Circuit agreed, and vacated Turner's sentence and remanded.

The Court of Appeals stated the following:

> **The government is correct. Under federal law, a defendant cannot be guilty of attempted murder without a specific intent to kill. *See Braxton v. United States,* 500 U.S. 344, 351 n. *, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) (quoting 4 C. Torcia, *Wharton's Criminal Law* § 743, p. 522 (14th ed. 1981)) ("Although murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill"). The same is true under Tennessee state law. *See State v. Kimbrough,* 924 S.W.2d 888, 891 (Tenn.1996). Simply stated, the cross reference here was to a crime that does not exist. *See generally* 2 Wayne R. Lafave, *Substantive Criminal Law* § 11.3(a), at 212–13 (2d ed.2003) (footnotes omitted).**

United States v. Turner, Id., at 631.

Applying the facts and case law referenced and cited above, at sentencing the Government did not prove by a preponderance of the evidence that Mr. Rico was not acting in self-defense when he fired shots at Mr. Wright. The Government did not prove that Rico was the initial aggressor. Therefore, the District Court erred when it applied the cross-referenced provisions of USSG §2X1.1 (Attempt, Solicitation, or Conspiracy).

k. Appendix:

i. Opinion delivered upon the rendering of judgment by the Tenth Circuit Court of Appeals, which is the subject of this Petition: *United States v. Nickie Nathanial Rico*, 10th Cir. No. 20-1050, opinion dated July 7, 2021.

ii. Any other opinions rendered in the case necessary to ascertain the grounds of judgment: None

iii. Any order on rehearing: None

iv. Judgment sought to be reviewed other than opinion referenced in (1):

None

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue for review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit in *United States v. Nickie Nathanial Rico,* 10th Cir. No. 20-1050 (10th Cir., July 7, 2021).

Respectfully submitted,

BY: /s/ J. Lance Hopkins

J. Lance Hopkins, OBA#14852
219 W. Keetoowah
Tahlequah, OK 74464
(918) 456-8603
(918) 456-1407 (fax)
Lance.Hopkins@lunalunallp.net
bacaviola@yahoo.com
Counsel for Petitioner
Nickie Nathanial Rico

CERTIFICATE OF COMPLIANCE

As required by Fed.R.App. P.32(a)(7)(C), I certify that this petition for certiorari is proportionally spaced and contains 5,930 words. I relied on Microsoft Word count to obtain word count, and I used Times New Roman, 14 pt.

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

_/s/ J. Lance Hopkins
J. Lance Hopkins

FILED
United States Court of Appeals
Tenth Circuit

July 7, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. NICKIE NATHANIAL RICO, Defendant - Appellant.	No. 20-1050

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CR-00145-PAB-1)

J. Lance Hopkins, CJA Appellate Panel Member, Tahlequah, Oklahoma, for Defendant-Appellant.

Elizabeth S. Ford Milani, Assistant United States Attorney (Jason R. Dunn, United States Attorney with her on the brief), Denver, Colorado for Plaintiff-Appellee.

Before **PHILLIPS**, **EBEL**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

Defendants often assert the affirmative defense of self-defense to justify conduct that results in injury to another. And as common sense tells us, self-defense means defending oneself from the threat of harm. So to invoke self-defense, one must face imminent danger that he did not cause. Defendant Nickie Nathanial Rico

faced no such danger when he fired several shots in the late hours of the night across a busy downtown Denver street. As a result of his actions, the government charged Defendant with one count of possessing a firearm as a felon in possession under 18 U.S.C. § 922(g)(1), and he pleaded guilty. At sentencing, the Presentence Investigation Report ("PSR") applied a cross-reference for attempted murder. Over Defendant's objection, the district court concluded the PSR appropriately applied the cross-reference and sentenced Defendant to 97 months' imprisonment. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

I.

Bar patrons poured onto Market Street as downtown Denver shut down for the night while Defendant and Armando Rogelio Durete ("Durete") started exchanging words with a rival gang. The verbal altercation began in a parking lot near a popular restaurant at 15th Street. Gerald Wright ("Wright") stood on the other side of the street. Defendant shouted expletives and threw gang signs. Either Defendant or Durete yelled, "Who wants to get painted?" while holding a gun in his hand, and the other lifted his shirt to show a gun in the waistband of his pants. As tensions rose, a security guard nearby saw Defendant kneel behind a taco truck, display a firearm, and fire the first several shots across Market Street toward a group of people near Wright. Wright fired several shots back. One shot from Defendant's direction struck Wright in the leg causing serious bodily injury. Another shot struck an innocent bystander in the back. And Defendant suffered a gunshot wound to his thumb and another to his arm. After the shooting, Defendant and Durete ran back to

Defendant's vehicle in the parking lot. Defendant placed the firearm on the front seat, and later testing confirmed Defendant's DNA on the firearm.

The government charged Defendant with one count of possession of a firearm as a prohibited person under 18 U.S.C. § 922(g). Ordinarily, that would have resulted in a United States Sentencing Guideline ("Guidelines" or "U.S.S.G.") range of 24 to 30 months' imprisonment. But here, the PSR concluded Defendant faced a Guidelines range of 78 to 97 months' imprisonment. To arrive at this range, the PSR applied U.S.S.G. § 2K2.1(c)(1)(A) and § 2X1.1 to cross-reference the substantive offense committed with the firearm—attempted murder.[1] Defendant objected to this particular application of the Guidelines, contending the government failed to prove he did not act in self-defense.

The district court concluded Defendant's conduct amounted to attempted murder and adopted the PSR's offense level calculation. Defendant received 97 months' imprisonment.

---

[1] U.S.S.G. § 2K2.1(c)(1) provides that "if the defendant used or possessed any firearm . . . cited in the offense of conviction in connection with the commission or attempted commission of another offense . . . apply § 2X1.1 in respect to that other offense, if the resulting offense level is greater than that determined above." In turn, § 2X1.1(c)(1) provides that "when an attempt . . . is expressly covered by another offense guideline section, apply that guideline section." The Guidelines expressly cover the attempted murder offense in § 2A2.1(a) establishing the base offense level at 27. Section 2A2.1(b)(1)(B) imposes a 2-level increase when a victim sustains a serious bodily injury. And when a defendant accepts responsibility, a PSR can apply a 3-level decrease. The PSR calculated Defendant's final offense level at 26, combined it with his criminal history category of III, and arrived at the Guideline range at issue here: 78 to 97 months' imprisonment.

II.

"We review the factual findings underlying a district court's sentencing determination for clear error and review the underlying legal conclusions de novo." United States v. Hooks, 551 F.3d 1205, 1216 (10th Cir. 2009) (citing United States v. Swanson, 253 F.3d 1220, 1222 (10th Cir. 2001)). Clear error exists when a factual finding lacks any factual support in the record, or after reviewing the evidence, the record convinces us the district court made a mistake. Id. (citation omitted). And we give "due deference to the district court's application of the Guidelines to the facts." United States v. Sells, 541 F.3d 1227, 1235 (10th Cir. 2008) (citing United States v. Wolfe, 435 F.3d 1289, 1295 (10th Cir. 2006)).

III.

Defendant contends the district court incorrectly found that he did not act in self-defense, and therefore erred in applying the Guideline enhancement for attempted murder. Defendant also contends that Colorado, and not federal, self-defense law applies. We need not decide which law applies because Defendant loses under either law.[2]

[2] Defendant also insists the government needed to show Defendant had not acted in self-defense by clear and convincing evidence because the enhancement had a dramatic effect citing United States v. Hymas, 780 F.3d 1285 (9th Cir. 2015). But we recently declined to adopt such a standard—thus foreclosing the issue. See United States v. Robertson, 946 F.3d 1168, 1171–72 (10th Cir. 2020) (citations omitted). And the district court judge determined that even under a clear and convincing standard his decision remained the same. ROA Vol. III at 35. So not only does the clear and convincing standard not apply, but also the district court concluded the facts met it.

Under federal law, "[a] person may resort to self-defense if he reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response." United States v. Toledo, 739 F.3d 562, 567 (10th Cir. 2014) (citations omitted). So self-defense only requires the defendant reasonably believe he needed to use deadly force in that context. Id. Colorado allows a person to use physical force to defend himself from what "he reasonably believes to be the use or imminent use of unlawful physical force by that other person." Colo. Rev. Stat. Ann. § 18-1-704(1). And an initial aggressor who does not effectively withdraw and communicate that withdrawal cannot argue self-defense under Colorado law. Colo. Rev. Stat. Ann. § 18-1-704(3)(b). Defendant asserts Wright drew his gun first. Thus, Defendant argues the district court erred in finding that he did not act in self-defense. But Defendant fails to support that assertion with record evidence. In fact, the record supports the district court's factual finding that the evening's events did not trigger a reasonable belief that Defendant needed to use deadly force in self-defense.

The district court found Defendant's actions ultimately provoked the gunfight in downtown Denver as the streets overflowed with bar patrons. And in that gunfight, Defendant shot multiple shots directly at someone. Defendant asks us to infer that Wright's conduct supports the assertion that he was the initial aggressor. Defendant mentions that Wright fled the scene, did not report the shooting, and did not seek medical attention at the nearest hospital. We cannot oblige for two reasons. First, Wright's conduct does not necessarily suggest guilt. And second, the record

supports the district court's conclusion that Defendant acted first. Defendant flashed his weapon, threw gang signs in the parking lot, and yelled inflammatory comments at the rival gang before any shots fired. Record evidence also contains the testimony of a security guard that Defendant fired the first shots and Defendant's own statement that Wright *returned* fire. Moreover, no allegation exists in the record that Wright threatened Defendant by the verbal altercation. So abundant facts in the record support the district court's conclusion that Defendant cannot claim self-defense because Defendant's actions provoked the conflict. Nor do the events suggest Defendant had a reasonable belief that he needed to use deadly force. And we do not find clear error when ample evidence in the record supports the district court's factual finding. See Hooks, 551 F.3d at 1217.

Because the record shows the district court did not clearly err in finding Defendant cannot claim self-defense, we conclude the district court did not err by applying the sentencing enhancement under the Guidelines.[3]

AFFIRMED.

---

[3] Defendant also contends that he lacked the requisite mens rea to satisfy the state attempted murder offense because he acted in self-defense when Wright drew his weapon first. Defendant fails to adequately brief this argument, so we consider it waived. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998) (citations omitted). ("Arguments inadequately briefed in the opening brief are waived[.]").