
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, 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,

September 21, 2021

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

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorney for the Petitioner

QUESTION PRESENTED

Is review of a claim that the evidence was insufficient to establish the knowledge of status required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019), limited to review for plain error when the defendant did not make a specific *Rehaif* argument but did make a general motion for judgment of acquittal?

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OTHER AUTHORITIES

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

Kenneth Randale Door petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is also published at 996 F.3d 606, is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included as Appendix 2. The portions of transcript reflecting Petitioner's motion for judgment of acquittal and the district court's denial of that motion are included as Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth

Circuit was entered on April 28, 2001, *see* App. A001, and a timely petition for rehearing en banc was denied on August 11, 2021, *see* App. A030. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

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;
> . . .
> to . . . possess in or affecting commerce, any firearm or ammunition; . . . .

18 U.S.C. § 924(a) 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.
> . . .
>
> **(7)** Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.
> . . .

18 U.S.C. § 931 provides, in pertinent part:

> **(a) In general.**—Except as provided in subsection (b), it shall be unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is—
> **(1)** a crime of violence (as defined in section 16); or;
> **(2)** an offense under State law that would constitute a crime of violence under paragraph (1) if

> it occurred within the special maritime and territorial jurisdiction of the United States.
> . . .

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.

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 QUESTION PRESENTED.

1. Conviction and Prior Appeals.

In the fall of 2011, pistols, ballistic vests, and an explosive device

known as a "seal bomb," which fishermen use to scare away marine mammals, were discovered in a search of Petitioner's home. *See* App. A037. Petitioner was charged with possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2); possession of body armor after having been convicted of a crime of violence, in violation of 18 U.S.C. § 931(a) and 18 U.S.C. § 924(a)(7); and possession of an explosive after having been convicted of a felony, in violation of 18 U.S.C. § 842(i)(1). *See* App. A038, A127. He proceeded to trial and was convicted of all counts. *See* App. A038, A127. The district court found him to be an armed career criminal under 18 U.S.C. § 924(e) – based on convictions for burglary, assault, and attempting to elude a police officer – and sentenced him to 25 years in prison.[1] *See* App. A039-40.

Petitioner appealed both the sentence and the denial of two motions to suppress evidence. The Court affirmed the convictions, but vacated the armed career criminal finding, vacated several sentencing guideline enhancements, and remanded for resentencing. *See United States v. Door*, 656 Fed. Appx. 376 (9th Cir. 2016) (unpublished); *United States v. Door*, 647 Fed. Appx. 755, 756 (9th Cir.) (unpublished), *amended*, 668 Fed. Appx. 784 (9th Cir. 2016) (unpublished). On remand, the district court imposed a slightly shorter sentence of 23 years in prison, *see* App. A128, which was the longest sentence

[1] 18 U.S.C. § 924(e), also known as the Armed Career Criminal Act, increases the maximum sentence for felon in possession of a firearm from 10 years to life and sets a mandatory minimum sentence of 15 years when the defendant has three prior convictions for a "violent felony" or "controlled substance offense."

it could impose,[2] and Petitioner appealed again. *See United States v. Door*, 917 F.3d 1146 (9th Cir.), *cert. denied*, 140 S. Ct. 120 (2019). This sentence also was vacated, based on erroneous categorization of Petitioner's assault convictions as "crimes of violence" under the sentencing guidelines. *See id.* at 1154-55.

2. Current Appeal.

The district court imposed the same statutory maximum sentence on remand, based on a greater upward variance from the sentencing guideline range, and Petitioner again appealed. *See* App. A001-29. Two of the claims raised were sentencing claims – challenging a sentencing guideline "obstruction of justice" enhancement and the reasonableness of the upward variance. *See* App. A003, A009. But there was also a new challenge to the convictions for possession of a firearm after having been convicted of a felony and possession of body armor after having been convicted of a crime of violence – based on the intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See* App. A009, A042-47. *Rehaif* held the word "knowingly" in 18 U.S.C. § 924(a)(2) – which adds the mens rea element and sets the sentence for unlawful possession of a firearm by classes of persons listed in 18 U.S.C. § 922(g) – modifies both the possession element and the

[2] The sentence consisted of consecutive statutory maximum sentences of 10 years on the felon in possession of a firearm count, 10 years on the felon in possession of explosives count, and 3 years on the violent felon in possession of body armor count. *See* App. A128 n.4.

status element in § 922(g), so a defendant charged with being a felon in possession of a firearm both must have known he possessed a firearm and must have known he had been convicted of a felony. *See* App. A010-11 (discussing *Rehaif*).[3] And Petitioner argued *Rehaif*'s reasoning extends to use of the word "knowingly" in § 924(a)(7), which adds the mens rea element and sets the penalty for possession of body armor by persons convicted of a crime of violence in violation of 18 U.S.C. § 931(a). *See* App. A044-45.

The *Rehaif* challenge had three prongs – a challenge to the sufficiency of the evidence, a challenge to the indictment, and a challenge to the jury instructions. *See* App. A043-47. For the second and third of these – the challenges to the indictment and jury instructions – Petitioner conceded review was limited to review for plain error, because there was no objection to the indictment or jury instructions. *See* App. A042. But he argued review was de novo for the sufficiency of evidence challenge, based on a general motion for judgment of acquittal he had made at trial. *See* App. A042.

The government agreed the sufficiency of evidence challenge was reviewed de novo, *see* App. A061, but argued the evidence was sufficient. For both convictions, it argued the only evidence presented – a stipulation that Petitioner in fact *had* a prior conviction for a felony and a prior conviction for a crime of violence – was sufficient to show he *knew* he had such convictions.

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[3] The defendant in *Rehaif* was an alien unlawfully in the United States, which is included by § 922(g)(5)(A), but the Court extended its reasoning by example to the more common class of felons – or, in the language of the statute, persons "convicted of . . . a crime punishable by imprisonment exceeding one year," 18 U.S.C. § 922(g)(1). *See Rehaif*, 139 S. Ct. at 2198. *See also Greer v. United States*, 141 S. Ct. 2090, 2095 (2021) (reading *Rehaif* as including the felon-in-possession offense).

See App. A070-71. For the body armor conviction, it added a preliminary argument that the only knowledge required was knowledge the conviction was for a felony, not knowledge it was for a crime of violence. *See* App. A062-66. Petitioner argued in response that the stipulation to status was not sufficient to establish *knowledge* of the status and the knowledge required for the body armor conviction was full knowledge of the crime of violence status. *See* App. A086-88.

After the case was argued, the Ninth Circuit issued *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020), *cert. denied*, No. 20-7194, 2021 U.S. LEXIS 3215 (U.S. June 21, 2021). *Johnson* considered a *Rehaif* challenge to the sufficiency of evidence in a bench trial, in which sufficiency challenges are preserved even without a motion for judgment of acquittal. *See Johnson*, 979 F.3d at 635-36. The Ninth Circuit held review was limited to review for plain error despite this, on the theory that a sufficiency of evidence challenge based on an intervening change in the law is "best understood not as a challenge to the sufficiency of the evidence, but rather as a claim that the district court applied the wrong legal standard in assessing [the defendant's] guilt – specifically, by omitting the knowledge-of-status element required under *Rehaif*." *Johnson*, 979 F.3d at 636.

The panel in Petitioner's case ordered supplemental briefing on the effect of *Johnson*. The government withdrew its concession that the sufficiency of evidence claim should be reviewed de novo and argued *Johnson* limited review to plain error review. *See* App. A096-105. Petitioner argued the government had waived this argument and *Johnson* was limited to bench trials in any event. *See* App. A106-17. He also reserved the right to challenge

Johnson en banc. *See* App. A107.

The panel rejected Petitioner's arguments, held it was bound by *Johnson*, and reviewed only for plain error. *See* App. A018.[4] This had two effects that led the panel to affirm the convictions. First, it meant Petitioner bore the burden rather than the government – specifically, he "bears the burden of offering 'a plausible basis for concluding that an error-free retrial might end more favorably.'" App. A019 (quoting *Johnson*, 979 F.3d at 637). *See also Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (noting that "the defendant has the burden of establishing each of the four requirements for plain-error relief" and "[s]atisfying all four prongs of the plain-error test 'is difficult'" (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Second, it meant the panel could look outside the trial record of just the stipulation – to the details of Petitioner's prior record. *See* App. A019 ("In reviewing for plain error, we may examine the entire record on appeal."); App. A022 (reiterating that "our review is not limited to the record adduced at trial" and discussing details of prior convictions). *See also Greer*, 141 S. Ct. at 2098 (also recognizing that appellate court conducting plain-error review may consider entire record). With this broader review and the shifted burden, the panel found Petitioner had not satisfied the fourth prong of the plain error standard. *See* App. A023.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. *See* App. A118-40. He argued the en banc court should reconsider

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[4] The panel did agree *Rehaif* extended to the possession of body armor provisions and required the defendant to know he had been convicted of a crime of violence. *See* App. A013-14.

Johnson because (1) *Johnson* created a split in the circuits on an important issue and (2) it is the position of the other circuits that is correct. *See* App. A119-20, A126, A132-37. The petition for rehearing was denied in spite of this. *See* App. A030.

V.

REASONS FOR GRANTING THE PETITION

This petition presents a question about the standard of review of a *Rehaif* claim not presented and thus not decided in this Court's recent opinion in *Greer v. United States*, 141 S. Ct. 2090 (2021). *Greer* considered only a *Rehaif* instructional error, and both parties agreed that plain error review applied to that claim. *See id.* at 2096, 2098. *But see id.* at 2099 (noting and rejecting argument by petitioner in jointly decided case of *United States v. Gary*, No. 20-444, that plain error review does not apply when defendant has entered guilty plea). The question presented here is whether review of a *sufficiency of evidence* claim is limited to plain error review when the defendant did not make a specific *Rehaif* argument, but did make a general motion for judgment of acquittal.

The Court should grant review and decide this question for several reasons. First, the Ninth Circuit opinions in the present case and the *Johnson* case the panel deemed controlling create a split in the circuits. Second, the question presented is important because it will be implicated in the vast majority of cases raising a *Rehaif* sufficiency of evidence claim, as well as most other cases in which there is a post-trial narrowing of the scope of a

criminal statute. Third, it is the view of the other circuits, not the view of the Ninth Circuit, that is correct.

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE PANEL OPINION CREATES A CIRCUIT SPLIT ON THE QUESTION PRESENTED AND THE QUESTION IS IMPORTANT.

The first reason to grant review is that the Ninth Circuit's holding in Petitioner's case and the *Johnson* case creates a square conflict with holdings in other circuits. Two circuits have held – and another has assumed – that the ordinary de novo standard of review applies to *Rehaif* sufficiency of evidence challenges where the defendant made a general motion for judgment of acquittal in the district court. The Seventh Circuit so held in *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020), *cert. denied*, No. 20-6129, 2021 U.S. LEXIS 3291 (U.S. June 21, 2021), and explained its holding as follows:

> [The defendant] moved for judgment of acquittal under Rule 29 in the district court. His motion was general. He asserted only that "the Government has not presented sufficient evidence to prove their case beyond a reasonable doubt." Without asking [the defendant] to elaborate, the district court denied the motion, which was clearly the correct decision under then-governing circuit precedent.
>
> This short exchange preserved all possible challenges to the sufficiency of the evidence, including the post-*Rehaif* argument that the government failed to prove that [the defendant] knew his felony status. A motion under Rule 29 that makes specific arguments waives issues not presented, but a general motion preserves every objection.

Id. at 958-59.

The Fifth Circuit took the same position, without even seeing a need to

explain, in *United States v. Staggers*, 961 F.3d 745 (5th Cir.), *cert. denied*, 141 S. Ct. 388 (2020). It stated: "We review the sufficiency of the evidence de novo, however, because [the defendant] made general objections to the sufficiency of the evidence." *Id.* at 754. The Eighth Circuit then assumed the same rule for the sake of analysis in *United States v. Owens*, 966 F.3d 700 (8th Cir. 2020), *cert. denied*, No. 20-6098, 2021 U.S. LEXIS 3207 (U.S. June 21, 2021), stating that "we will assume for the sake of analysis that the general motions [for judgment of acquittal] were sufficient to preserve a sufficiency challenge on the knowledge element." *Id.* at 709.

Other circuits have applied the ordinary standard to sufficiency challenges based on other changes in the law while appeals were pending. The Second Circuit used the de novo standard in considering a challenge to the sufficiency of the evidence based on a change in interpretation, in *Skilling v. United States*, 561 U.S. 358 (2010), 561 U.S. 358 (2010), of 18 U.S.C. § 1346, the honest services fraud statute. *See United States v. Bruno*, 661 F.3d 733, 743 (2d Cir. 2011). The Eleventh Circuit used the de novo standard in considering a challenge to the sufficiency of the evidence based on a change in interpretation, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), of 18 U.S.C. § 5324, the currency transaction structuring statute. *See United States v. Vazquez*, 53 F.3d 1216, 1218, 1224 (11th Cir. 1995). The D.C. Circuit implicitly did the same in *United States v. Wynn*, 61 F.3d 921 (D.C. Cir. 1995). *See id.* at 923 (not listing de novo standard of review, but listing other aspects of ordinary standard for reviewing sufficiency of evidence challenges). These cases bring to five the number of circuits which have taken a different approach than the Ninth Circuit.

The question presented is also an important one, because of the number of cases it will affect. It is standard practice to make a general motion for judgment of acquittal at the end of a jury trial, and that means there will be such a motion in the vast majority of cases raising a *Rehaif* sufficiency of evidence claim. The holding will also affect every other case in which there is a post-trial interpretation that narrows the scope of a criminal statute – such as the *Skilling* and *Ratzlaf* cases which triggered the sufficiency of evidence challenges in the Second Circuit, Eleventh Circuit, and D.C. Circuit cases just cited.

There is also a need for national uniformity. Relief for a felon in possession defendant raising a *Rehaif* claim – or other defendants for whom there is a post-trial change in the law – should not depend on the happenstance of which circuit the defendant was prosecuted in. The same standard should apply to all defendants.

B. THE COURT SHOULD GRANT THE PETITION BECAUSE IT IS THE POSITION OF THE OTHER CIRCUITS THAT IS CORRECT.

Another reason to grant review is that it is the position of the other circuits that is correct. It is hornbook law that "[s]pecificity is not required by Rule 29," 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). *See also United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (collecting cases from other circuits holding motions for judgment of acquittal "do not need to state the grounds upon

which they are based because 'the very nature of such motions is to question the sufficiency of the evidence to support a conviction'" (quoting *United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983)). 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).

This view arises out of the text of Rule 29, which is what interpretation of the rule must begin with, *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute."); *see, e.g., Greer*, 141 S. Ct. at 2099 (focusing on text of Rule 52, governing plain error and harmless error review, and text of Rule 51, requiring contemporaneous objections). Rule 29 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 corresponding civil rules – such as Federal Rule of Civil Procedure 7(b)(1), which requires motions to "state with particularity the grounds for seeking the order," and Federal Rule of Civil Procedure 50(a)(2), which 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* 2A Wright and Miller, *supra* p. 12, § 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, *see Russello v. United States*, 464 U.S. 16, 23 (1983). And in this instance the advisory committee's note directly expresses such intent, by describing the criminal rule as "substantially the same" as the civil rules, "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.

It is also unfair to defendants and their counsel to announce a different rule after the fact. It is "the absurdity of commanding a man today to do something yesterday." Lon Fuller, *The Morality of Law* 59 (1964), *cited with approval in Landgraf v. USI Film Products*, 511 U.S. 244, 265 n.18 (1994). And failure to make a specific objection at the time of trial was not a careless mistake, but wise strategy. There is good reason for a defendant not to make specific arguments in a motion for judgment of acquittal, because making specific arguments waives other arguments. *Compare Navarro Viayra*, 365 F.3d at 793 (general motion preserves all grounds), *with United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) (arguing specific ground waives all other grounds). For all the courts and appellate counsel know, trial counsel considered the argument made in *Rehaif* and refrained from specifically making it, in reliance on the foregoing general rule, only because he did not want to waive other arguments he might not have thought of.

This unfairness is enhanced – indeed, made almost perverse – when one considers the different treatment of a post-*Rehaif* defendant raising a claim of insufficient evidence based on *Rehaif*. That defendant – under the well established general rule that a motion for judgment of acquittal at least usually

does not need to specify its grounds – would be entitled to ordinary de novo review of his claim. That would mean a post-*Rehaif* defendant who *did* have reason to make a specific *Rehaif* argument, but either deliberately or inadvertently chose not to do so, would be treated more favorably than a pre-*Rehaif* defendant who did not have reason to make a specific *Rehaif* argument.

Ninth Circuit case law cited in *Johnson* – even if this Court were to agree with it – does not compel the Ninth Circuit's holding. First, *United States v. Weems*, 49 F.3d 528 (9th Cir. 1995), and *United States v. Kim*, 65 F.3d 123 (9th Cir. 1995), which *Johnson* cited in support of its conclusion that the *Rehaif* sufficiency challenge is "best understood not as a challenge to the sufficiency of the evidence, but rather as a claim that the district court applied the wrong legal standard," *id.*, 979 F.3d at 636 (citing *Weems* and *Kim*), do not compel that conclusion. Those cases held only that the Double Jeopardy Clause does not preclude a retrial where the law at the time of the first trial gave the government no reason to introduce evidence required by subsequent case law. *See Weems*, 49 F.3d at 530-31. *See also Kim*, 65 F.3d at 126-27 (simply following *Weems*). This appropriately prevents unfairness to the government in the form of not requiring evidence that was not required at the time of trial. But it does not require unfairness to the defense in the form of overriding the well established effect of a general motion for judgment of acquittal. A general motion for judgment of acquittal should not have a greater effect than it would in the absence of the new case law, but it should not have a lesser effect either.

Johnson also overstated the holdings of cases such as *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016), when it stated a district

court's legal error regarding the elements of the offense in a bench trial "is reviewed in the same way we review an erroneous jury instruction regarding the elements of the offense." *Johnson*, 979 F.3d at 636 (citing *Argueta-Rosales*, 819 F.3d at 1156). The jury cases are not directly applicable, but are merely "analogous" and furnish "guideposts." *Wilson v. United States*, 250 F.2d 312, 324 (9th Cir. 1957), *cited in Argueta-Rosales*, 819 F.3d at 1156. The only jury instruction standard the cases have actually carried over to bench trials is the demanding standard requiring it to be "clear beyond a reasonable doubt" that the error did not affect the verdict. *Argueta-Rosales*, 819 F.3d at 1156 (quoting *United States v. Liu*, 731 F.3d 982, 992 (9th Cir. 2013)). *See also United States v. Wallen*, 874 F.3d 620, 633 (9th Cir. 2017).

The requirement of legal objections has not been carried over, and it should not be in light of its source. That source is Rule 30 of the Federal Rules of Criminal Procedure, which governs only jury instructions, and (1) requires "request[s] in writing that the court instruct the jury on the law," Fed. R. Crim. Pro. 30(a); (2) requires "specific objection and the grounds for the objection" to erroneous instructions, Fed. R. Crim. Pro. 30(d); and (3) provides that "[f]ailure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b) [for plain error]," *id.* This contrasts with the rule governing nonjury trials – Rule 23(c) – which requires only a request for "findings of *fact*." Fed. R. Crim. Pro. 23(c) (emphasis added). *See Cesario v. United States*, 200 F.2d 232 (1st Cir. 1952) (noting with apparent approval trial judge's refusal to rule on "requests for rulings" because "superfluous to give such instructions to himself," and describing Rule 30 as "a rule which obviously has reference only to cases tried to a jury"), *cited with approval in*

Wilson, 250 F.2d at 325; 2 Wright and Miller, *supra* p. 12, § 374 ("A request for special findings of fact is the appropriate way to preserve for appeal a contention that the court applied an erroneous standard of law.").

The prior opinion which the panel in Petitioner's appeal here found controlling is thus flawed. It not only conflicts with the holdings of other circuits – at least when extended to Petitioner's jury trial case[5] – but is wrong.[6]

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[5] An argument could be made – and was made by Petitioner – that the *Johnson* opinion does not extend to jury trials, *see* App. A109-11, A138-39, but that argument was rejected, *see* App. A018.

[6] There remains a question of whether the stipulation to status alone would have been sufficient for a reasonable jury to find the knowledge required by *Rehaif* beyond a reasonable doubt, but the panel in Petitioner's case expressly declined to rely on the stipulations alone. *See* App. A022 (stating that "we do not rest our decision on Door's stipulation alone" and looking outside the trial record as permitted by plain error standard). Whether the stipulation alone is sufficient should be decided by the court of appeals in the first instance – for two reasons. First, the Ninth Circuit has not yet taken a clear position on this question, and other courts of appeals are divided. *Compare United States v. Nasir*, 982 F.3d 144, 172-73 (3d Cir. 2020) (holding that 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"), *petition for cert. pending*, No. 20-1522 (filed April 30, 2021), *with United States v. Staggers*, 961 F.3d at 757 (holding 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"). Second, the assumption that a person who has been convicted of a felony would know he had been convicted of a felony because such a conviction is "a major life event," App. A021, does not so readily extend to the knowledge of the "crime of violence" status which is required for Petitioner's violent felon in possession of body armor conviction, *see* App. A013-14. Assuming a defendant would understand all the nuances of how and why his conduct qualified as a "crime of violence" should not be so

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: September 21, 2021

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

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readily assumed.

A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. KENNETH RANDALE DOOR, *Defendant-Appellant.*	No. 19-30213 D.C. No. 3:12-cr-05126-RBL-1 OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted September 4, 2020
Seattle, Washington

Filed April 28, 2021

Before: Jay S. Bybee and Daniel P. Collins, Circuit Judges, and James Alan Soto,* District Judge.

Opinion by Judge Bybee

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* The Honorable James Alan Soto, United States District Judge for the District of Arizona, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed a criminal judgment in a case in which Kenneth Randale Door was convicted for being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1)) and a felon convicted of a crime of violence in possession of body armor (18 U.S.C. § 931(a)).

The panel held that in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the district court committed plain error by failing to require the government to prove Door's knowledge of his prohibited status and omitting the knowledge element from the indictment and jury instructions. The government admitted that Door's § 922(g)(1) conviction is governed by *Rehaif*, but contested the application of *Rehaif* with respect to his § 931(a) conviction. The government asserted that *Rehaif* only requires the government to prove that a defendant knew of his status as a felon, not that he was a felon convicted of a crime of violence. The panel rejected this contention, concluding that *Rehaif* requires the government to prove that a defendant charged with violating § 931(a) knew he had a felony conviction and that the felony of which he was convicted had "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). The panel held that Door cannot show that these errors affected the fairness, integrity, or public reputation of the judicial proceedings.

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

The panel held that the district court did not clearly err in applying an obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1 based on Door's pre-trial threats. The panel rejected Door's claims that the sentence was procedurally and substantively unreasonable.

COUNSEL

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OPINION

BYBEE, Circuit Judge:

Defendant Kenneth Randale Door was convicted in 2014 for being a felon in possession of a firearm and a felon convicted of a crime of violence in possession of body armor. Relying on the Supreme Court's intervening opinion in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Door argues that his convictions cannot stand because the government failed to prove, the indictment failed to allege, and the jury instructions failed to require that he knew of his prohibited statuses. Door further asserts that the district court erred in applying the obstruction of justice enhancement during sentencing. Finally, Door challenges his sentence as both procedurally and substantively unreasonable. We have

jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm.

I. FACTS AND PROCEEDINGS

A. *Search, Indictment, and Trial*

Kenneth Door has an extensive criminal history, including convictions for burglary, theft, assault, and harassment. In 2011, an informant told an agent of the Bureau of Alcohol, Tobacco, Firearms, and Explosives that Door possessed guns and was selling methamphetamine out of his home. Because Door was on probation in Washington, the agent contacted a Washington State Community Corrections officer, who conducted a probation search of Door's house in Tacoma. The search revealed two pistols, multiple rounds of ammunition for the pistols, two military grade ballistic vests, an explosive device known as a "seal bomb," two digital scales, drug packaging materials, and two drug pipes containing methamphetamine residue. Door was arrested shortly thereafter.

While in the county jail, and before he was indicted on federal charges, Door requested a meeting with his federal case agent. During that visit, Door admitted that the guns, vests, and seal bomb belonged to him. After the agent testified at Door's suppression hearing, Door told his attorney that he intended to have the agent killed. The attorney asked to be removed from the case and reported the threats to the government. After his trial, Door made additional threats in front of other inmates that he would have the case agent and his former attorney killed.

In March 2012, Door was indicted in United States District Court for the Western District of Washington and charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e); a felon convicted of a crime of violence in possession of body armor in violation of 18 U.S.C. §§ 931(a) and 924(a)(7); and, a felon in possession of explosives in violation of 18 U.S.C. §§ 842(i)(1) and 844(a)(1). Door entered the following stipulation regarding his felon and violent felon status:

> Prior to November 9, 2011, Kenneth Door, the defendant herein, had been convicted of a felony crime punishable by a term of imprisonment exceeding one year. That is a crime of violence, as defined by law, and therefore was a convicted felon and a person convicted of a felony that is a crime of violence at the time of the events that are the subject of this prosecution.

Door proceeded to trial and was convicted on all counts.

B. *Sentencing and First Appeal*

The Probation Office (Probation) recommended a base offense level of 24 due to "at least two felony convictions of either a crime of violence or a controlled substance offense." Probation also recommended a number of Sentencing Guidelines (Guidelines) enhancements, including for possession of a destructive device (seal bomb), possession of a stolen firearm, possession of firearms in connection with another felony offense (drug trafficking), and obstruction of justice (based on Door's threats to kill the case agent and others). Probation also concluded that Door was an armed

career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his prior convictions for attempting to elude a police vehicle, multiple second-degree burglary convictions, and second-degree assault with a deadly weapon.[1] The enhancements, combined with Door's criminal history category of VI, produced a Guidelines range of 262–327 months. Probation recommended 300 months. Over Door's objections, the district court found that the enhancements and the ACCA applied and sentenced Door to 300 months.

On direct appeal, we found that the destructive device enhancement did not apply to the seal bomb, and that the district court made insufficient findings on the obstruction of justice and the "in connection with another felony" enhancements. *United States v. Door*, 647 F. App'x 755, 757 (9th Cir. 2016), *as amended by* 668 F. App'x 784 (9th Cir. 2016). We initially deferred ruling on the ACCA issue but ultimately held that Door's burglary convictions were not violent felonies under the ACCA and vacated Door's sentence accordingly. *United States v. Door*, 656 F. App'x 376, 376–77 (9th Cir. 2016).

C. *Re-sentencing and Second Appeal*

On remand, Probation again recommended a base offense level of 24, reasoning that Door's prior Washington state convictions for second-degree assault with a deadly weapon and felony harassment constituted crimes of violence.

[1] The ACCA categorization did not increase the Guidelines offense level, but it did increase the statutory maximum sentence to life and trigger a statutory mandatory minimum sentence of 15 years. 18 U.S.C. § 924(e).

Probation further recommended enhancements for possession of a stolen firearm, possession of a firearm in connection with another felony, and obstruction of justice. The enhancements, coupled with Door's criminal history category of VI, produced a Guidelines range of 210–262 months. Probation recommended a 276-month sentence due to Door's extensive criminal history.

Over Door's objections, the district court determined at sentencing that the second-degree assault and felony harassment convictions qualified as crimes of violence under the required categorical approach. The district court also ruled that the various enhancements were supported by sufficient evidence. During sentencing, the district court noted its "long-standing criticism" of the categorical approach but acknowledged that it was "duty-bound" to re-sentence Door in accordance with the law. The district court imposed the recommended sentence of 276 months, followed by 5 years of supervised release. On Door's second appeal, we ruled that a felony harassment conviction is a crime of violence for Guidelines purposes but that Door's conviction for second-degree assault is not and remanded accordingly for a second re-sentencing. *United States v. Door*, 917 F.3d 1146, 1152–55 (9th Cir. 2019).[2]

[2] In a concurrently filed memorandum disposition, we also determined that Door's felony harassment conviction constitutes a crime of violence supporting his conviction for unlawful possession of body armor, and that the enhancement for possessing a firearm in connection with another felony was warranted. *United States v. Door*, 756 F. App'x 757, 758–59 (9th Cir. 2019). We declined to order reassignment on remand. *Id.*

D. *Second Re-sentencing and Current Appeal*

At the second re-sentencing, Probation recommended a base offense level of 20 based on Door's felony harassment conviction. Probation also recommended enhancements for possession of a stolen firearm, possession of a firearm in connection with another felony, and obstruction of justice. The enhancements, coupled with Door's criminal history category of VI, produced a Guidelines range of 140 to 175 months. Probation again recommended 276 months. The government did likewise. Door objected to all the enhancements.

At the start of the re-sentencing hearing, the district court again expressed frustration with the categorical approach jurisprudence. Of Door, the district court stressed, "I consider Mr. Door to perhaps be the most dangerous defendant I have had in 18 or 19 years . . . . He did everything and then more to justify his sentence, with the threats." Before imposing the sentence, the district court made clear that it had heard argument and reviewed all of the material submitted from both sides. In response to defense counsel's argument that Door's recent good behavior in prison merited mitigation, the district court agreed that re-sentencing afforded an opportunity for "a mid-course correction" but noted that Door was being sentenced for his past behavior, "which is very serious." The district court further observed that "[t]he guidelines are a guide, unless they are not."

In imposing the sentence, the district court adopted the factual assertions in the PSR and applied the sentencing enhancements. Relevant to this appeal, the district court found—over Door's objection—that the obstruction of justice enhancement was warranted because it involved "the worst

kind of abuse of our system, including threats to officers." The district court then adopted the recommendation from Probation and the government for 276 months, followed by three years of supervised release.

In the present appeal, Door raises four issues: (1) whether his felon in possession of firearm and violent felon in possession of body armor convictions must be vacated because the government failed to prove, the indictment failed to allege, and the jury instructions failed to require that he knew of his prohibited statuses when he possessed the firearms and body armor, as required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019); (2) whether the district erred in applying the Guideline enhancement for obstruction of justice; (3) whether his sentence was procedurally and substantively unreasonable; and (4) whether we should reassign the case in the event of remand. We will consider each issue in turn. Because we conclude that there was no error in the first three issues raised, we need not reach the question of reassignment, which in any event has been mooted by the retirement of the district judge who imposed the sentence.

II. KNOWING POSSESSION AND *REHAIF*

We first consider Door's claim that the Supreme Court's intervening decision in *Rehaif* requires us to vacate his convictions for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1)[3] and a felon convicted of

[3] 18 U.S.C. § 922(g) makes it "unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or

a crime of violence in possession of body armor in violation of 18 U.S.C. § 931(a)(1).[4] Door asserts that the evidence presented at trial was insufficient to sustain his convictions because the government failed to prove he knew of his prohibited statuses and, similarly, the indictment and jury instructions omitted the requisite knowledge element. We will begin with a discussion of *Rehaif* and then address Door's challenge to the sufficiency of the evidence.

A. Rehaif *and Knowing Violations*

Hamid Rehaif was convicted of violating 18 U.S.C. § 922(g)(5)(A) for being an alien unlawfully in the United States in possession of firearms. *See Rehaif*, 139 S. Ct. at 2194. A separate provision provides that any person who "knowingly violates" § 922(g) shall be fined or imprisoned. 18 U.S.C. § 924(a)(2). Rehaif had come to the United States on a student visa but had been dismissed from school, making his presence unlawful. *Rehaif*, 139 S. Ct. at 2194. He was arrested after he visited a firing range to shoot two firearms, and was charged with violating § 922(g). *Id*. Rehaif argued that although he had possessed firearms, the district court

ammunition . . . ." Section 924(a)(2) provides: "Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

[4] 18 U.S.C. § 931(a) makes it "unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is—(1) a crime of violence (as defined in section 16)." Section 16 provides, in relevant part: "The term 'crime of violence' means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Section 924(a)(7) states: "Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both."

erred in instructing the jury that the government did not have to prove Rehaif knew he was in the country unlawfully. *Id.* at 2195. The Court agreed with Rehaif that the term "knowingly" in § 924 applied to Rehaif's conduct (possessing the firearm) and his status (being an alien unlawfully in the United States). *Id.* at 2200. Because it was not clear whether the district court had correctly instructed the jury that it must find that Rehaif knew he was out of status when he left school, the Court reversed and remanded for further proceedings. *Id.*

Although neither Door nor the government anticipated the Court's decision in *Rehaif*, Door gets the benefit of *Rehaif* on his direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."). The government admits that Door's conviction under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm is governed by *Rehaif*, *see United States v. Benamor*, 937 F.3d 1182, 1188 (9th Cir. 2019), but it contests the application of *Rehaif* with respect to Door's conviction for being a violent felon in possession of body armor pursuant to 18 U.S.C. § 931(a). The government asserts that *Rehaif* only requires the government to prove that a defendant knew of his status as a felon, not that he knew he was a felon convicted of a crime of violence.

We think such a construction is incompatible with *Rehaif*'s analysis. In *Rehaif*, the Supreme Court held that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." 139 S. Ct. at 2195. The Court reasoned that "[a]s a matter of

ordinary English grammar, we normally read the statutory term knowingly as applying to all the subsequently listed elements of the crime." *Id*. at 2196 (citation and internal quotation marks omitted). The direct object, § 922(g), contained a "status element," namely that Rehaif was "an alien . . . illegally or unlawfully in the United States." *Id.* at 2195–96 (quoting 18 U.S.C. § 922(g)(5)(A)). The Court found that "[a]pplying the word 'knowingly' to the defendant's status in § 922(g) helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts." *Id*. at 2197. Because "the possession of a gun can be entirely innocent" it is "the defendant's *status*, and not his conduct alone, that makes the difference." *Id.* Thus, the Court expressed concern that, under the government's construction, these statutes might be applied to an alien who was brought to the United States as a child and was unaware of his status, or a person convicted of a prior crime who was given probation and might not have known the crime was punishable by imprisonment for a term exceeding a year. *Id.* at 2197–98.

This same logic extends to the relationship between § 924(a)(7) and § 931(a)(1), which govern Door's conviction for possessing body armor. The term "knowingly" in § 924(a)(7) modifies the verb "violates" and its direct object, "section 931." Following *Rehaif*, "knowingly" thus applies to all the elements listed in § 931(a)(1): "a person [who] purchase[s], own[s], or possess[es] body armor, if that person has been convicted of a felony that is—a crime of violence (as defined in section 16)." The government offers no explanation as to why the word "knowingly" in § 924(a)(7) applies to the noun listed in § 931(a)(1) ("a felony") but does not apply to the phrase that qualifies it ("a crime of violence (as defined in § 16)"). Instead, the government warns that

requiring proof of a defendant's knowledge that he was convicted of a crime that meets the legal definition of a crime of violence places an impossible and unnecessary burden on the government.

We think the government has overread *Rehaif*. We do not understand *Rehaif* to mean that the government must prove that the defendant knew that he had been convicted of a crime that a court has specifically declared to be a "crime of violence" under 18 U.S.C. § 16. That would be a nearly impossible burden for the government, and it would severely limit the scope of § 931(a)(1). Section 931(a)(1) does not say "a crime of violence, declared to be such by a court"; rather, it states "a crime of violence *as defined in section 16*." 18 U.S.C. § 931(a)(1) (emphasis added; parenthesis omitted). We understand *Rehaif* to mean that the government must prove that a defendant who possessed body armor knew that (1) he was convicted of a felony and, (2) the felony of which he was convicted had as an element "the use, attempted use, or threatened use of physical force." 18 U.S.C. § 16(a). The term "physical force" should be given its ordinary meaning, which "in the context of a statutory definition of '*violent* felony,' . . . means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 138, 140 (2010);[5] *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (observing that "[t]he ordinary meaning of this term [crime of violence],

[5] *Johnson* addressed the phrase "physical force" as used in § 924(e)(2)(B)(i), *see* 559 U.S. at 138, but the same phrase appears in § 16. Generally, "when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

combined with § 16's emphasis on the use of physical force . . . suggests a category of violent, active crimes"). If anything, the case law in this area suggests that the lay understanding of what constitutes a crime of violence may be overinclusive, such that a defendant may find himself pleasantly surprised to learn that a court has deemed his past crime *not* to be a crime of violence.[6]

We thus conclude that *Rehaif* requires the government to prove that a defendant charged with violating § 931(a) knew he had a felony conviction and that the felony of which he was convicted had "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). We now turn to the merits of Door's asserted *Rehaif* errors, beginning with his challenge to the sufficiency of the evidence.

B. *Sufficiency of the Evidence*

At the close of the government's case, Door made a general oral motion for a "directed verdict on all three counts" under Federal Rule of Criminal Procedure 29.[7] Door offered no argument, and the district court denied his motion. Door summarily renewed his Rule 29 motion on all charges after closing argument, which the district court promptly denied.

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[6] Our recent decision in *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019), offers an example of perhaps a less intuitive holding in which we determined that second-degree murder does not constitute a crime of violence. *See id.* at 1042 (N.R. Smith, J., dissenting) ("How can this be?").

[7] Not pertinent to this appeal, Door also challenged the sufficiency of the evidence supporting his ACCA eligibility in his Rule 29 motion.

Both parties initially assumed that Door's summary Rule 29 motion entitled him to de novo review of his sufficiency of the evidence claim under *Rehaif*, and both sides briefed the issue as such. In its brief, the government explained that it believed de novo review was required based on our precedent holding that a general Rule 29 motion preserves all objections to the sufficiency of the evidence. *See, e.g., United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) ("Rule 29 motions for acquittal do not need to state the grounds upon which they are based."). Where preserved, "[w]e review de novo the denial of a motion for acquittal." *United States v. Niebla-Torres*, 847 F.3d 1049, 1054 (9th Cir. 2017).

Following oral argument, however, we held in *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020), *amending* 963 F.3d 847 (9th Cir. 2020), that plain error, not sufficiency of the evidence, is the proper standard to review an unpreserved *Rehaif* error. In that case, Lamar Johnson was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *Id.* at 634. After we affirmed his conviction, the Supreme Court decided *Rehaif*. *Id.* Johnson subsequently filed a petition for certiorari, "in which he argued for the first time that the government failed to prove at trial that he knew of his status as a convicted felon." *Id.* at 635. The Supreme Court granted his petition and, on remand, we analyzed Johnson's *Rehaif* argument as a challenge to the sufficiency of the evidence. *Id.* Because Johnson had not raised his sufficiency challenge in the district court, however, we reviewed his claim for plain error and found no manifest injustice. *Id.* (citing *Johnson*, 963 F.3d at 850).

Johnson then petitioned for rehearing and rehearing en banc, arguing that because he had pled not guilty and

proceeded to a bench trial, the panel should have reviewed his sufficiency of the evidence challenge de novo. *Id.* (discussing *United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (en banc) (holding that, in a bench trial, a defendant who had pled not guilty need not move for acquittal to preserve an objection to the sufficiency of the evidence)). Denying rehearing and rehearing en banc, we filed an amended opinion. *Johnson*, 979 F.3d at 635–36. We concluded that *Atkinson* was inapposite because "although Johnson [] framed his argument as a challenge to the sufficiency of the evidence, that [was] not in fact the correct way to conceive of it." *Id*. at 636. As we explained, "a sufficiency challenge must be assessed against the elements that the government was required to prove at the time of trial." *Id.* (citing *United States v. Kim*, 65 F.3d 123, 126–27 (9th Cir. 1995); *United States v. Weems*, 49 F.3d 528, 530–31 (9th Cir. 1995)). Johnson did not dispute that the government had introduced sufficient evidence at trial under our pre-*Rehaif* precedent; thus his *Rehaif* challenge was "best understood . . . as a claim that the district court applied the wrong *legal* standard in assessing his guilt—specifically, by omitting the knowledge-of-status element now required under *Rehaif*." *Id.* (emphasis added). Because a district court's *legal* error during a bench trial regarding the elements of the offense is reviewed in the same manner as an erroneous jury instruction—plain error where the defendant failed to object—we held that Johnson's claim was reviewable for plain error and reaffirmed our prior conclusion. *Id.* at 636, 639.

Following oral argument in this case, the government filed a 28j letter alerting us to *Johnson*. We asked the government and Door to submit supplemental briefs addressing what impact, if any, *Johnson* has on the standard

of review applicable to Door's sufficiency of the evidence challenge. Having reviewed the parties' submissions, we conclude that *Johnson* compels the conclusion that Door's sufficiency claim is subject to plain-error review.

Door first argues that the government has forfeited any plain-error argument. Relying on *United States v. Murguia-Rodriguez*, 815 F.3d 566 (9th Cir. 2016), Door urges the panel that the government's briefing of sufficiency of the evidence operates as a forfeiture of plain-error review. But unlike *Murguia-Rodriguez*, this is not a situation in which the government failed to argue that, under controlling law, an error was not objected to and therefore forfeited. *Id.* at 573–74. Rather, both parties assumed that the general rule regarding preservation of sufficiency of the evidence claims via summary Rule 29 motions extended to arguments based on a change in the law after trial. Until *Rehaif* and *Johnson*, there was no precedent on this precise question and, indeed, at least two other circuits have reviewed *Rehaif* challenges to the sufficiency of the evidence de novo where a general Rule 29 motion was made in the district court. *See, e.g., United States v. Staggers*, 961 F.3d 745, 754 (5th Cir. 2020); *United States v. Maez*, 960 F.3d 949, 959 (7th Cir. 2020). We think the government gets the benefit of the same rule that allows Door to bring his *Rehaif* claims—"an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 281 (1969). Although the government might have argued differently in its original brief, we are not willing, in these circumstances, to deem such failure a forfeiture. *Cf. Murguia-Rodriguez*, 815 F.3d at 574–75 ("Our rule, of course, is discretionary, and there may well be good reason to apply plain error in a particular case . . . .").

Door next argues that we are not bound by *Johnson* because Door had a jury trial, not a bench trial. We are not persuaded that this distinction relieves us of our duty to follow *Johnson.* Johnson advanced the precise claim that Door asserts here: the government failed to prove at trial that he knew of his prohibited statuses, as now required by *Rehaif*. *Johnson*, 979 F.3d at 636. As in *Johnson*, Door does not claim that the government failed to introduce "evidence sufficient to satisfy each of the elements required for conviction *at the time of his trial*." *Id.* (emphasis added). We fail to see how the difference between a jury trial and a bench trial would require us to view these identical legal challenges differently. Stated otherwise, if Johnson's challenge could not be conceived of as a sufficiency challenge, then neither can Door's. We thus understand Door's sufficiency challenge as a claim of trial error. Because Door did not object to the trial court's omission of the knowledge-of-status element, we review for plain error under Rule 52(b).

Under plain-error review, we may reverse only where there is an (1) error that is (2) plain, (3) affects substantial rights, and (4) "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993) (cleaned up) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). In light of *Rehaif*, it is clear that the district court erred in failing to require the government to prove Door's knowledge of his prohibited statuses and that error is now plain. As we did in *Johnson*, we will "assume without deciding that the district court's error affected [Door]'s substantial rights." 979 F.3d at 636. Thus, we will resolve this case under the fourth prong of plain-error review.

This prong "helps enforce one of Rule 52(b)'s core policies, which is to reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Id.* (citation and internal quotation marks omitted). To satisfy the fourth prong, Door bears the burden of offering "a plausible basis for concluding that an error-free retrial might end more favorably." *Id.* at 637 (discussing *Johnson v. United States*, 520 U.S. 461, 470 (1997), wherein the Supreme Court concluded that the failure to submit the element of materiality to the jury did not warrant reversal under the fourth prong of plain-error review because the petitioner "presented no plausible argument that the false statement under oath for which she was convicted . . . was somehow not material to the grand jury investigation"). That is, Door must demonstrate that a "miscarriage of justice would otherwise result." *Id.* at 636–37 (citations omitted). No miscarriage of justice results where the "correction of an unpreserved error would ultimately have no effect on the judgment." *Id.* at 638. We conclude that Door has not made such a showing.

Beginning with Door's § 922(g) conviction, Door cannot show that our refusal to correct the district court's error would result in a miscarriage of justice. In reviewing for plain error, we may examine the entire record on appeal. *See Johnson*, 979 F.3d at 638; *Benamor*, 937 F.3d at 1189. When Door possessed the firearms (and body armor), he had multiple felony convictions for which he was sentenced to prison terms ranging from 14 months to 10 years. Having served more than a year in prison, Door cannot (and does not attempt to) argue that a jury would find that he was unaware of his status as a person previously convicted of an offense punishable by more than a year in prison.

Turning to Door's § 931(a)(1) conviction, we are likewise convinced that Door cannot plausibly argue that he was unaware of his status as a person previously convicted of a felony that is a crime violence. To begin, Door and the government entered into a stipulation that was read to the jury, in which Door conceded that he had been convicted of both predicate crimes in language identical to the statutes. The stipulation provided:

> Prior to November 9, 2011, Kenneth Door, the defendant herein, had been convicted of a felony crime punishable by a term of imprisonment exceeding one year. That is a crime of violence, as defined by law, and therefore was a convicted felon and a person convicted of a felony that is a crime of violence at the time of the events that are the subject of this prosecution.

Thus, at the very least, that stipulation admitted that Door knew of the *fact* of his convictions at trial.

The more difficult question is whether the stipulation also conceded that Door *knew* that at least one of his prior felonies was punishable for a term exceeding a year and that one was a crime of violence as defined in § 16 when he possessed the firearms and body armor in 2011. Although the stipulation did not explicitly state that Door knew of his prohibited statuses, the stipulation recited that Door had been convicted of a felony "punishable by a term of imprisonment exceeding one year" and further specified that the felony was "a crime of violence, as defined by law." It is the shortest of steps for a juror to conclude that, when Door possessed the firearms and body armor, he knew of the crimes for which he had

previously been convicted. Being convicted of a felony is generally a major life event; as the Second Circuit has aptly observed, "given the rights to appointed counsel, effective assistance of counsel, and due process, it is highly improbable that a person could be convicted of a felony without being aware that his possible sentence would exceed one year's imprisonment." *United States v. Miller*, 954 F.3d 551, 559 (2d Cir. 2020) (footnotes omitted); *see also Staggers*, 961 F.3d at 757 (reasoning 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" as evidenced by the defendant's stipulation); *United States v. Ward*, 957 F.3d 691, 695–96 (6th Cir. 2020) (holding that a rational juror could have inferred the defendant knew of his prohibited status based on his stipulation and his lawyer's emphasis on the stipulation, and observing that "[a]lthough the stipulation of a prior felony does not automatically establish knowledge of felony status, it is strongly suggestive of it" (citation and internal quotation marks omitted)).

The stipulation was, no doubt, a strategic concession by Door because it precluded the government from presenting evidence of Door's status as a violent felon and laying out his multiple prior convictions before the jury. *See Old Chief v. United States*, 519 U.S. 172, 190–92 (1997). Had Door refused to stipulate to his convictions, the government likely would have—subject, of course, to the limitations imposed by the Federal Rules of Evidence—introduced proof of his prior convictions to establish the status element. *See, e.g., United States v. Weiland*, 420 F.3d 1062, 1077–78 (9th Cir. 2005) (analyzing the admissibility of records of convictions in a § 922(g) prosecution under Federal Rule of Evidence 403 in

the absence of the defendant's stipulation to his criminal status).

Moreover, this case presents a starkly different situation than the hypothetical that the Court set out in *Rehaif*. In *Rehaif*, the majority posited that a convicted felon might lack knowledge that he was convicted of a crime punishable by imprisonment for a term exceeding one year if he was "convicted of a prior crime but sentenced only to probation." 139 S. Ct. at 2198. In the Court's hypothetical, the fact that a defendant charged with a felony received probation might have obscured the felon's understanding of the length of the sentence he had faced. By contrast, Door's stipulation admitted that he knew of his convictions and the defining features of those crimes. There is nothing tricky or hidden in the stipulation and therefore no ambiguity in what Door stipulated to. As such, we think the stipulation tends to weigh against reversal.

But we do not rest our decision on Door's stipulation alone. As discussed, our review is not limited to the record adduced at trial, and Door had multiple felony convictions when he possessed the body armor. One of those convictions was for felony harassment under Wash. Rev. Code. §§ 9A.46.020(1)(a)(i) and (2)(b)[8] for "threatening to kill" a person. We previously held in a published opinion in Door's prior appeal that a conviction under Wash. Rev. Code

[8] The sections of the Washington harassment statute that applied to Door's 1997 conviction provided (1) "[a] person is guilty of harassment if . . . [w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury in the future to the person threatened or any other person"; and (2) a "person is guilty of a class C felony if . . . the person harasses another person . . . by threatening to kill the person threatened or any other person." Wash. Rev. Code. § 9A.46.020.

§ 9A.46.020(2)(b) qualifies as a crime of violence because a knowing threat to kill a person "necessarily entails the threatened use of violent physical force against another person." *Door*, 917 F.3d at 1152. Door tries to downplay the significance of this conviction by arguing that the record contains no plea colloquy establishing that he understood the nature of felony harassment. But it is Door's burden to show how the plain error has seriously affected the fairness, integrity or public reputation of his judicial proceedings. *See Johnson*, 520 U.S. at 470. Door has not carried that burden. Nowhere does he offer a plausible argument that he lacked the requisite knowledge of his status as a violent felon or that he would have proceeded differently at trial had the government been required to prove his knowledge of his prohibited statuses. Indeed, we are quite confident that Door would not have foregone the benefits of his stipulation if *Rehaif* had been decided prior to his trial. The stipulation shielded Door from having the government splay the details of his prior felonies before the jury; Door has given us no reason to think that it would be a prudent strategy to waive his rights under *Old Chief* and withdraw his stipulation. *See Staggers*, 961 F.3d at 756 (concluding that if *Rehaif* were in effect at the defendant's trial, he "would have stipulated to both the felon-status element and the knowledge-of-felon-status element to keep the jury ignorant of the inculpatory details otherwise required to prove knowledge of felon status"). In short, Door fails to persuade us that a correction of the *Rehaif* error would ultimately affect the outcome. *See, e.g., United States v. Cotton*, 535 U.S. 625, 633 (2002) ("Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base."). We therefore conclude that the district court's error did not seriously affect the fairness, integrity or public reputation of judicial proceedings.

C. *Indictment and Jury Instructions*

Door argues that his indictment and jury instructions were also flawed because neither stated that Door's knowledge of his prohibited statuses was an element of the crimes. Because Door did not raise these challenges in the district court, we review them for plain error. *See Olano*, 507 U.S. at 732.

1. Indictment

With respect to the § 922(g) charge, Count One of the indictment alleged that Door, "having been convicted of a crime punishable by imprisonment for a term exceeding one year . . . did knowingly possess firearms." Count One also listed eleven different convictions with their docket numbers. Similarly, with respect to the § 931(a) charge, Count Two alleged that Door, "having been convicted of a felony crime of violence . . . did knowingly possess body armor" and listed six different convictions with their docket numbers.

The government claims that (1) Door has waived his challenge to the indictment; and (2) the indictment is not plainly insufficient because it tracked the statutory language of § 922(g)(1) and § 931(a)(1). Both arguments lack merit. First, a defendant may challenge an indictment after trial; our review is just limited to plain error. *See United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); *see also United States v. Qazi*, 975 F.3d 989, 992 (9th Cir. 2020). Second, although the indictment uses the word "knowingly" to describe the charged offenses, it only uses the word to modify "possess firearms" and "possess body armor," respectively. In light of *Rehaif*, because the indictment only charged Door with knowledge of possession, not knowledge of his status, the indictment clearly failed to allege an element

of each offense. This was plain error. *See Henderson v. United States*, 568 U.S. 266, 274 (2013) (explaining that an error can be "plain" under Federal Rule of Criminal Procedure 52(b) if it is plain at "the time of appellate consideration" (citation and internal quotation marks omitted)). But, for the reasons discussed, Door cannot show that this error affected the fairness, integrity or public reputation of the trial.

2. Jury Instructions

It is undisputed that "the absence of an instruction requiring the jury to find that Defendant knew he was a felon was clear error under *Rehaif*." *Benamor*, 937 F.3d at 1188. However, as discussed, Door cannot satisfy the final prong of the plain-error test.

III. OBSTRUCTION OF JUSTICE

We next consider whether the district court erred in applying the obstruction of justice enhancement. We review the proper interpretation of the Guidelines de novo, the district court's factual findings made at sentencing for clear error, and the application of the Guidelines to the facts of a case for abuse of discretion. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017).

As a preliminary matter, our review is not, as the government contends, limited to plain error. At sentencing, Door objected to the obstruction of justice enhancement on the grounds that the record was insufficient to show he made any threats; Door now argues that the district court failed to make a finding as to his *purpose* in making the alleged threats. Door's basic claim, however, remains the same: the

district court's findings were insufficient to support the obstruction of justice enhancement. *See United States v. Guzman-Padilla*, 573 F.3d 865, 877 n.1 (9th Cir. 2009) (holding that claims, not arguments, are waived or forfeited).[9]

An enhancement for obstructing or impeding the administration of justice is warranted if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. Door argues that his alleged threats to kill his federal case agent can only support an obstruction of justice enhancement if they were intended to prevent future testimony or cooperation, not for the purpose of retaliation.[10] Even assuming retaliatory motive alone is insufficient to warrant an enhancement under U.S.S.G. § 3C1.1, the district court did not commit clear error. Although Door communicated his threats after the agent testified at the suppression hearing, he still made the threats prior to the agent's testimony at trial. These pre-trial threats could reasonably be construed as an attempt to

[9] Nor has Door waived his right to appeal the application of this enhancement because he failed to raise it in his second appeal. We did not limit the scope of the remand when we remanded Door's case for a second re-sentencing. *See Door*, 917 F.3d at 1155; *Door*, 756 F. App'x at 758–59. The district court was thus "empowered to address all sentencing issues following remand." *United States v. Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994).

[10] *But see United States v. Rubio*, 317 F.3d 1240, 1244–45 (11th Cir. 2003) (holding retaliatory purpose sufficient because Application Note 4(i) to U.S.S.G. § 3C1.1 authorizes an enhancement based upon any conduct prohibited by the obstruction of justice provisions of Title 18, including 18 U.S.C. § 1513(b), which prohibits a person from inflicting bodily injury on a witness with the intent to retaliate).

obstruct justice on the theory that Door wanted to prevent the agent from testifying at his trial.

IV. SENTENCE

Finally, we consider Door's claim that his sentence was both procedurally and substantively unreasonable. The court reviews the district court's sentencing decision for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007).

"Procedural errors include, but are not limited to, incorrectly calculating the Guidelines range, treating the Guidelines as mandatory, failing to properly consider the § 3553(a) factors, using clearly erroneous facts when calculating the Guidelines range or determining the sentence, and failing to provide an adequate explanation for the sentence imposed." *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008). Door argues that his sentence is procedurally unreasonable because the district court gave the Guidelines no weight and therefore failed to properly consider the § 3553(a) factors. In support of this proposition, Door points to the district court's expressions of frustration with the categorical approach and statement that the "guidelines are a guide, unless they are not."

We disagree. It is well settled that the district court "may not presume that the Guidelines range is reasonable . . . . Nor should the Guidelines factor be given more or less weight than any other." *Carty*, 520 F.3d at 991. Rather, the sentencing court is "free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy." *United States v. Christensen*, 732 F.3d 1094, 1101 (9th Cir. 2013). Contrary to Door's

characterization, the district court's remarks indicate that it looked to the Guidelines and determined that the range did not adequately account for the seriousness of Door's criminal history and his various threats to witnesses. This was an experienced judge, who was very familiar with Door's case. Moreover, the district court explained that its non-Guidelines sentence was based on "[r]espect for the law, deterrence, [and] protection for the community," which are among the additional sentencing factors specifically listed in § 3553(a). *See* 18 U.S.C. § 3553(a)(2)(A)–(C). The district court did not commit procedural error in concluding that the Guidelines did not adequately reflect the nature and circumstances of Door's offense and the danger he posed to the community.

Door's sentence is also substantively reasonable. In reviewing the reasonableness of a sentence, we consider the totality of the circumstances. *Carty*, 520 F.3d at 993. The reviewing court must give "due deference to the district court's decision that the § 3553(a) factors, on the whole, justify the extent of the variance. " *Gall*, 552 U.S. at 51. Although a sentence outside the Guidelines does not carry a presumption of unreasonableness, "the greater the variance, the more persuasive the justification will likely be because other values reflected in § 3553(a) . . . may figure more heavily in the balance." *Carty*, 520 F.3d at 992. This does not, however, mean that the district court must "tick off each of the § 3553(a) factors to show it has considered them." *Id.*

It is undisputed that in imposing a 276-month sentence, the district court deviated significantly from the guideline range of 140–175 months. The district court explained that it had, "on two prior occasions, said that I consider Mr. Door to perhaps be the most dangerous defendant I have had in 18 or 19 years. . . . Mr. Door is, was, and will be in my mind

an extremely dangerous person. He did everything and then more to justify his sentence." The record fully supports the district court's determination that Door was an extremely dangerous person who had shown an unwillingness to change. There is no basis upon which to find Door's sentence substantively unreasonable.

V. CONCLUSION

Although, in light of *Rehaif*, the district court committed plain error by failing to require the government to prove Door's knowledge of his prohibited statuses and omitting the knowledge element from the indictment and jury instructions, Door cannot show that these errors affected the fairness, integrity, or public reputation of the judicial proceedings. With respect to Door's sentence, the district court did not clearly err in finding that the pre-trial threats Door made could reasonably be construed as an attempt to obstruct justice. Nor is there a basis upon which to find Door's sentence either procedurally or substantively unreasonable. We therefore affirm the convictions and sentence.

AFFIRMED.

A P P E N D I X 2

FILED

AUG 11 2021

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. KENNETH RANDALE DOOR, Defendant-Appellant.	No. 19-30213 D.C. No. 3:12-cr-05126-RBL-1 Western District of Washington, Tacoma ORDER

Before: BYBEE and COLLINS, Circuit Judges, and SOTO,* District Judge.

The panel judges have voted to deny Door's petition for rehearing. Judge Collins voted to deny the petition for rehearing en banc, and Judges Bybee and Soto recommended denying the petition for rehearing en banc.

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

Door's petition for rehearing and petition for rehearing en banc, filed July 15, 2021, are DENIED.

* The Honorable James Alan Soto, United States District Judge for the District of Arizona, sitting by designation.

A P P E N D I X 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,	Docket No. CR12-5126RBL
Plaintiff,	Tacoma, Washington
vs.	March 7, 2014
KENNETH RANDALE DOOR,	
Defendant.	JURY TRIAL DAY 3 COA #: 14-30170

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE and a jury

APPEARANCES:

For the Plaintiff: NORMAN M. BARBOSA
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Court Reporter: Teri Hendrix
Union Station Courthouse, Rm 3130
1717 Pacific Avenue
Tacoma, Washington 98402
(253) 882-3831

Proceedings recorded by mechanical stenography, transcript produced by reporter on computer.

THE COURT: All right. Please be seated.

Does the government have any more witnesses to call?

MR. BARBOSA: No, Your Honor. At this point, the government rests its case-in-chief.

THE COURT: Ladies and gentlemen, don't get comfortable. This is a schedule delay for just a few moments. So if you would return to the jury room, and we'll deal with business at hand, and then we'll be back with you in just a moment.

Get your exercise.

(Jury not present.)

THE COURT: All right. Please be seated. Mr. Lohraff.

MR. LOHRAFF: Your Honor, defense would make a Rule 29 motion for directed verdict on all three counts, as well as a failure to find -- present evidence and find that he's ACCA eligible.

THE COURT: Do you want to support that by facts or do you want to make the motion?

MR. LOHRAFF: I don't have argument at this point, Judge. I am just making the motion to preserve my record.

THE COURT: Motion is denied.

Now, if Mr. Door is prepared to testify, we can continue today. If not, we'll --

MR. LOHRAFF: He's not prepared to testify.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,	)	Docket No. CR12-5126RBL
	)	
Plaintiff,	)	Tacoma, Washington
	)	
vs.	)	March 10, 2014
	)	
KENNETH RANDALE DOOR,	)	
	)	JURY TRIAL DAY 4
Defendant.	)	COA #: 14-30170
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
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APPEARANCES:

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Court Reporter: Teri Hendrix
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Proceedings recorded by mechanical stenography, transcript produced by reporter on computer.

you.

(Jury commences deliberations upon a verdict.)

THE COURT: Please be seated. So they can let the vest go in the jury room and the bag. All right.

Ten, fifteen minutes away from a phone call.

MR. LOHRAFF: Your Honor, just for the record, I need to renew my Rule 29 motion for judgment on all charges, on all counts. I have no argument.

THE COURT: That motion is denied.

MR. MASADA: Your Honor, just for the Court's awareness, just to make clear that the government is not trying to mislead the jury about the calls that were played, the other federal case that Mr. Lohraff referred to, the tax charges in front of Judge Settle, that was actually charged in April of 2012. So nowhere near December 2011. I just want to alert the Court.

MR. LOHRAFF: Your Honor, my client knew of those charges. My proffer is my client was talking about that case.

THE COURT: I sustained the objection, and it's done. So we'll see when they deliver a question or return a verdict. Court will be at recess.

(Court recessed at 12:00 p.m.)

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(In open court at 1:30 p.m. for a verdict.)

THE COURT: Please be seated. We have been informed

A P P E N D I X 4

CA NO. 19-30213

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE RONALD B. LEIGHTON
United States District Judge

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Attorney for Defendant-Appellant

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IV.

STATEMENT OF THE CASE

A. SEARCH, INDICTMENT, AND TRIAL.

In the fall of 2011, an informant provided information to an ATF agent that Mr. Door was in possession of firearms and selling methamphetamine. RT(12/7/12) 9-14. The ATF agent contacted a Washington State Community Corrections officer who was supervising Mr. Door on probation, and that officer decided to conduct a probation search of Mr. Door's house, with the assistance of the ATF agent and other officers. RT(3/7/14) 292. Mr. Door was home, but did not answer the door when the officers arrived at the house, RT(3/6/14) 182; RT(3/7/14) 296-98, so the community corrections officer left a note and a voice mail message telling Mr. Door to call, RT(3/7/14) 298-99. Another officer remained to watch the house and detained Mr. Door when he saw Mr. Door outside. RT(3/7/14) 299-300. The community corrections officer then returned, and he and other officers conducted the search. RT(3/7/14) 300. In the kitchen, the officers found a black duffel bag which contained two pistols, ammunition for the pistols, and two ballistic vests. RT(3/7/14) 301. In the living room, the officers found an explosive device known as a "seal bomb," which is used to scare away marine mammals, and two digital scales, methamphetamine pipes, and clear plastic bags. RT(12/7/12) 78-79; RT(3/6/14) 146, 230-33; RT(3/7/14) 303-04; PSR, ¶ 6.

The community corrections officer placed Mr. Door under arrest for violating his probation, and Mr. Door was taken to jail. RT(3/7/14) 306. Several

weeks later, allegedly in response to a message that Mr. Door wanted to talk to him, the ATF agent went to the jail to interview Mr. Door. RT(3/6/14) 179-80. The agent told Mr. Door he first would have to answer questions about the items found in his home, and Mr. Door admitted possessing the guns, body armor, and seal bomb. RT(3/6/14) 182-84.

Soon after this, Mr. Door was indicted in federal court for being a felon in possession of a firearm, being a felon in possession of explosives, and being a violent felon in possession of body armor. *See* ER 68-71. He filed a motion to suppress the evidence found in the search, *see* CR 32, but that motion was denied, *see* RT(12/7/12) 154; RT(3/6/14) 171, 173. After pleading guilty but then withdrawing his plea, *see* CR 126, 134, 161, Mr. Door proceeded to trial and was convicted of all counts, CR 208. The evidence the government presented included testimony from the ATF agent and the community corrections officer about the discovery of the guns, body armor, and seal bomb, *see* RT(3/6/14) 140-41; RT(3/7/14) 301-04; testimony from the ATF agent about Mr. Door's admissions about the guns, body armor, and seal bomb, *see* RT(3/6/14) 182-84; and several jail recordings in which Mr. Door talked about not answering the door and hiding the guns when the officers first came to the house, *see* RT(3/6/14) 152-54, 185-91; Govt. Exs. 300-02. The evidence of Mr. Door's prior convictions was a stipulation that he had been convicted of a felony crime punishable by a term of imprisonment exceeding one year that was also a crime of violence. *See* ER 66-67.

B. SENTENCING AND FIRST APPEAL.

The presentence report recommended a sentencing guidelines base offense level of 24, based on "at least two felony convictions of either a crime of violence or controlled substance offense." PSR, ¶ 12 (citing U.S.S.G. § 2K2.1(a)(2)).[1] The report also recommended multiple guidelines enhancements, including a 2-level enhancement under § 2K2.1(b)(3) for possession of a destructive device, based on the seal bomb, *see* PSR, ¶ 13; a 2-level enhancement under § 2K2.1(b)(4) for possession of a firearm which was stolen, *see* PSR, ¶ 14; a 4-level enhancement under § 2K2.1(b)(6)(B) for possession of the firearms "in connection with another felony offense (drug trafficking)," PSR, ¶ 15; and a 2-level enhancement under § 3C1.1 for obstruction of justice, *see* PSR, ¶ 18. This made the total offense level 34, *see* PSR, ¶ 20, which produced a guideline range of 262 to 327 months when combined with Mr. Door's criminal history category of VI, *see* PSR, ¶ 99.

The presentence report also concluded Mr. Door was an armed career criminal under the Armed Career Criminal Act in 18 U.S.C. § 924(e) (hereinafter "ACCA"), *see* PSR, ¶ 20, which requires three prior convictions for either "violent felonies" or "controlled substance offenses," 18 U.S.C. § 924(e). The prior convictions the presentence report relied upon were a conviction for attempting to elude a pursuing police vehicle, multiple second-degree burglary convictions, and

[1] The presentence report and subsequent revisions are being filed concurrently with this brief pursuant to Interim Circuit Rule 27-13. The final presentence report submitted for the first sentencing is cited as "PSR"; a "Revised Memorandum on Resentencing" filed after a first remand is cited as "First Revised PSR"; and a "Second Revised Memorandum on Resentencing" filed after a second remand is cited as "Second Revised PSR."

convictions of multiple second-degree assault counts in a single case. *See* PSR, ¶ 20. The ACCA categorization did not increase the guidelines offense level, *compare* PSR, ¶ 20 (ACCA offense level) *with* PSR, ¶ 19 (pre-ACCA offense level), but it did increase the statutory maximum sentence to life and trigger a statutory mandatory minimum sentence of 15 years, *see* PSR, ¶ 98; 18 U.S.C. § 924(e).

The defense objected to both the ACCA categorization and the guidelines enhancements. As to the enhancements, it argued the seal bomb did not qualify as a destructive device and there was not reliable evidence supporting the other enhancements. *See* CR 154, at 20-22. As to the ACCA, it argued Mr. Door's prior burglary convictions and attempting to elude conviction did not qualify as "violent felonies" under the categorical approach the ACCA requires. *See* CR 154, at 5-19. The district court rejected the defense arguments, found the enhancements and the ACCA did apply, and sentenced Mr. Door to 300 months, or 25 years, in prison. *See* RT(8/15/14) 20-21.

Mr. Door thereafter appealed. He challenged both the denial of his motion to suppress evidence and a motion to suppress statements he had made just before and during trial, *see* CR 184, 185; RT(3/6/14) 162, and the application of the ACCA and several of the guidelines enhancements. *See United States v. Door*, 647 Fed. Appx. 755 (9th Cir.) (unpublished), *amended*, 668 Fed. Appx. 784 (9th Cir. 2016) (unpublished). This Court affirmed the denial of the motions to suppress, but vacated the sentence. It held the destructive device enhancement did not apply to the seal bomb and there were insufficient findings on the obstruction of justice and "in connection with another felony" enhancements. *See id.* at 757. It initially deferred ruling on the ACCA issue pending the Supreme Court's

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VI.

ARGUMENT

A. THE FELON IN POSSESSION OF A FIREARM AND VIOLENT FELON IN POSSESSION OF BODY ARMOR CONVICTIONS MUST BE VACATED BECAUSE THE GOVERNMENT FAILED TO PROVE, THE INDICTMENT FAILED TO ALLEGE, AND THE INSTRUCTIONS FAILED TO REQUIRE, THAT MR. DOOR *KNEW* HE HAD BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR IN PRISON AND A FELONY CRIME OF VIOLENCE, AS REQUIRED BY *REHAIF*.

1. Reviewability and Standard of Review.

Defense counsel made motions for judgment of acquittal, which the district judge denied, both at the close of the government's case and after closing argument. *See* ER 23, 25. 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).[7]

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

The statutes that Counts 1 and 2 of the indictment charge Mr. Door with violating are 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) (in Count 1) and 18 U.S.C. § 931 and 18 U.S.C. § 924(a)(7) (in Count 2). *See* ER 68-70. Section 922(g)(1) provides "it shall be unlawful" for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. Section 931 provides "it shall be unlawful" for any person who has been convicted of a felony "crime of violence," as defined in 18 U.S.C. § 16, to possess body armor. Section 924(a) is a separate provision that establishes the mens rea and maximum penalty for these unlawful acts. Subsection (a)(2) of § 924(a) 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 18 U.S.C. § 924(a)(2) and adding emphasis). Subsection (a)(7) of § 924(a) provides that anyone who "*knowingly* violates" § 931 shall be fined or imprisoned for up to 3 years. 18 U.S.C. § 924(a)(7) (emphasis added).

The question considered in *Rehaif* – for § 922(g) and § 924(a)(2) – 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

[7] That the claims were not raised in Mr. Door's prior appeals 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).

> 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 offense *Rehaif* considered was possession of a firearm by an alien unlawfully in the United States, *see id.* at 2194, which is made unlawful by paragraph (5)(A) of § 922(g). But *Rehaif*'s reasoning readily extends to possession of a firearm by a person convicted of a crime punishable by imprisonment for a term exceeding one year, as evidenced by *Rehaif*'s use of that as an example. *See id.* at 2198; *see also United States v. 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*"). *Rehaif*'s reasoning also extends to § 931 and § 924(a)(7), for § 931 uses the same "it shall be unlawful" language, and § 924(a)(7) uses the same "knowingly violates" language. *See also* H.R. Rep. 107-193, at 7 (2002) ("Anyone who *knowingly* violates this section shall be fined, imprisoned not more than 3 years, or both." (Emphasis added.))

This means a defendant can be convicted of being a felon in possession of a

firearm or being a violent felon in possession of body armor only if there is evidence establishing beyond a reasonable doubt the defendant knew he had been convicted of a felony – or, in the technical language of the statute, "a crime punishable by imprisonment for a term exceeding one year" – or knew he had been convicted of a felony crime of violence. The evidence in the present case did not establish this knowledge.

To begin, the stipulation which was read to the jury did not establish Mr. Door's knowledge of his status. That stipulation read in full as follows:

> Prior to November 9, 2011, Kenneth Door, the defendant herein, had been convicted of a felony crime punishable by a term of imprisonment exceeding one year [t]hat is a crime of violence, as defined by law, and therefore was a convicted felon and a person convicted of a felony that is a crime of violence at the time of the events that are the subject of this prosecution.

ER 66-67. Glaringly absent from the stipulation is an agreement Mr. Door *knew* the crime he was convicted of was punishable by imprisonment for a term exceeding one year and was a felony crime of violence.

The only other evidence about Mr. Door's status was the testimony of the community corrections officer who supervised Mr. Door and authorized and participated in the search. This officer testified Mr. Door was under community supervision and had a condition prohibiting him from possessing firearms. *See* RT(3/7/14) 285. But cross examination established the offense for which Mr. Door was on supervision was a misdemeanor, so this testimony proved nothing about Mr. Door's knowledge he was a felon or violent felon. *See* RT(3/7/14) 308.[8]

Because of the absence of evidence, both the felon in possession count and

[8] The convictions on which the charges and the stipulation were based were other, earlier convictions.

violent felon in possession of body armor count must fall. The Court should order judgments of acquittal on both counts.[9]

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. Door "did knowingly possess firearms," ER 69, and "did knowingly possess body armor," ER 70. All it said about the prior convictions was that they existed, to wit, that Mr. Door "ha[d] been convicted of a crime punishable by imprisonment for a term exceeding one year," ER 68, and "ha[d] been convicted of a felony crime of violence," ER 69. The instructions also modified only the "possessed a firearm" and "possessed body armor" elements with "knowingly" and required no finding of knowledge of the felon or violent felon status. *See* ER 63, 64.

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 the other two prongs of the plain error standard are satisfied, i.e., whether the error affected Mr. Door'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).

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[9] *Rehaif*'s reasoning does not clearly extend to the felon in possession of explosives count, because the penalty provision for that offense requires only that the defendant "violates" the substantive statute, 18 U.S.C. § 844(a)(1), not that he "*knowingly* violates" it.

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. Door'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. 21. And the jury was not properly instructed on the knowledge element.

In the case of deficient jury instructions, the question is whether there is a "reasonable probability" 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 – indeed, far more than a reasonable probability – for there was no evidence at all of Mr. Door's knowledge of his felon and violent felon status.

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A P P E N D I X 5

No. 19-30213
[NO. 3:12-cr-05126-RBL, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH RANDALE DOOR,

Defendant-Appellant.

ANSWERING BRIEF OF UNITED STATES

Appeal from the United States District Court
for the Western District of Washington at Tacoma
The Honorable Ronald B. Leighton
United States District Judge

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district court had jurisdiction pursuant to 18 U.S.C. §3231. This Court has jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

On August 30, 2019, Door was sentenced to a 276-month prison term, followed by 3 years of supervised release. ER_28-34.[1] The judgment was entered that same day (CR_306), and Door timely appealed on September 11, 2019. CR_307; ER_26-27.

DEFENDANT'S BAIL STATUS

Door is serving the 276-month prison sentence imposed by the district court. His projected release date is June 12, 2033.

STATEMENT OF THE CASE

I. The Evidence Supporting Door's Conviction.

In late October 2011, ATF Special Agent Jonathan Hansen received a tip from a then-anonymous source that Door, an individual with a lengthy criminal history, was selling drugs and had firearms in his home in Tacoma, Washington. PSR_3 (¶6); RT_127-30, 209-12, 246-

[1] "CR_" refers to the district court's record of the case; "ER_" to Appellant's Excerpts of Record; "SER_" to Appellee's Supplemental Excerpts of Record; "RT_" to Reporter's Transcript of the trial; "PSR_" to the Presentence Report; "1RPSR_" to the first Revised Memorandum on Resentencing; "2RPSR_" to the second Revised Memorandum on Resentencing; and "OB_" to Appellant's Opening Brief.

47. Hansen conducted an investigation and then contacted Door's state community corrections officer, Tim Dougherty-Sanders, and reported Door was suspected of selling methamphetamine and possessing firearms. RT_129, 134, 284, 292, 320.

Based on that information, and other prior suspicious events including the discovery of a "Police"-style raid jacket in Door's possession, Officer Dougherty-Sanders decided to conduct a warrantless search of Door's home, as permitted under the terms of Door's supervision. PSR_3, 72 (¶¶6, 72); RT_134-35, 292-93, 309. That search was carried out on November 9, 2011. PSR_3 (¶6). The first attempt failed because no one came to the door despite repeated knocking. RT_137-39, 296, 299, 322-23. The search ultimately took place a while later after Door was observed and detained outside the residence. RT_300, 321, 326. During the search, Dougherty-Sanders discovered two handguns, some magazines loaded with ammunition, two sets of body armor, a seal bomb, two digital scales, drug packaging materials, and two drug pipes containing methamphetamine residue. PSR_3 (¶6); RT_141-45, 158-60, 221-26, 265-74, 301-03, 324-25. These discoveries

led to Door's arrest, first on state charges, and later on charges brought in a federal complaint. *See* CR_1.

In November 2011, while the state charges were pending, Agent Hansen visited Door at the county jail at Door's invitation. PSR_3 (¶7); RT_179-80, 201, 215, 305; ER_110. Door said he was interested in working as an informant, but Hansen told him there was "a credibility issue we need to get past," namely that Door had "lied" after his arrest by claiming everything seized from his home belonged to a friend. RT_176-179, 182; ER_110. Door then admitted to possessing each of those items. RT_182-83; ER_110-11; PSR_3 (¶7). Door also admitted selling methamphetamine to pay his debts, but claimed he stopped several weeks before the search of his home. ER_111; PSR_3 (¶7). Door admitted he was home when the officers first attempted to conduct the search and that he knew the items were present in the residence. ER_110-11. Among other things, Door told Hansen that he believed one of the firearms was stolen from an elderly man. ER_111.

While in pretrial detention, in both state and federal facilities, Door made a number of telephone calls using a monitored inmate telephone system that were introduced at trial. RT_111-15, 148-52. In

one call, Door told a female caller, "So, what the fuck, I had two guns, so what. Two guns and two bulletproof vests, big deal." Gov't Exh. 301A. In that same call, Door told the caller, "I had to pay an attorney. And, I wasn't gonna go ask my mom. . . . So, I was like fuck it, I'm gonna sell some dope. And the only way to sell dope, to do it, to stay up, to fucking run with all the tweakers." Gov't Exh. 301B. In a second call, Door admitted that he was present when the authorities first came to search his home on November 9, 2011; that he knew about the items in his house; and that he tried to get rid of those item when the authorities left. Gov't Exh. 301C. In yet a third call, Door mentioned that an ATF agent had come to see him, and told the caller he had "about 50 guns out there" that could be surrendered in an effort to cooperate. Gov't Exh. 301D.

II. Door's Indictment, Conviction, And Initial Sentencing.

A. The Indictment And The Jury Verdict.

On March 28, 2012, Door was charged by indictment with being a Felon In Possession of a Firearm, in violation of 18 U.S.C. §922(g)(1) (Count 1); Possessing Body Armor as a Felon Convicted of a Crime of Violence, in violation of 18 U.S.C. §931(a) (Count 2); and a being a Felon

in Possession of an Explosive, in violation of 18 U.S.C. §842(i)(1) (Count 3).[2] ER_68-71. The indictment also alleged that Door was subject to enhanced sentencing under the Armed Career Criminal Act (ACCA) on Count 1. ER_68-69. *See* 18 U.S.C. §§924(a)(2) and 924(e)(1). Each count listed several of Door's prior convictions supporting his status as a felon. ER_68-71.

Door was convicted as charged following a jury trial. CR_212. Regarding the elements pertaining to his felon status, Door stipulated that he "had been convicted of a felony crime punishable by a term of imprisonment exceeding one year. That is a crime of violence, as defined by law, and therefore was a convicted felon and a person convicted of a felony that is a crime of violence at the time of the events that are the subject of this prosecution." ER_66-67. The elements

[2] In a separate case, Door was charged with, and pleaded guilty to, Conspiracy to Defraud the United States, in violation of 18 U.S.C. §286. This charge arose from a conspiracy involving the filing of false tax returns that Door led while incarcerated in state prison. PSR_3 (¶5). Door received a 60-month prison sentence, 40 months of which were to be served concurrent with the sentence in this case, and 20 months to be served consecutive to this sentence. *See United States v. Door*, 12-cr-05139-BHS (W.D. Wash.), Dkt. Nos. 170-71.

instruction that the district court provided the jury for all three counts referenced this stipulation. ER_63-64; CR_209 at 17-19.

B. Door's First Sentencing.

The district court found Door was subject to an enhanced sentence under ACCA because he had three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. §924(e)(1). The government identified eight prior Washington state convictions as qualifying violent felonies supporting the enhancement. CR_221. Specifically, Door had prior convictions for second-degree assault with a deadly weapon, stemming from an altercation in which Door fired at police officers[3]; attempting to elude arising from a high-speed chase with police officers; and six prior convictions for second-degree burglary, in which Door burgled a residence or a business. PSR_7-12 (¶¶41-69); *see also* SER_1-17, 71-95.

The Probation Office calculated Door's advisory sentencing range as follows:

[3] Door had five second-degree assault convictions based on this shooting, but since they were committed during a single incident they constituted only one ACCA predicate. *See* 18 U.S.C. §924(e)(1).

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the court found the Guidelines range insufficient to account for the circumstances of Door's case. This was procedurally reasonable. Finally, given Door's unrelenting history of criminality and violence, the 276-month sentence he received was substantively reasonable.

ARGUMENT

I. Door's Guilt Of Unlawfully Possessing A Firearm And Body Armor Was Proven Beyond A Reasonable Doubt.

When Door was tried in 2014, a conviction under 18 U.S.C. §922(g)(1) only required proof that the defendant had a felony conviction (a crime punishable by imprisonment for at term exceeding one year), and that he knowingly possessed a firearm; the government did not have to prove the defendant knew his "felon status." *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997). Similarly, a conviction under 18 U.S.C. §931(a) only required proof that the defendant knowingly possessed body armor and had a prior felony conviction that met the legal definition of a crime of violence; the government did not have to prove the defendant knew his conviction was a felony or that it met this definition. *Cf. United States v. Mirabal*, 876 F.3d 1029, 1038 (10th Cir. 2017). The jury in this case was instructed in accordance with these principles, and thus was not asked

to find whether Door knew he was a felon or that he knew his predicate conviction qualified as a crime of violence.

Recently, however, the Supreme Court held that a conviction under §922(g) requires proof both that the defendant knowingly possessed a firearm and that he knew of his prohibited status (in this case that he had a felony conviction). *See Rehaif v. United States*, 139 S. Ct. 2191, 2195-97 (2019). Door does not dispute that the evidence proved he knowingly possessed a firearm, or that he did so as a felon. Door does, however, argue that his conviction under §922(g)(1) cannot stand because the evidence was insufficient to prove he knew his predicate conviction was punishable by a term of imprisonment exceeding one year. Similarly, while Door does not dispute that the evidence proved he knowingly possessed body armor while he had a felony conviction for a crime of violence, he argues that *Rehaif*'s holding applies to §931(a), and that there was insufficient evidence to prove he knew "he had been convicted of a felony crime of violence." OB_21-22.

Generally, this Court "do[es] not examine the sufficiency of evidence of an element that the Government was not required to prove under the law of our circuit at the time of trial because the Government

had no reason to introduce such evidence in the first place." *United States v. Kim*, 65 F.3d 123, 126-27 (9th Cir. 1995). But this rule had been applied only where the Court concludes the trial court committed reversible error in failing to instruct the jury in accordance with this intervening change in the law, thereby misstating what the government is required to prove. *See United States v. Recio*, 371 F.3d 1093, 1106-07 (9th Cir. 2004); *Kim*, 65 F.3d at 125-27. Here, however, the jury instructions omitting the knowledge element required by *Rehaif* do not amount to reversible plain error, *see* Section II.C., *infra*, so it is not clear if cases such as *Kim* preclude the Court from reaching Door's sufficiency claims. Regardless, these claims fail on the merits.

A. Standard Of Review.

Evidence is legally sufficient if, viewed in the light most favorable to the verdict, there is proof "beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). "[T]he government does not need to rebut all reasonable interpretations of the evidence that would establish the defendant's innocence." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). The question is whether "*any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Where preserved, the Court reviews a sufficiency challenge de novo. *See United States v. Phillips*, 929 F.3d 1120, 1123 (9th Cir. 2019). To preserve such an issue, the defendant's Rule 29 motion "do[es] not need to state the grounds upon which [it is] based." *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004). "[H]owever, when a Rule 29 motion is made on a specific ground, other grounds not raised are waived."[8] *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010). Here, the defense made a summary Rule 29 motion challenging "all three counts" at the close of the government's case (ER_25), and the close of all the evidence (ER_23), and supported those motions with no argument. Under this Court's precedents, this sufficed to preserve Door's newly-minted sufficiency claim.[9]

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[8] This is an unusual rule, as it rewards a defendant who makes a summary Rule 29 motion (leaving the district court to guess as to which part of the government's case is insufficient), and punishes a defendant who advances a focused argument to support his motion.

[9] Because Door's sufficiency claim is based on an intervening change in the law, the government agrees (OB_20 n.7) that his failure to raise it in his prior appeals does not bar him from doing so now. *See United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009).

B. Following Rehaif v. United States*, The Government Must Prove The Defendant Knew He Was A Felon To Convict Him Of Unlawfully Possessing Firearms Or Body Armor.*

While *Rehaif* involved a prosecution for being an illegal alien in possession of a firearm, the Government does not dispute that this holding applies to the prohibited status listed in all subsections of §922(g). *See Rehaif*, 139 S. Ct. at 2194, 2200. Thus, the government agrees that a felon-in-possession conviction under §922(g)(1) now requires proof the defendant knew he had a past conviction that was punishable by a term of imprisonment exceeding one year. *See United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019).

The government also agrees that because of its statutory structure, *Rehaif*'s holding apples to §931(a), though not in the manner urged by Door. Section 931(a) provides that "it shall be unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is—(1) a crime of violence (as defined in section 16); or (2) an offense under State law that would constitute a crime of violence under paragraph (1) if it occurred within the special maritime and territorial jurisdiction of the United States." A separate statute provides that "[w]hoever knowingly violates section 931 shall be

fined under this title, imprisoned not more than 3 years, or both." 18 U.S.C. §924(a)(7). This is the same statutory structure at issue in *Rehaif*: a statute defining the crime (§922(g)) and another statute providing that a knowing violation of the definitional statute is punishable by a prescribed penalty (§924(a)(2)). Applying the rules of statutory construction announced in *Rehaif*, the government agrees that the knowledge element applicable to §931(a) applies to both the possession element and the defendant's status as a felon.

Section 931(a) does not, however, apply to every felon, only felons who have a past felony conviction that meets the definition of a crime of violence, i.e., "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §16(a). [10] Door insists that in addition to proving the defendant knew his status as a felon, *Rehaif* also requires the government to prove the defendant knew his conviction was "a felony

[10] A crime of violence also includes "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. §16(b), but this definition has been invalidated as unconstitutionally vague. *See Sessions v. Dimaya,* 138 S. Ct. 1204 (2018).

crime of violence." OB_22. This cannot be correct, since it would impose an impossible burden on the government. *Cf. United States v. Balint*, 258 U.S. 250, 254 (1922) (difficulty of proving knowledge suggests Congress did not intend to require such proof).

As this Court is no doubt aware, judges often cannot agree about whether a crime meets the statutory definition of a crime of violence given the complicated legal principles governing this inquiry. *See*, *e.g.*, *United States v. Begay*, *supra* (split Ninth Circuit opinion disagreeing about whether federal second-degree murder is a crime of violence). Given this reality, there is no way Congress intended to limit §931(a) to defendants who knew their past crimes met the legal definition of a crime of violence. Since that analysis does not take place until some future conviction, the universe of such defendants is all but nonexistent. Sections 931(a) and 924(a)(7) were enacted as part of the James Guelff and Chris McCurley Body Armor Act of 2002, *see* Pub. L. 107-273, Div. C, Title I, §§11009(e)(2)(A), (C), 116 Stat. 1758, 1821 (Nov. 2, 2002), and were intended by Congress to address "the serious threat to community safety posed by criminals who wear body armor during the commission of a violent crime." 34 U.S.C. §10534(b)(4). This

congressional intent would be frustrated if these statutes were construed to apply only to the insignificant number of felons who have knowledge that their prior convictions meet the statutory definition of a crime of violence.

The government's proposed construction of §931(a) and §924(a)(7) is consistent with *Rehaif*. Like the statutes at issue in that case, §931(a) and §924(a)(7) operate to ground the defendant's unlawful conduct not on his mere possession of body armor (which is lawful for most persons), but on the status of the person who possesses body armor. Requiring the government to prove the defendant knew his felon status is sufficient to limit prosecutions to "'those who understand the wrongful nature of their act,'" and thus protect those who are unaware their acts are unlawful. *Rehaif*, 139 S. Ct. at 2196. Requiring proof that the defendant knew his past felony also constituted a crime of violence does not meaningfully further that goal, and, as noted, is inconsistent with Congress's intent in enacting these statutes.

Nor does the statutory text require this result. In *Rehaif*, the Supreme Court held the knowledge requirement of §924(a)(2) applied to the status elements in §922(g) because "[t]he term 'knowingly' in

§ 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)," and thus applies to all the elements in §922(g) except the jurisdictional element. 139 S. Ct. at 2195-96. Door, though, is not proposing that §924(a)(7)'s knowing requirement be read to modify the text of §931(a) alone. Section 931(a) references §16 to incorporate that statute's definition of a crime of violence, meaning that Door's proposed construction is asking that the "knowingly" requirement in §924(a)(7) be read to modify not only §931, to which §924(a)(7) expressly refers, but also to the definition in §16, which is not referenced in §924(a)(7). *Rehaif* does not compel this construction. *Cf.* 139 S. Ct. at 2196 ("This is notably not a case where the modifier 'knowingly' introduces a long statutory phrase, such that questions may reasonably arise about how far into the statute the modifier extends."). Indeed, under Door's proposal, the government would not only have to prove the defendant knew his felony conviction involved "the use, attempted use, or threatened use of physical force," it would also have to prove the defendant knew "physical force" is not just any force, but only "violent force" as defined by the Supreme Court. *See Johnson v. United States*,

559 U.S. 133, 139-42 (2010). This cannot be right, and was certainly not what Congress intended when it enacted these statutes in 2002.

C. Sufficient Evidence Supports Door's Conviction For Possessing A Firearm As A Convicted Felon, And For Possessing Body Armor As A Felon Convicted Of A Crime Of Violence.

Door does not dispute that the evidence proved he knowingly possessed the firearms and body armor found in his residence, or that when he possessed those items he had a felony conviction that qualifies as a crime of violence. However, as discussed, following *Rehaif* the government was also required to prove that Door knew his status as a felon to convict him under §922(g)(1) for possessing a firearm as a felon, and under §931(a) for possessing body armor following a felony conviction that is a crime of violence. The government did so, because Door stipulated to his felon status.

Prior to trial, the defense indicated Door would stipulate to his prohibited status. CR_168 at 7. Accordingly, the jury was informed that the parties had stipulated to the following:

> Prior to November 9, 2011, Kenneth Door, the defendant herein, had been convicted of a felony crime punishable by a term of imprisonment exceeding one year. That is a crime of violence, as defined by law, and therefore was a convicted felon and a person convicted of a felony that is a crime of

> violence at the time of the events that are the subject of this prosecution.

ER_66-67. The jury was also instructed that because of this stipulation, "You should therefore treat these facts as having been proved." ER_67. The court's final instructions likewise informed the jury that Door stipulated that "at the time its alleged he possessed a firearm, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year and thus was a felon" (ER_63), and that "at the time it is alleged he possessed body armor, the defendant had been convicted of a crime of violence punishable by imprisonment for a term exceeding one year." ER_64.

Door's "factual stipulation[s] w[ere] binding, and [they] relieved the government of the burden to prove [Door]'s status as a felon," as well as his status as felon who had been convicted of a crime of violence. *Benamor*, 937 F.3d at 1188. Door responds that because these stipulations did not expressly mention that he knew his prohibited status, they were insufficient to prove the knowledge element required by *Rehaif*. OB_22. Given the procedural posture of this case, Door should be estopped from making this argument. And, in in any event, this argument lacks merit.

Because Door offered to stipulate to his felon status, the district court was required to accept that stipulation. *See United States v. Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997). And as a result of that stipulation, the government was precluded from offering any evidence about the circumstances of Door's past felony convictions that would show Door knew his prohibited status. *See Old Chief v. United States*, 519 U.S. 172, 190-92 (1997). For example, Door's stipulation prevented the jury from learning that he served a 10-year sentence for a felony assault conviction for shooting at police officers (PSR_11 (¶¶63-65); SER_1-17), which would have conclusively proven Door knew he has a felony conviction that was punishable by a term of imprisonment exceeding one year, as required by §922(g)(1). The jury was also barred from learning that Door served a 51-month sentence for felony harassment for threatening to kill his ex-girlfriend (PSR_10 (¶¶61-62); SER_18-27), which would have conclusively proven Door knew he has a felony conviction involving a threat to kill. And although the government was not required to prove Door knew this conviction was a crime of violence, this evidence would have done so, since anyone would recognize that a threat to kill involves a threat to use "physical force"

against the person of another under any definition of that term. Door should not now be permitted to complain about the government's failure to prove his knowledge of his prohibited status when any such failure was a direct result of Door's affirmative act of stipulating to that status. *Cf. United States v. Butler*, 74 F.3d 916, 924 (9th Cir. 1996) (defendant who requested a lesser-included offense and was convicted of that offense and acquitted on the greater, was precluded from arguing that his offense of conviction was not actually a lesser-included of the charged crime).

In any event, Door's sufficiency challenge is foreclosed by *Benamor*. In *Benamor*, the Court held that because the defendant's stipulation removed the issue of the defendant's felon status from the case, that stipulation also relieved the government of having to prove the defendant's knowledge of that status. *See* 937 F.3d at 1188.[11] The same reasoning applies here.

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[11] After discussing the effect of the defendant's stipulation, the Court in *Benamor* went on to say that "[a]ssuming, however, that the stipulation does not end the discussion as to Defendant's *knowledge* of his status as a felon," relief on plain-error review was not warranted because the record "proved beyond a reasonable doubt that Defendant had the knowledge required by *Rehaif* and that any error in not (continued . . .)

Even if this were not the case, a defendant's knowledge of his prohibited status may be proven by circumstantial evidence. *See Rehaif*, 139 S. Ct. at 2198. Here, Door stipulated that his felony conviction was a crime of violence punishable by a term of imprisonment exceeding one year, and the jury could easily infer that Door was aware of the punishment attendant with this conviction. *See United States v. Reed*, 941 F.3d 1018, 1022 (11th Cir. 2019). Defendants, after all, are generally not oblivious to the punishment they are ordered to serve following a conviction. Because this is a reasonable inference to draw from Door's stipulation, the Court "'must presume'" the jury did so, "'even if it does not affirmatively appear in the record.'" *Nevils*, 598 F.3d at 1164 (citation omitted). This stipulation was therefore sufficient to prove Door's knowledge of his felon status required for his convictions under §922(g)(1) and §931(a).[12]

(continued . . .)
instructing the jury to make such a finding did not affect Defendant's substantial rights or the fairness, integrity, or public reputation of the trial. 937 F.3d at 1188-89. This alternative holding assumed the stipulation did not resolve the knowledge question, which confirms that the Court also held the stipulation was indeed dispositive of this issue.

[12] This inference was not only warranted by the stipulation, it was factually true. Door's predicate felonies were Washington convictions,
(continued . . .)

D. If The Court Finds The Evidence Is Insufficient, In This Case The Appropriate Remedy Is A New Trial.

Normally, if an appellate court concludes that the government presented insufficient evidence to sustain a defendant's conviction, the Double Jeopardy Clause dictates that the remedy is to order entry of a judgment of acquittal. *See Burks v. United States*, 437 U.S. 1, 18 (1978). However, an exception applies if the insufficiency results from a change in the law that adds an element the government was not required to prove at the time of trial. In that event, "the proper disposition of this case is remand for new trial." *United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995).

As discussed, when Door was tried, controlling authority from this Court held that the government was not required to prove the

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(continued . . .)
and such convictions are "punishable by a term of imprisonment exceeding one year" within the meaning of §922(g)(1) (and presumably §931(a)) only if the low end of the defendant's mandatory sentencing guidelines range exceeds one year. *See United States v. McAdory*, 935 F.3d 838, 842-44 (9th Cir. 2019). A defendant sentenced under such a system undoubtedly knows his crime is, in fact, punishable by more than one year in prison. And, indeed, Door's state judgments, which Door signed, confirm he had felony convictions where his guidelines range and sentence exceeded one year. SER_1-27, 95-119.

defendant's knowledge of his "felon status" to secure a conviction under §922(g)(1), *Miller*, 105 F.3d at 555, and, by parity of reasoning, a conviction under §931(a). *Rehaif* has changed this, and now requires the government to prove the defendant's knowledge of his prohibited status. Thus, if the Court were to find the evidence of this element is insufficient, this would be because "[t]he government had no reason to introduce such evidence because, at the time of trial, under the law of our circuit, the government was not required to prove that a defendant knew" his felon status. *Weems*, 49 F.3d at 531. Accordingly, a new trial would be the appropriate remedy in this circumstance. *See id.*

II. Omission Of *Rehaif*'s Knowledge-Of-Prohibited-Status Element From The Indictment And The Jury Instructions Was Not Reversible Plain Error.

As a corollary to his sufficiency claims, Door argues that his convictions for possessing a firearm as a felon, and possessing body armor as a felon whose felony is a crime of violence, must be reversed because the indictment failed to allege he had knowledge of his felon status when he possessed those items. Door similarly argues the jury instructions were fatally defected because they did not require the

government to prove this knowledge element. OB_23-24. Door is incorrect.

A. Standard Of Review.

As Door concedes (OB_19), because he did not object to either the indictment or the jury instructions below, the Court reviews for plain error. *See United States v. Cotton*, 535 U.S. 625, 631 (2002) (indictment); *Jones v. United States*, 527 U.S. 373, 388-89 (1999) (jury instructions).

B. Door Has Waived His Challenge To The Indictment, Which Is Not Plainly Insufficient.

A defendant is presently required to challenge the sufficiency of the indictment, including a claim that the indictment "fail[s] to state an offense," in a pretrial motion. Fed. R. Crim. P. 12(b)(3)(B)(v). Absent good cause, a failure to comply with Rule 12(b)(3) results in a waiver.[13] *See* Fed. R. Crim. P. 12(c)(3); *United States v. Ortiz*, 776 F.3d 1042, 1044

[13] Some cases continue to say "that the failure of an indictment to state an offense cannot be waived," *United States v. Spangler*, 810 F.3d 702, 711 (9th Cir. 2016), but this rule was based on the premise that an indictment's failure to state an offense deprives the district court of subject matter jurisdiction. *See United States v. Broncheau*, 597 F.2d 1260, 1262 n.1 (9th Cir. 1979). This premise is no longer correct. *See Cotton*, 535 U.S. at 629-31.

n.3 (9th Cir. 2015), and this waiver leaves the issue unreviewable even for plain error. *See United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000). Door did not challenge the indictment before trial, and since he has not attempted to show good cause for this failure in his opening brief, the issue is waived. *See Ortiz,* 776 F.3d at 1044 n.3.

Even if reviewable, Door's untimely challenge to the indictment does not demonstrate clear or obvious error. "An indictment is required to set forth the elements of the offense sought to be charged." *United States v. Debrow*, 346 U.S. 374, 376 (1953); *see also* Fed. R. Crim. P. 7(c)(1). However, "indictments which are tardily challenged are liberally construed in favor of validity," *Spangler*, 810 F.3d at 711, and an indictment that tracks the language of the statute charged is generally sufficient. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Here, the indictment tracked the statutory language of §922(g)(1) and §931(a) by alleging Door's possession of a firearm and body armor; the required nexus to commerce; and Door's status as a felon and a felon convicted of a crime of violence, respectively. And the indictment also tracked the language of §924(a)(2) and §924(a)(7) by

appending the "knowingly" modifier to his commission of both offenses. ER_68-70.

Although "implied, necessary elements, not present in the statutory language, must be included" in the indictment, *United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir. 1995), *Rehaif* recognized an element that *was* present in the statutory text. The Supreme Court's analysis was expressly anchored to the text itself. *See* 139 S. Ct. at 2195-96. The Court did not purport to discover an "implied, necessary element[] not present in the statutory language." *Jackson*, 72 F.3d at 1380. As a result, the indictment in this case was not required to articulate the precise contours of "knowingly" and was not plainly erroneous, particularly when "liberally construed in favor of validity." *Spangler*, 810 F.3d at 711.

C. The Defect In The Jury Instructions Did Not Affect Door's Substantial Rights.

Like an indictment, the jury instructions must set forth all the elements of the crime charged. *See Neder v. United States*, 527 U.S. 1, 8 (1999). Here, the jury instructions lacked the knowledge-of-prohibited-status element required by *Rehaif*. ER_63-64. Because *Rehaif* predates

this appeal, this error is "plain" within the meaning of Rule 52(b). *See Johnson v. United States*, 520 U.S. 461, 468 (1997).

However, while Door claims otherwise (OB_24), he cannot make the last two showings required to obtain relief on plain-error review. First, "there is no probability that, but for the error[s], the outcome of the proceeding would have been different." *Benamor*, 937 F.3d at 1189. In making this assessment, the Court "may consult the whole record when considering the effect of any error on substantial rights." *United States v. Vonn*, 535 U.S. 55, 59 (2002). Thus, the Court may consider all the record evidence about Door's criminal past, not just the trial evidence, to determine whether Door was prejudiced by the jury instruction's omission of the knowledge element required by *Rehaif*. *See Benamor*, 937 F.3d at 1189. The Court may do likewise if it were to find any plain defect in the indictment. *See Reed*, 941 F.3d at 1021-22.

The record before the Court proves overwhelmingly that Door knew he has a conviction punishable by a term of imprisonment for a term exceeding one year, as required by §922(g)(1). In fact, Door has around 20 felony convictions where he served prison terms ranging from 14 months to 10 years. PSR_8-11 (¶¶43-48, 51-58, 61-65); SER_1-

27. And among these is a felony conviction for a crime of violence (felony harassment) for which Door served a 51-month prison sentence (PSR_10 (¶¶61-62); SER_18-27), which shows he knew his felon status as required by §931(a). These convictions "proved beyond a reasonable doubt that [Door] had the knowledge required by *Rehaif* and that any error in not instructing the jury to make such a finding did not affect Defendant's substantial rights or the fairness, integrity, or public reputation of the trial." *Benamor*, 937 F.3d at 1189. The same is true for any plain defect in the indictment. *See Reed*, 941 F.3d at 1022.

III. The District Court Committed No Error At Sentencing.

Door argues that the district court committed two procedural errors at sentencing. First, Door contends the court erred in assessing an enhancement for obstruction of justice under USSG §3C1.1. OB_26-30. Second, Door claims the court procedurally erred by giving "the sentencing guidelines no weight." OB_31. Door also claims his sentence is substantively unreasonable. OB_34-37. These arguments are meritless.

PAGES NOT PERTINENT TO PETITION FOR

WRIT OF CERTIORARI OMITTED

A P P E N D I X 6

CA NO. 19-30213

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE RONALD B. LEIGHTON
United States District Judge

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I.

ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FELON IN POSSESSION OF A FIREARM AND VIOLENT FELON IN POSSESSION OF BODY ARMOR CONVICTIONS.

1. Required Mens Rea.

For felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), the government agrees *Rehaif v. United States*, 139 S. Ct. 2191 (2019), requires proof the defendant knew the facts that made him a prohibited person, namely, he had been convicted of "a crime punishable by imprisonment for a term exceeding one year." But for violent felon in possession of body armor in violation of 18

U.S.C. § 931, the government argues only partial knowledge is required. The defendant must know he has been convicted of a felony, but does not need to know it was a crime of violence.

This half step cannot be squared with *Rehaif*. *Rehaif*'s reasoning requires complete knowledge for violent felon in possession of body armor just as it does for felon in possession of a firearm.

Initially, *Rehaif*'s textual analysis requires complete knowledge for violent felon in possession of body armor. That textual analysis had three steps. First, it pointed out that "[t]he term 'knowingly' in §924(a)(2) modifies the verb 'violates' and its direct object, which in this case is §922(g)." *Id.*, 139 S. Ct. at 2195. Second, it listed the elements in that direct object: "With some here-irrelevant omissions, §922(g) makes possession of a firearm or ammunition unlawful when the following elements are satisfied: (1) a status element (in this case, "being an alien . . . illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element (a "firearm or ammunition"). *Id.* at 2195-96. Third, the Court recognized a principle of "ordinary English grammar," requiring "read[ing] the statutory term '"knowingly" as applying to all the subsequently listed elements of the crime.'" *Id.* at 2196 (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).

The same logical steps apply to § 924(a)(7) and § 931. First, "[t]he term 'knowingly' in §924(a)[(7)] modifies the verb 'violates' and its direct object, which in this case is §[931]." Second, "§[931] makes possession of [body armor] unlawful when the following elements are satisfied: (1) a status element (in this case, ["has been convicted of a felony that is . . . a crime of violence (as defined in

section 16)"]; (2) a possession element (to "possess"); . . . and [(3)] a [body armor] element (["body armor"]).[1] Finally, "ordinary English grammar," requires "reading the statutory term '"knowingly" as applying to all the subsequently listed elements of the crime.'" Those subsequently listed elements are the possession element and both parts of the status element, i.e., "felony" and "that is . . . a crime of violence," not the possession element and just the first part, but not the second part, of the status element.[2]

Rehaif's recognition of the general requirement of scienter, or a "vicious will," *id.*, 139 S. Ct. at 2196, also extends. Just as possession of a gun can be entirely innocent, *see Rehaif*, 139 S. Ct. at 2197, possession of body armor can be entirely innocent. Possession of body armor may be even more innocent to some extent, because it is innately defensive.

The government's argument that the defense construction places an "impossible burden" on the government because even judges cannot agree about what constitutes a "crime of violence" ignores the difference between judges and

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[1] Section 931 itself does not include the jurisdictional interstate or foreign commerce element in § 922(g), but § 921(a)(35) defines "body armor" to require sale in interstate or foreign commerce.

[2] An additional textual consideration *Rehaif* noted is that the possession element follows the status element in § 922(g), and the Court saw "no basis for interpreting 'knowingly' as applying to the second §922(g) element but not the first." *Rehaif*, 139 S. Ct. at 2196. But, first, this does not support the government's position requiring knowledge of part of the status element but not the rest; indeed, there is even less basis for splitting a single element. Second, the primary textual point is the preceding one, "of ordinary English grammar," that "we normally read the statutory term '"knowingly" as applying to all the subsequently listed elements of the crime.'" *Rehaif*, 139 S. Ct. at 2196 (quoting *Flores-Figueroa*, 556 U.S. at 650).

ordinary laypeople. Proving the defendant knew his crime involved the "violent force" required by *Johnson v. United States*, 559 U.S. 133 (2010), will not be difficult because the definition of "physical force" which *Johnson* adopted was the "ordinary meaning" rather than "a more specialized legal usage." *Id.* at 138-39. Ordinary jurors deciding what ordinary defendants thought force meant will presumably use that ordinary meaning in deciding whether the defendant knew his crime involved "physical force."

There are those less intuitive holdings in which courts have *excluded* crimes that most laypeople would think were violent, such as the federal second-degree murder example the government offers, *see United States v. Begay*, 934 F.3d 1033, 1038-41 (9th Cir. 2019); *see also United States v. Vederoff*, 914 F.3d 1238, 1249 (9th Cir. 2019) (holding Washington second-degree murder not "crime of violence"). But that will negate the actual status element, not the defendant's mens rea about the status. Most, if not all, defendants convicted of federal second-degree murder probably "know" in their minds that their convictions are for crimes of violence; they are just mistaken due to court interpretation a layperson would not anticipate. The same can be said of defendants convicted of other typically violent crimes that escape the "crime of violence" categorization through a technical overbreadth. Those defendants will escape conviction under the body armor statute not because they lack knowledge – or belief – that their crimes are crimes of violence, but because their crimes in fact are not crimes of violence.

In sum, the government's burden is far from impossible. Defendants convicted of murder or other typically violent crimes will believe their crimes were crimes of violence, and be found not guilty only if there is an unanticipated court interpretation of the particular murder statute. Defendants convicted of

assault will believe their assaults were crimes of violence, and be found not guilty only if there is an unanticipated court interpretation of the particular assault statute. The government's burden will be difficult only in the case of more unusual crimes on the fringe of the "crime of violence" definition. *Cf. Rehaif*, 139 S. Ct. at 2198 (positing less common example of felon placed on probation as example of person who might not know he had been convicted of crime "*punishable* by imprisonment for a term exceeding one year" (quoting § 922(g)(1), and adding emphasis)).

2. Insufficiency of Evidence.

A preliminary government argument that Mr. Door is precluded from raising the sufficiency of evidence claim by the exercise of his right to stipulate under *Old Chief v. United States*, 519 U.S. 172 (1997), *see* Govt. Brief, at 32-33, fails because the sufficiency claim is based on an intervening change in the law. This precludes any finding of waiver and distinguishes the case the government cites – *United States v. Butler*, 74 F.3d 916 (9th Cir. 1996). *See United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998) (acknowledging *Butler* and other similar cases, but declining to apply invited error rule to jury instruction claim when claim based on intervening Supreme Court precedent). Mr. Door was no more responsible for predicting *Rehaif* than the government was. *See* Govt. Brief, at 24 n.9 (acknowledging right to raise claim based on intervening change in law). The government's remedy is to retry Mr. Door and present the evidence *Rehaif* requires, which presently controlling precedent allows. *See infra* p. 8.

The government's substantive argument also fails. Its argument that Mr.

Door's stipulation to his status establishes *knowledge* of his status stretches the stipulation too far. All the stipulation told the jury was that Mr. Door had been convicted of "a felony crime punishable by a term of imprisonment exceeding one year" that was a "crime of violence." ER 66-67. It told the jury nothing about what, if anything, Mr. Door was told about the elements of the crime or maximum sentence. It told the jury nothing about what sentence Mr. Door received. It did not even tell the jury about general practice in criminal proceedings, such as what defendants are told about elements or sentence exposure when they plead guilty, what they are told about elements or sentence exposure when they go to trial, or what they are told about elements or sentence exposure when they are sentenced.

This made it impossible for a jury to draw any inferences about what Mr. Door knew about those things. Without knowing the sentence actually imposed, or at least something about what advice was, or generally in practice is, given about sentence exposure, the jury had no basis for judging what Mr. Door would have known about sentence exposure. Without knowing what advice was, or generally in practice is, given about the elements of the offense, the jury had no basis for judging what Mr. Door would have known about that. The offense could have been one of the "obvious" crimes of violence like murder, *see supra* p. 4, but it could have been one of the less "obvious" ones on the fringe of the "crime of violence" definition. Finding knowledge based on the stipulation alone would have been speculation, and "speculation and conjecture cannot take the place of reasonable inferences and evidence," *Juan H. v. Allen*, 408 F.3d 1262, 1279 (9th Cir. 2005), *cited with approval in United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc).

Neither of the cases cited by the government – *United States v. Benamor*,

937 F.3d 1182 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020), and *United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019) – suggest differently. To begin, neither *Benamor* nor *Reed* considered the additional mens rea which must be found for violent felon in possession of body armor conviction, so *Benamor* and *Reed* go not at all to that conviction. More generally, neither *Benamor* nor *Reed* suggest that stipulation to the fact of conviction alone establishes the knowledge required by *Rehaif*.

Benamor did not decide the question, but avoided it. Preliminarily, *Benamor* reviewed only for plain error because "a sufficiency-of-evidence claim was not raised before the district court." *Id.*, 937 F.3d at 1188. More fundamentally, all *Benamor* said about the stipulation to felon status was that "it relieved the government of the burden to prove Defendant's *status* as a felon." *Id.* It said nothing about what the stipulation showed about the defendant's *knowledge* of his status. To the contrary, it "assum[ed] . . . that the stipulation does not end the discussion as to Defendant's *knowledge* of his status as a felon." *Id.* (emphasis in original).

Neither did *Reed* hold the stipulation to felon status alone could support a finding of knowledge of felon status. Initially, *Reed*, like *Benamor*, reviewed only for plain error. *See Reed*, 941 F.3d at 1021. Secondly, *Reed* relied on more than the stipulation. It relied on "[the defendant's] stipulation *and* . . . his testimony that he *knew* he was not supposed to have a gun." *Id.* (emphasis partially added).

In the present case, review is not for plain error, but de novo, as the government acknowledges. *See* Govt. Brief, at 24. And there was no additional evidence like the defendant's testimony in *Reed*. The stipulation was the *only* evidence. That alone is not enough.

3. Remedy.

The government correctly cites precedent of this Court that the general rule barring retrial does not apply when evidence becomes insufficient because of intervening case law. *See United States v. Weems*, 49 F.3d 528, 530-31 (9th Cir. 1995). A later case has labeled the review of sufficiency claims on appeal, at least when there are other grounds for reversal, as a "policy." *United States v. Jimenez Recio*, 371 F.3d 1093, 1106 (9th Cir. 2004).[3]

This precedent is binding on the panel in this case, but the defense respectfully suggests it was wrongly decided and reserves the right to seek further en banc or Supreme Court review. The right to review of sufficiency of evidence is not a "policy," but a constitutional right arising out of the Double Jeopardy Clause. *See Burks v. United States*, 437 U.S. 1 (1978). At least one circuit, and arguably a second, have barred retrial after reversal for insufficient evidence regardless of whether the insufficiency is due to an intervening change in the law. *See United States v. Bruno*, 661 F.3d 733, 742-43 (2d Cir. 2011); *United States v. Smith*, 82 F.3d 1564, 1567-68 (10th Cir. 1996). The defense suggests this is the better view.

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[3] The government floats the idea that the case law goes even further and precludes sufficiency review even when there is not another ground for reversal. *See* Govt. Brief, at 22-23 (citing *Jimenez Recio* and *United States v. Kim*, 65 F.3d 123 (9th Cir. 1995)). The cases cited do not stand for that proposition, however, because there were other grounds for reversal in those cases, and they were simply applying *Weems*, *See Jimenez Recio*, 371 F.3d at 1106-07 (citing *Weems*); *Kim*, 65 F.3d at 127 (citing *Weems*). The government acknowledges "it is not clear" that review is precluded where there are not other grounds for reversal, Govt. Brief, at 23, and does not pursue the argument, so it is waived.

B. THERE WAS PLAIN ERROR IN THE INDICTMENT AND INSTRUCTIONS.

1. Indictment.

The government's first argument – that the challenge to the indictment is completely waived – fails for two reasons. First, it ignores precedent. It has been long established that a defendant may challenge an indictment after trial, subject to the rule that the indictment is then liberally construed. *See United States v. Spangler*, 810 F.3d 702, 711 (9th Cir. 2015), *and cases cited therein*. That rule has been applied as recently as this past year, *see, e.g., United States v. Read*, 918 F.3d 712, 718-19 (9th Cir. 2019), including to a challenge based on *Rehaif*, *see United States v. Hessiani*, 786 Fed. Appx. 658, 661 (9th Cir. 2019) (unpublished). The government cites no case changing the rule.

Finding waiver in the present would go beyond just ignoring this precedent, moreover. Prior to the decision in *Rehaif*, there was no basis for challenging the indictment. Certainly in these circumstances, there can be no finding of waiver. *Cf. United States v. Burt*, 143 F.3d at 1217 (no waiver of jury instruction challenge when claim based on intervening Supreme Court precedent).

The government's substantive argument also fails. Its premise – that "the indictment tracked the statutory language of §922(g)(1) and §931(a)," Government Brief, at 38 – is wrong. The statutory language for felon in possession of a firearm and violent felon in possession of body armor is found not in § 922(g)(1) and § 931 alone, but in those sections *and* § 924. An allegation tracking the language of the statute – or in this case, two statutes – would track both the statutes together.

For felon in possession of a firearm, it would be language such as "the defendant knowingly violated § 922(g)(1) by, after having been convicted of a crime punishable by imprisonment for a term exceeding one year, possessing a firearm," or, if the government wished to eliminate the statutory reference, language such as "the defendant knowingly, having been convicted of a crime punishable by imprisonment for a term exceeding one year, possessed a firearm." For violent felon in possession of body armor, it would be language such as "the defendant knowingly violated § 931 by possessing body armor, after having been convicted of a felony that is a crime of violence," or, if the government wished to eliminate the statutory reference, language such as "the defendant knowingly possessed body armor, after having been convicted of a felony that is a crime of violence."

Tracking the statutory language in this way, with the word "knowingly" before both the prior conviction element and the possession element, would have triggered the principle of "ordinary English grammar" recognized in *Rehaif* and *Flores-Figueroa* – reading "knowingly" to "apply[ ] to all the subsequently listed [words]." *Rehaif*, 139 S. Ct. at 2196 (quoting *Flores-Figueroa*, 556 U.S. at 650 (2009)). This might theoretically have put Mr. Door on notice – though only theoretically, since all existing case law was to the contrary – that he had to know his prior convictions were of "a crime punishable by imprisonment for a term exceeding one year" and/or "a felony that is a crime of violence."

The actual indictment did not track the statutory language in this way, however. It varied in a critical respect. Consistent with the then prevailing – but incorrect – case law, it put "knowingly" before only the "possessed" element – and *after* the prior conviction element. The felon in possession of a firearm count read: "[T]he defendant, KENNETH RANDALE DOOR, having been convicted of

a crime punishable by imprisonment for a term exceeding one year, to wit: [list of prior convictions] did knowingly possess firearms, to wit, [listing firearms]." ER 68-69. The violent felon in possession of body armor count read: "[T]he defendant, KENNETH RANDALE DOOR, having been convicted of a felony crime of violence, to wit: [list of prior convictions] did knowingly possess body armor." ER 69-70.

This not only failed to give notice of the additional knowledge requirement *Rehaif* recognized, but suggested such knowledge is not required. That is because of (1) the principle of "ordinary English grammar," that a word is normally read as applying to all the subsequently listed words,'" *supra* pp. 2-3, 10, and (2) only the possession element being "subsequently listed."

The indictment thus is not saved by the principle that an indictment that tracks the language of the statute is generally sufficient. First, the language of the indictment did not track the language of the statute(s). Second, the language of the indictment varied from the language of the statute(s) in a critical way that suggested the offenses did not require the additional knowledge *Rehaif* requires.

2. Instructions.

The government asserts *Benamor* establishes courts may look at criminal record evidence presented for sentencing to judge whether an instructional error affects substantial rights. *Benamor* did describe aspects of the defendant's criminal record and rely upon that to conclude he would have been convicted even if the jury had been properly instructed. *See id.*, 937 F.3d at 1189. There is no indication the evidence was presented only for sentencing, however. *See id.*

Benamor certainly did not address the issues posed by considering non-trial evidence.

There are other cases that have considered evidence presented only for sentencing. *See, e.g., United States v. Hunt*, 656 F.3d 906, 913-14 (9th Cir. 2011). But, first, they require the evidence presented for sentencing to be "overwhelming and uncontroverted." *Id.* at 913 (internal quotations omitted). Second, still other cases, including very recent ones, suggest only trial evidence may be considered, stating the court should "consider the whole *trial* record." *United States v. Tydingco*, 909 F.3d 297, 304 (9th Cir. 2018) (emphasis added).

The latter view is the better one, as only evidence presented at trial is tested by trial evidentiary rules and the crucible of cross-examination. But if the Court disagrees and concludes it can consider evidence presented only for sentencing, it must apply the stringent "overwhelming and uncontroverted" standard. And it must consider whether this test is satisfied for both the felon in possession of a firearm count and the violent felon in possession of body armor count. First, was there "overwhelming and uncontroverted" evidence showing Mr. Door knew he had been convicted of a crime punishable by imprisonment exceeding one year? Second, was there "overwhelming and uncontroverted" evidence showing Mr. Door knew he had been convicted of a felony that is a crime of violence?

As to knowledge of having been convicted of a crime punishable by imprisonment exceeding one year, the evidence presented for sentencing probably does satisfy the standard. There are multiple convictions for which Mr. Door actually served more than a year in prison. It is difficult to argue he did not know

the offenses were punishable by at least the amount of time he actually served.[4]

But evidence Mr. Door knew the felony harassment conviction was a crime of violence is not overwhelming and uncontroverted. The records presented by the government include an information with the prosecution's allegations and the judgment setting forth the name of the crime, "felony harassment," and the Washington criminal code sections that define it. *See* SER 18-27; CR 297-2. The presentence report simply labels the charge as "Felony Harassment" and describes some underlying facts. *See* PSR, ¶¶ 61-62.

Nowhere is there a plea colloquy showing what, if anything, Mr. Door was told about what the government would have to prove to establish the offense of "felony harassment." This leaves entirely unclear whether Mr. Door knew this conviction was for a crime that required proof of the use, attempted use, or threatened use of physical force.[5] There thus is not the "overwhelming and uncontroverted" evidence there must be for evidence not presented at trial to establish a lack of prejudice.

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[4] Such evidence should not be used to evaluate prejudice from a deficient indictment because the purpose of an indictment is to satisfy, first, the due process right to notice, and, second, the Fifth Amendment right to grand jury consideration.

[5] Given the "categorical approach" which is used to decide whether a conviction is for a "crime of violence," *see generally Descamps v. United States*, 570 U.S. 254 (2013), it is the defendant's knowledge of what must be proven to convict, not his knowledge of what he actually did, that is relevant. This does not mean he must know all the legal ins and outs of statutory interpretation, "divisibility," and "categorical approach," described in *Descamps*, but he must have a lay understanding of what the government must prove.

PAGES NOT PERTINENT TO PETITION FOR

WRIT OF CERTIORARI OMITTED

A P P E N D I X 7

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December 1, 2020

Filed Electronically

Ms. Molly Dwyer
Clerk, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94119-3939

Re: *United States v. Kenneth Randale Door,* C.A. No. 19-30213
USDC No. CR12-5126RBL, W.D. Washington

Argued and Submitted on September 4, 2020 in Seattle, Washington (before Judges Bybee, Collins, and Soto (D. Ariz.))

Dear Ms. Dwyer:

On November 10, 2020, the Court directed the parties to submit supplemental letter briefs "addressing what effect, if any, *United States v. Johnson*, [979] F.3d [632] (9th Cir. Oct. 26, 2020), *amending* 963 F.3d 847 (9th Cir. 2020) has on the standard of review applicable to Appellant's sufficiency-of-the-evidence challenge." Dkt. No. 48. The short answer to the Court's question is that, under this *Johnson* decision, Defendant-Appellant Kenneth Randale Door's sufficiency claim is subject to plain-error review. A more detailed explanation follows.

I. The Initial *Johnson* Decision (*Johnson I*).

The defendant in *Johnson* was convicted, following a bench trial, of being a Felon in Possession of a Firearm, in violation of 18 U.S.C. §922(g)(1). At the time of Johnson's conviction, this Court had held that the knowledge element of §922(g)(1) only required proof that the defendant knowingly possessed a firearm, and did not require proof that the defendant knew his "felon status." *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997). And, before the district court, Johnson did not contend that the evidence was legally insufficient to sustain his §922(g)(1) conviction under then-controlling law. *See United States v. Johnson*, 963 F.3d 847, 850 (9th Cir. 2020) (*Johnson I*).

After this Court initially affirmed Johnson's conviction (an appeal which did not contest the sufficiency of the evidence), the Supreme Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which holds that a conviction under §922(g) does require proof that the defendant knew his prohibited status, in addition to proof that he knowingly possessed a firearm. Johnson thereafter filed a petition for a writ of certiorari "in which he argued for the first time that the government failed to prove at trial that he knew of his status as a convicted felon." *Johnson I*, 963 F.3d at 849. The Supreme Court

granted that petition and remanded for further consideration in light of *Rehaif*. 140 S. Ct. 440 (2019).

On remand, the Court addressed Johnson's sufficiency claim, holding at the outset that "because Johnson did not raise his sufficiency-of-the-evidence challenge in the district court, we review that challenge for plain error." *Johnson I*, 963 F.3d at 850. The Court further held that in applying the plain-error standard, the Court was not limited to the trial evidence in deciding whether "the district court's error seriously affects the fairness, integrity, or public reputation of judicial proceedings," and thus the Court could consider the entire record to determine whether there was evidence the defendant knew his prohibited status. *See* id at 851-53. Because the record contained "overwhelming and uncontroverted" evidence proving "that Johnson knew of his status as a convicted felon," the Court held that even though a plain *Rehaif* error occurred, it did not result in a manifest injustice that warranted correction on plain-error review. *Id.* at 853-54.

II. The Amended *Johnson* Decision (*Johnson II*).

Johnson sought rehearing, and an amicus pointed out that because Johnson was convicted at a bench trial, under this Court's precedent he was not required to contest the sufficiency of the evidence in the district court to

preserve that question, and thus his sufficiency claim should be reviewed de novo. *See United States v. Johnson*, 979 F.3d 632, 635-36 (9th Cir. 2020) (*Johnson II*). After additional briefing, the Court adhered to its earlier decision that the plain-error standard applied to this claim, but offered a different rationale for this conclusion.

The Court reasoned that although Johnson framed his argument as a sufficiency challenge, "that is not in fact the correct way to conceive of it." *Id.* at 936. The Court observed that a sufficiency challenge is measured against the elements the government was required to prove at the time of trial, and there was no question that the evidence of Johnson's guilt was sufficient under this Court's pre-*Rehaif* precedent. *See id.* The Court thus held that "Johnson's argument is best understood not as a challenge to the sufficiency of the evidence, but rather as a claim that the district court applied the wrong legal standard in assessing his guilt—specifically, by omitting the knowledge-of-status element now required under *Rehaif*." *Id.*

Because a district court's legal error regarding the elements of an offense during a bench trial "is reviewed in the same way we review an erroneous jury instruction regarding the elements of the offense," and because "[a] jury instruction that omits an element of the offense is reviewed for plain error if

the defendant failed to object in the district court," the Court held that Johnson's challenge was reviewable for plain error. *Id.* The Court also stressed that this "remains true even if 'a solid wall of circuit authority' would have rendered any objection futile at the time of trial." *Id.* (citation omitted). The Court then reaffirmed its prior conclusion that, because the record as a whole showed that Johnson knew his prohibited status, relief on plain-error review was unwarranted. *See id.* at 637-39.

III. *Johnson II* Compels The Conclusion That Door's Sufficiency Claim Is Properly Characterized As An Unpreserved Allegation Of Trial Error That Is Reviewable For Plain Error.

The pertinent facts of *Johnson* and this case are indistinguishable. As in *Johnson*, at the time Door was convicted the government was not required to prove he knew his prohibited status to obtain a conviction for Felon in Possession of a Firearm under 18 U.S.C. §922(g)(1), or a conviction under 18 U.S.C. §931(a) for Possessing Body Armor as a Felon Convicted of a Crime of Violence. As was also true in *Johnson*, Door has never disputed that the evidence was sufficient to prove his guilt under the law that obtained at the

time of his trial, at least as pertains to these crimes's knowledge element.[1] Thus, as in *Johnson*, even if Door were to prevail on his *Rehaif* claims, a retrial for these crimes would be permitted. *See United States v. Kim*, 65 F.3d 123, 126-27 (9th Cir. 1995). That being so, it is not really accurate for Door to characterize his claim as one challenging the sufficiency of the evidence.

As noted, a sufficiency claim is measured against the elements the government was required to prove at the time of trial. *See id.; United States v. Weems*, 49 F.3d 528, 530-31 (9th Cir. 1995). And, as in *Johnson,* Door is not claiming that the evidence is insufficient under this Court's pre-*Rehaif* precedent. Door's argument is therefore "best understood not as a challenge to the sufficiency of the evidence, but rather as a claim that the district court applied the wrong legal standard" in ruling on his Rule 29 motion. *Johnson II*, 979 F.3d at 636. Because Door is not really challenging the sufficiency of the evidence, precedent regarding the type of objection necessary to preserve a true

[1] On a prior appeal, Door did raise a legal challenge to his conviction for unlawful possession of body armor, claiming he did not have a predicate conviction that constitutes a "crime of violence" necessary to sustain this conviction. *See United States v. Door*, 756 F. App'x 757, 758-59 (9th Cir. 2019). Door has not otherwise previously challenged the evidence proving his guilt of this crime.

sufficiency claim is inapposite.[2] *See id.* Rather, Door's claim "is properly understood as a claim of trial error," *id.* at 637, and absent a specific objection any such claim is reviewed for plain error. *See id.* at 636; *see also Puckett v. United States*, 556 U.S. 129, 135 (2009) (an "unpreserved claim of trial error" may be reviewed for "'plain error'") (quoting Fed. R. Crim. P. 52(b)). And because the record contains overwhelming evidence that Door "knew of his status as a convicted felon"—he has several prior felony convictions for which he received sentences exceeding one year, including a felony harassment conviction that qualifies as a crime of violence (PSR_8-11)—Door "cannot show that refusing to correct the district court's error would result in a miscarriage of justice." *Johnson II*, 979 F.3d at 638-39.

The only distinction between this case and *Johnson* is that *Johnson* involved a bench trial, while Door's case involved a jury trial. But this distinction is immaterial, as the core error alleged is the same. In *Johnson*,

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[2] Door relies on precedent holding that a summary Rule 29 motion, like that he made at trial (1-ER-23, 25), suffices to preserve a sufficiency claim for appellate review. *See, e.g.*, *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004). The defendant in *Johnson* similarly relied on *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en banc), which holds that no specific objection is required to preserve a sufficiency claim at a bench trial. *Johnson II* held this precedent did not apply because the defendant's *Rehaif* claim was not properly characterized as a true sufficiency challenge. *See* 979 F.3d at 636. The same reasoning applies here.

the claim was that "the district court applied the wrong legal standard in assessing [the defendant's] guilt—specifically, by omitting the knowledge-of-status element now required under *Rehaif*." *Johnson II*, 979 F.3d at 636. Here, Door claims the district court made precisely the same error, only in the context of evaluating his Rule 29 motion rather than in rendering a verdict as the trier-of-fact. But it is hard to see why this distinction should make any difference as to the applicable standard of review.

A summary Rule 29 motion may be sufficient to preserve a claim alleging that the government failed to prove all the elements required at the time of trial (*see* note 2, *supra*), since it is fair to assume the district court was aware the government had to prove those elements. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) ("[w]e assume that district judges know the law"). But as discussed, that is not the claim Door is making. Door is claiming that the district court applied the wrong legal standard in ruling on his Rule 29 motion, because the court did not consider an element that was not required under then-controlling law. This is not an error the district court could be expected to be aware of absent a specific objection from the defendant. Accordingly, Door's "failure to object at trial to the district court's omission of the knowledge-of-status element triggers review under the plain-error

standard of Rule 52(b)." *Johnson II*, 979 F.3d at 636; *see also United States v. Benamor*, 937 F.3d 1182, 1188 (9th Cir. 2019) (reviewing *Rehaif*-based sufficiency claim for plain error where, as here, the defendant made a summary Rule 29 motion).[3]

IV. The Government Has Not Waived The Plain-Error Standard Of Review.

In its answering brief (at page 24), the government agreed that, under this Court's precedent (*see* note 2, *supra*), Door's summary Rule 29 motion sufficed to preserve his sufficiency claim for de novo review. Door may seek to argue that this concession should foreclose any argument that, under *Johnson II*, plain error is the appropriate legal standard. Any such argument should be rejected. This Court is "not bound by a party's concession as to the meaning of the law, even if that party is the government and even in the context of a criminal case." *United States v. Ogles*, 440 F.3d 1095, 1099 (9th Cir. 2006) (en banc). The Court is thus free to determine on its own the applicable standard of review in this case.

Nor can the government's earlier concession be viewed as a waiver of the plain-error standard. This Court has held that plain-error review can be waived if the government fails to argue for this standard, at least where controlling law would

[3] The record in *Benamor* confirms that the defendant made a summary Rule 29 motion. *See United States v. Benamor*, 9th Cir. No. 17-50308, Dkt. No. 18-2 at 267-68. The Court may, of course, take judicial notice of this document. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

permit such an argument. *See United States v. Kortgaard*, 425 F.3d 602, 610 (9th Cir. 2005); *see also United States v. Murguia-Rodriguez*, 815 F.3d 566, 573-74 (9th Cir. 2016); *contra United States v. Bain*, 586 F.3d 634, 639 n.4 (8th Cir. 2009) (holding that the correct standard of review cannot be waived). But that is not the circumstance that confronts the Court. It is only this Court's recent holding in *Johnson II* that clarified that Door is not really advancing a true sufficiency claim, and hence that the rules governing preservation of sufficiency claims do not apply in this context. Since *Johnson II* did not exist at the time the government filed its answering brief, it could not have waived the benefit of that decision. A "waiver occurs when a [party] 'considered the controlling law, . . . and, in spite of being aware of the applicable law,' relinquished his right." *United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019) (citation omitted). That did not happen here.

Respectfully submitted,

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/s Michael S. Morgan
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December 1, 2020

Molly C. Dwyer
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re: Supplemental Letter Brief addressing *United States v. Johnson*, ___ F.3d ___, 2020 WL 6268027 (9th Cir. 2020)

Dear Ms. Dwyer:

Defendant-Appellant Kenneth Randale Door submits this letter brief in response to the Court's order filed November 10, 2020.

I.

INTRODUCTION

Johnson does not require plain error review with consideration of evidence outside the trial record in the present case for two reasons. First, the government has waived any plain error argument. Second, the trial in *Johnson* was a bench trial and *Johnson*'s reasoning does not apply to jury trials.

If *Johnson* does require plain error review with consideration of evidence outside the trial record, there is "uncontroverted and overwhelming evidence" – which is what *Johnson* requires – that prevents a plausible argument a jury might

not have found Mr. Door knew he was a felon. But there is not such "uncontroverted and overwhelming evidence" that Mr. Door knew he had been convicted of a "crime of violence," *i.e.*, a crime having as an element the use, attempted use, or threatened use of physical force. This means the violent felon in possession of body armor conviction must be vacated even if the felon in possession of firearm conviction is not.

II.

ARGUMENT

A. THE DEFENSE RESERVES THE RIGHT TO SEEK EN BANC AND/OR SUPREME COURT REVIEW OF *JOHNSON*.

The defense believes *Johnson* is wrongly decided and reserves the right to seek en banc and/or Supreme Court review. This panel is bound by *Johnson*, however, so this letter brief assumes arguendo that *Johnson* is correctly decided.

B. *JOHNSON* DOES NOT REQUIRE PLAIN ERROR REVIEW WITH CONSIDERATION OF EVIDENCE OUTSIDE THE TRIAL RECORD IN THE PRESENT CASE.

1. The Government Has Waived Any Argument for Plain Error Review.

Initially, this Court should not apply the plain error standard because the

government has waived the argument. As explained in *United States v. Murguia-Rodriguez*, 815 F.3d 566 (9th Cir. 2016), "the government may waive the argument that an error was not objected to and was therefore forfeited. Without a forfeited error, plain error does not apply." *Id.* at 574. The court instead "review[s] the claim under the standard of review that is applied when the issue is properly preserved below." *Id.* (quoting *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 586 (1st Cir. 2015)).

Finding waiver of plain error review is especially appropriate where the government expressly argued the plain error standard for other issues. *See Murguia-Rodriguez*, 815 F.3d at 573 (noting "the government consistently stated that *clear error* applies to that issue, even though it asserted that *plain error* applies to two of the three other errors that [the defendant] raised on this appeal" (emphasis in original)). That is the situation before the court here. The government has argued the jury instruction and deficient indictment issues are reviewed for plain error, *see* Govt. Brief, at 37, but the sufficiency of evidence issue is not. For the sufficiency of evidence issue, the government has acknowledged that "the defense made a summary Rule 29 motion challenging 'all three counts' at the close of the government's case (ER_25), and the close of all the evidence (ER_23), and supported those motions with no argument." Govt. Brief, at 24. It then conceded that "this sufficed to preserve Door's newly-minted sufficiency claim. (Footnote omitted.)" Govt. Brief, at 24.

This is not a case where a plain error argument was absolutely foreclosed by existing precedent, moreover. Precedent is clear that a specific argument is not required for sufficiency of evidence claims based on law that existed at the time of

trial. But as both government counsel and defense counsel acknowledged at oral argument, there is no case on the question of whether the general rule extends to arguments based on a change in the law after trial. Though the defense believes the general rule should extend, the government could have argued differently in its brief.[1]

2. *Johnson*'s Reasoning Applies Only to Bench Trials.

Johnson is distinguishable even if the Court does not find waiver. Where the trial in *Johnson* was a bench trial, *see id.*, 2020 WL 6268027, at *2, the trial in the present case was a jury trial. This is an important distinction because the question of whether the district court applied an incorrect legal standard in a bench trial is treated as the equivalent of a jury instruction issue. *See Johnson*, 2020 WL 6268027, at *3 (citing *United States v. Argueta-Rosales*, 819 F.3d 1149, 1156 (9th Cir. 2016)). Thus, "[w]hen a district court in a bench trial has made a legal error regarding the elements of an offense, the error is reviewed using the same harmless error standard that would apply to an erroneous jury instruction." *Argueta-Rosales*, 819 F.3d at 1156. Where the defendant objected to the district court's legal error, this is the ordinary harmless error standard of whether "it is clear beyond a reasonable doubt that a rational jury would have found the

[1] Any effort the government might have made to adopt the argument when Judge Collins asked about the possibility at oral argument is insufficient because arguments raised for the first time at oral argument are waived. *See, e.g., Recycle for Change v. City of Oakland*, 856 F.3d 666, 673 (9th Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 n.4 (9th Cir. 2016).

defendant guilty absent the error," *id.* (quoting *United States v. Liu*, 731 F.3d 982, 992 (9th Cir. 2013)), but where the defendant did not object to the legal error, it is the plain error standard, *see Johnson v. United States*, 520 U.S. 461, 465-66 (1997), *cited in Johnson*, 2020 WL 6268027, at *3.

But it is "in a bench trial" that "a district court's legal error regarding the elements of the offense is reviewed in the same way [as] an erroneous jury instruction regarding the elements of the offense." *Johnson*, 2020 WL 6268027, at *3. In a jury trial, the issues of sufficiency of evidence and jury instructions are separate issues. Applying the plain error standard to the jury instruction issue is appropriate because it is well established that objections to jury instructions must be made at the time the jury is instructed. *See* Fed. R. Crim. Pro. 30(d). *See also* Appellant's Opening Brief, at 19 (acknowledging plain error review of jury instruction claim). Applying the plain error standard to the sufficiency of evidence issue is not appropriate because there is a different well established rule – that such a motion "do[es] not need to state the grounds upon which [it is] based," *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004), *quoted in* Govt. Brief, at 24.[2] Changing the rule after the fact would be requiring the defendant to make a specific objection when he can no longer do so. *Cf.* Lon Fuller, *The Morality of Law* 59 (1964) (noting "the absurdity of commanding a man today to do something yesterday"), *quoted in United States v. Portillo*, 633 F.2d 1313, 1321 (9th Cir. 1980)). And there is good reason for a defendant not to make specific arguments, namely, that a general motion preserves all arguments,

[2] Case law had not expressly extended this rule to a claim based on a change in the law after trial, but there was no case law suggesting the rule did not extend.

while offering specific arguments waives other arguments. *Compare Navarro Viayra*, 365 F.3d at 793 (general motion not stating grounds preserves all grounds), *with United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) (motion on specific ground waives all other grounds), *quoted in* Govt. Brief, at 24. For all the Court and appellate counsel know, trial counsel considered the argument made in *Rehaif* that knowledge of status was required and refrained from specifically making it in reliance on the foregoing general rule.

C. EVEN IF *JOHNSON* DOES REQUIRE PLAIN ERROR REVIEW AND ALLOW CONSIDERATION OF EVIDENCE OUTSIDE THE TRIAL RECORD, *JOHNSON* SETS A HIGH BAR THAT IS SATISFIED ONLY FOR THE FELON IN POSSESSION OF A FIREARM CONVICTION.

1. *Johnson* Requires the Evidence Outside the Trial Record to Be "Uncontroverted and Overwhelming Evidence" that Prevents Any Plausible Argument the Jury Potentially Could Have Not Found the Element.

Johnson requires the evidence outside the trial record be not merely suggestive, or even persuasive, but "overwhelming and uncontroverted." *Id.*, 2020 WL 6268027, at *4 (quoting *United States v. Cotton*, 535 U.S. 625, 633 (2002)). *See also Johnson*, 2020 WL 6268027, at *5 (explaining no reason to ignore evidence if record discloses it "and the evidence is uncontroverted," and noting "the overwhelming and uncontroverted nature" of evidence in case at bar). Put another way, there must be "no plausible argument," *Johnson*, 2020 WL 6268027,

at *4 (quoting *Johnson v. United States*, 520 U.S. at 470), that a jury could have not found the element. *See also Johnson*, 2020 WL 6268027, at *5 (noting defendant could not "plausibly argue" jury would find he was unaware of status). The question is not whether the jury probably would have found the element, but whether "the outcome would *potentially* be any different." *Johnson*, 2020 WL 6268027, at *5 (emphasis added).

The bar must be set this high because evidence outside the trial record has not been tested in the adversarial process. *Cf. Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (recognizing cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth" (quoting 5 J. Wigmore, *Evidence* § 1367 (J. Chadbourn rev. 1974)). While a defendant can make sentencing objections, his incentives to do so are at the very least less strong and often entirely absent. *Cf. Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) ("At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to' – or even be precluded from doing so by the court." (Quoting *Descamps v. United States*, 570 U.S. 254, 270 (2013)).

In sum, if such untested evidence is to be considered, it must clear a very high bar.

* * *

2. There Was Uncontroverted and Overwhelming Evidence in the Sentencing Record Preventing a Plausible Argument that a Jury Potentially Could Have Not Found the Knowledge of Felon Status Required for the Felon in Possession of a Firearm Conviction.

The sentencing record does satisfy the high *Johnson* bar for the knowledge required for the felon in possession of a firearm conviction, *i.e.* knowledge on Mr. Door's part that he had been convicted of a crime punishable by imprisonment for a term exceeding one year. This is because Mr. Door has multiple prior convictions for which he actually served imprisonment exceeding one year. It is difficult – indeed, virtually impossible – to argue Mr. Door did not know the crimes were *punishable* by imprisonment for a term exceeding one year if the *actual* punishment exceeded that.

3. There Was Not Uncontroverted and Overwhelming Evidence in the Sentencing Record Preventing a Plausible Argument that a Jury Potentially Could Have Not Found the Knowledge of Violent Felon Status Required for the Violent Felon in Possession of Body Armor Conviction.

The sentencing record does not satisfy the high *Johnson* bar for the knowledge required for the violent felon in possession of body armor conviction. Initially, it is important to understand what it is the defendant must know. It is that he was *convicted* of a crime of violence. Under the categorical approach explained in *Mathis* and *Descamps*, that means a crime that has the use, attempted

use, or threatened use of force *as an element*. *See Mathis*, 136 S. Ct. at 2251-54; *Descamps*, 570 U.S. at 260-64. The defendant must know the elements of the offense he was convicted of – or, in lay terms, what it is the prosecution had to prove to convict him – not the particular conduct he engaged in that made him guilty. This does not mean he must know all the legal ins and outs of statutory interpretation, "divisibility," and "categorical approach" discussed in *Mathis* and *Descamps*, but he must have a lay understanding of what the prosecution must prove.

There was nothing approaching "overwhelming and uncontroverted evidence" of such knowledge here. First, nothing in the label placed on the crime Mr. Door was convicted of – "felony harassment" – compels the conclusion there must be a use, attempted use, or threatened use of physical force; this is not a crime like murder or rape which an ordinary person would assume is a "crime of violence." Second, nothing in the presentence report establishes the required knowledge; while the report does describe actual conduct including threats of force, it nowhere suggests this is an element of the offense rather than just the particular conduct Mr. Door engaged in. Third, the court records the government filed with its sentencing memorandum do not establish knowledge that use, attempted use, or threatened use of physical force is an element. There is an information and "Declaration for Determination of Probable Cause," that, like the presentence report, describe threats to kill as the felony harassment in Mr. Door's

particular case. *See* FER-4–7.[3] But the records nowhere say the prosecution is always required to prove such threats to convict a person of felony harassment, *i.e.*, that this is an element, rather than what the prosecution chose to allege and try to prove in Mr. Door's particular case. The more detailed "Declaration for Determination of Probable Cause" is especially problematic because it was used to support not just the felony harassment charge to which Mr. Door pled guilty, but additional charges of assault and burglary to which he did not plead guilty. *See* FER-6.

The Court cannot assume there was additional advice given in a plea colloquy, moreover. First, that would require making assumptions that the state court taking Mr. Door's plea gave advice on the elements, that it did so in language that a layperson would understand, and that Mr. Door in particular understood – and those are assumptions that should not be made without cross-examination of witnesses, presentation of a defense, and other adversarial testing. Second, Washington court rules, unlike the Federal Rules of Criminal Procedure, do not require an oral plea colloquy. *State v. Codiga*, 175 P.3d 1082, 1087 (Wash. 2008). *See also State v. Zhao*, 137 P.3d 835, 841-42 (Wash. 2006) (explaining that Washington rule governing guilty pleas differs from federal rule and does not require oral colloquy about nature of charges). Under the Washington rules, simply providing the defendant with a copy of the information can be sufficient. *See In re Ness*, 855 P.2d 1191, 1194 (Wash. App. 1993) (collecting cases). This

[3] The complete records filed by the government in the district court, which were only partially included in the government's supplemental excerpts of record, are being filed concurrently with this brief as further excerpts of record.

means the information, the "Declaration for Determination of Probable Cause," and other records may be – or even likely are – all that exist.[4]

Without something else, there is a more than "plausible" argument, especially under the demanding beyond a reasonable doubt standard, that Mr. Door might have believed the threatened use of force was just what the prosecution relied on in his case rather than something it is required to prove in any felony harassment case. His attorney could have argued – and he might have testified – that he thought the threats were just one form of conduct constituting felony harassment and he either had no idea or had a mistaken idea about what other conduct is also sufficient.[5] There is at least a "potential" for a different outcome, and that is all *Johnson* requires.

Sincerely,

s/ Carlton F. Gunn

Carlton F. Gunn
Attorney at Law

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[4] The state court taking Mr. Door's plea would have had to believe the documents were sufficient to make Mr. Door understand "the nature of the charge," Wash. Crim. R. 4.2(d), but that does not mean a jury would have been convinced beyond a reasonable doubt the judge was correct in that belief.

[5] This is also not a case where disclosure of the nature of the "crime of violence" would be prejudicial. Felony harassment is at the more palatable end of the "crime of violence" spectrum, and a defense attorney might *want* a jury to know the "crime of violence" was felony harassment rather than something more serious like murder.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-30213

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A P P E N D I X 9

CA No. 19-30213

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE RONALD B. LEIGHTON
United States District Judge

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Defendant-appellant, Kenneth Randale Door, hereby petitions for rehearing with a suggestion for rehearing en banc. The underlying claim is that there was insufficient evidence of the knowledge of status required by the unlawful possession of firearms by prohibited persons statute under *Rehaif v. United States*, 139 S. Ct. 2191 (2019). A panel holding that plain error review applies to such a claim even when the defendant made a general motion for judgment of acquittal in the district court – which extends *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020), *cert. denied*, No. 20-7194, 2021 U.S. LEXIS 3215 (U.S. June 21, 2021) – creates a split in the circuits. The issue is an important one because it will affect the vast majority of *Rehaif* sufficiency of evidence claims, as well as sufficiency of

evidence claims based on other post-trial changes in the law. Creation of the circuit split and the importance of the issue make en banc review critical.

Respectfully submitted,

DATED: July 15, 2021

By s/ Carlton F. Gunn
CARLTON F. GUNN
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I.

INTRODUCTION

This petition seeks reconsideration of a holding in *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020), *cert. denied*, No. 20-7194, 2021 U.S. LEXIS 3215 (U.S. June 21, 2021), and an extension of the *Johnson* holding by the panel in this case. As extended, the holding is that a general motion for judgment of acquittal in the district court does not preserve a sufficiency of evidence claim based on a post-trial change in the law – here, the holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that the unlawful possession of firearms by prohibited persons statute requires knowledge of status as well as knowledge of the firearm.

This holding and the *Johnson* case should be reviewed en banc for two reasons.[1] First, they create a circuit split on an important issue, which is an expressly recognized basis for en banc review. *See* Fed. R. App. Pro. 35(b)(1)(B); Circuit Rule 35-1. Second, the other circuits' position is the correct one and the one that is consistent with well established law.

[1] A petition for rehearing en banc in *Johnson* itself was barred by an order issued with the opinion, which amended an earlier opinion in response to a petition for rehearing. *See Johnson*, 979 F.3d at 634. And the petition for writ of certiorari the defendant filed did not include the question in its questions presented. *See* Petition for Writ of Certiorari, *Johnson v. United States*, 2021 U.S. LEXIS 3215 (No. 20-7194).

II.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. CONVICTION AND PRIOR APPEALS.

In the fall of 2011, pistols, ballistic vests, and an explosive device known as a "seal bomb," which fishermen use to scare away marine mammals, were discovered in a search of Mr. Door's home. *See* Appellant's Opening Brief, at 4.[2] Mr. Door was charged with possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2); possession of body armor after having been convicted of a crime of violence, in violation of 18 U.S.C. § 931(a) and 18 U.S.C. § 924(a)(7); and possession of an explosive after having been convicted of a felony, in violation of 18 U.S.C. § 842(i)(1). *See* ER 68-71. He proceeded to trial and was convicted. *See* Appellant's Opening Brief, at 5. The district court found him to be an armed career criminal under 18 U.S.C. § 924(e) – based on convictions for burglary, assault, and attempting to elude a police officer – and sentenced him to 25 years in prison.[3] *See* Appellant's Opening Brief, at 6-7.

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[2] The citations in this petition to Appellant's Opening Brief, the government's brief, and Appellant's Reply Brief are to the briefs in this most recent appeal, which is a third appeal.

[3] 18 U.S.C. § 924(e), also known as the Armed Career Criminal Act, increases the maximum sentence for felon in possession of a firearm from 10 years to life and sets a mandatory minimum sentence of 15 years when the defendant has three prior convictions for a "violent felony" or "controlled substance offense."

Mr. Door appealed both the sentence and the denial of two motions to suppress evidence. The Court affirmed the convictions, but vacated the armed career criminal finding, vacated several sentencing guideline enhancements, and remanded for resentencing. *See United States v. Door*, 656 Fed. Appx. 376 (9th Cir. 2016) (unpublished); *United States v. Door*, 647 Fed. Appx. 755, 756 (9th Cir.) (unpublished), *amended*, 668 Fed. Appx. 784 (9th Cir. 2016) (unpublished). On remand, the district court imposed a slightly shorter sentence of 23 years in prison, *see* ER 57-58, which was the longest it could impose,[4] and Mr. Door appealed again. *See United States v. Door*, 917 F.3d 1146 (9th Cir.), *cert. denied*, 140 S. Ct. 120 (2019). This sentence also was vacated, based on erroneous categorization of Mr. Door's assault convictions as "crimes of violence" under the sentencing guidelines. *See id.* at 1154-55.

B. CURRENT APPEAL.

The district court imposed the same statutory maximum sentence on remand, based on a greater upward variance, and Mr. Door again appealed. *See United States v. Door*, 996 F.3d 606 (9th Cir. 2021) (hereinafter cited as "*Door IV*" and attached as Appendix). Two of the claims raised were sentencing claims – challenging a sentencing guideline "obstruction of justice" enhancement and the reasonableness of the upward variance. *See id.* at 611; Appellant's Opening Brief,

[4] The sentence consisted of consecutive statutory maximum sentences of 10 years on the felon in possession of a firearm count, 10 years on the felon in possession of explosives count, and 3 years on the violent felon in possession of body armor count. *See* ER 57.

at 25-37. But there was also a new challenge to the convictions for possession of a firearm after having been convicted of a felony and possession of body armor after having been convicted of a crime of violence – based on the Supreme Court's intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See Door IV*, 996 F.3d at 613; Appellant's Opening Brief, at 19-24. *Rehaif* held the word "knowingly" in 18 U.S.C. § 924(a)(2), which sets the sentence for unlawful possession of a firearm by classes of persons listed in 18 U.S.C. § 922(g), modifies both the possession element and the status element in § 922(g), so a defendant charged with being a felon in possession of a firearm must both know he possessed a firearm and know he had been convicted of a felony. *See Door IV*, 996 F.3d at 614 (discussing *Rehaif*).[5] And Mr. Door argued *Rehaif*'s reasoning extends to use of the word "knowingly" in § 924(a)(7), which sets the penalty for possession of body armor by persons convicted of a crime of violence in violation of 18 U.S.C. § 931(a). *See* Appellant's Opening Brief, at 21-22.

The *Rehaif* challenge had three prongs – a challenge to the sufficiency of the evidence, a challenge to the indictment, and a challenge to the jury instructions. *See* Appellant's Opening Brief, at 20-24. For the second and third of these – the challenges to the indictment and jury instructions – Mr. Door conceded review was limited to review for plain error, because there was no objection to the

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[5] The defendant in *Rehaif* was an alien unlawfully in the United States, which is included by § 922(g)(5)(A), but the Supreme Court extended its reasoning by example to the more common class of felons – or, in the language of the statute, persons "convicted of . . . a crime punishable by imprisonment exceeding one year," 18 U.S.C. § 922(g)(1). *See Rehaif*, 139 S. Ct. at 2198; *United States v. Benamor*, 937 F.3d 1182, 1188 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020).

indictment or jury instructions. *See* Appellant's Opening Brief, at 19. But he argued review was de novo for the sufficiency of evidence challenge, because there was a general motion for judgment of acquittal at trial. *See* Appellant's Opening Brief, at 19 (citing ER 23, 25).

The government agreed the sufficiency of evidence challenge was reviewed de novo, *see* Govt. Brief, at 24, but argued the evidence was sufficient. For both convictions, it argued the only evidence presented – a stipulation that Mr. Door in fact *had* a prior conviction for a felony and a prior conviction for a crime of violence – was sufficient to show he *knew* he had such convictions. *See* Govt. Brief, at 33-34. For the body armor conviction, it added a preliminary argument that the only knowledge required was knowledge the conviction was for a felony, not knowledge that it was for a crime of violence. *See* Govt. Brief, at 25-29. Mr. Door argued in response that the stipulation to status was not sufficient to establish *knowledge* of the status and the knowledge required for the body armor conviction was full knowledge of the crime of violence status. *See* Appellant's Reply Brief, at 5-7.

After the case was argued, this Court issued *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020), *cert. denied*, No. 20-7194, 2021 U.S. LEXIS 3215 (U.S. June 21, 2021). *Johnson* considered a *Rehaif* challenge to the sufficiency of evidence in a bench trial, in which sufficiency challenges are preserved even without a motion for judgment of acquittal. *See Johnson*, 979 F.3d at 635-36. The Court held review was limited to review for plain error despite this, on the theory that the sufficiency of evidence challenge based on the intervening change in the law is "best understood not as a challenge to the sufficiency of the evidence, but

rather as a claim that the district court applied the wrong legal standard in assessing [the defendant's] guilt – specifically, by omitting the knowledge-of-status element required under *Rehaif*." *Johnson*, 979 F.3d at 636.

The panel in Mr. Door's case ordered supplemental briefing on the effect of *Johnson*. The government withdrew its concession that the sufficiency of evidence claim should be reviewed de novo and argued *Johnson* limited review to plain error review. *See* Government's Supplemental Letter Brief. Mr. Door argued the government had waived this argument and *Johnson* was limited to bench trials in any event. *See* Defense Supplemental Letter Brief. He also reserved the right to challenge *Johnson* en banc. *See* Defense Supplemental Letter Brief, at 2.

The panel rejected Mr. Door's arguments, held it was bound by *Johnson*, and reviewed only for plain error. *See Door IV*, 996 F.3d at 617-18.[6] This had two effects that led the panel to affirm the convictions. First, it meant that Mr. Door bore the burden rather than the government – specifically, he "bears the burden of offering 'a plausible basis for concluding that an error-free retrial might end more favorably.'" *Door IV*, 996 F.3d at 618 (quoting *Johnson*, 979 F.3d at 637). *See also Door IV*, 996 F.3d at 620 ("But it is Door's burden . . . ."). Second, it meant the Court could look outside the trial record of just the stipulation – to the details of Mr. Door's prior record. *See id.* at 618 ("In reviewing for plain error, we may examine the entire record on appeal"); *id.* at 620 (reiterating that "our review

[6] The panel did agree *Rehaif* extended to the possession of body armor provisions and required the defendant to know he had been convicted of a crime of violence. *See Door IV*, 996 F.3d at 615-16.

is not limited to the record adduced at trial" and discussing details of prior convictions). With this broader review and the shifted burden, the Court found the fourth prong of the plain error standard was not satisfied. *See id.* at 620.

III.

ARGUMENT

A. THE COURT SHOULD GRANT EN BANC REVIEW BECAUSE THE PANEL OPINION CREATES A CIRCUIT SPLIT ON AN IMPORTANT ISSUE.

A basis for rehearing en banc expressly set forth in the rules of appellate procedure is the creation of a conflict on a question that is important and/or on which there is a need for national uniformity. See Fed. R. App. Pro. 35(b)1)(B); Circuit Rule 35-1. The holding here qualifies on both counts.

First, it squarely conflicts with holdings in other circuits. Two circuits have held – and another has assumed – that the ordinary de novo standard of review applies to *Rehaif* sufficiency of evidence challenges where the defendant made a general motion for judgment of acquittal in the district court. The Seventh Circuit so held in *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020), *cert. denied*, No. 20-6129, 2021 U.S. LEXIS 3291 (U.S. June 21, 2021), and explained its holding as follows:

> [The defendant] moved for judgment of acquittal under Rule 29 in the district court. His motion was general. He asserted only that "the Government has not presented sufficient evidence to prove their case beyond a reasonable doubt." Without asking [the defendant] to elaborate, the district court denied the motion, which was clearly the correct decision under

> then-governing circuit precedent.
>
> This short exchange preserved all possible challenges to the sufficiency of the evidence, including the post-*Rehaif* argument that the government failed to prove that [the defendant] knew his felony status. A motion under Rule 29 that makes specific arguments waives issues not presented, but a general motion preserves every objection.

Id. at 958-59. The Fifth Circuit took the same position, without even seeing a need to explain, in *United States v. Staggers*, 961 F.3d 745 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 388 (2020). *See id.* at 754 ("We review the sufficiency of the evidence de novo, however, because [the defendant] made general objections to the sufficiency of the evidence."). The Eighth Circuit assumed the same rule for the sake of analysis in *United States v. Owens*, 966 F.3d 700 (8th Cir. 2020), *cert. denied*, No. 20-6098, 2021 U.S. LEXIS 3207 (U.S. June 21, 2021). *See id.* at 709 ("[W]e will assume for the sake of analysis that the general motions were sufficient to preserve a sufficiency challenge on the knowledge element.").

Second, the issue is important, because of the number of cases it will affect. The panel's extension of *Johnson*'s holding will affect the vast majority of *Rehaif* claims, because it is standard practice to make a general motion for judgment of acquittal at the end of a jury trial. The holding will also affect every other case in which there is a post-trial interpretation that narrows the scope of a criminal statute.

There is also a need for national uniformity. Relief for a felon in possession defendant raising a *Rehaif* claim – or other defendants for whom there is a post-trial change in the law – should not depend on the happenstance of which circuit the defendant has been prosecuted in. The same standard should apply to all defendants.

B. THE COURT SHOULD GRANT EN BANC REVIEW BECAUSE IT IS THE POSITION OF THE OTHER CIRCUITS THAT IS CORRECT.

En banc review should also be granted because it is the position of the other circuits that is correct. It is hornbook law that "[s]pecificity is not required by Rule 29," 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). *See also United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (following cases from other circuits that motions for judgment of acquittal "do not need to state the grounds upon which they are based because 'the very nature of such motions is to question the sufficiency of the evidence to support a conviction'" (quoting *United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983)). 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).

This view is also supported by the language of Rule 29. The rule 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 corresponding civil rules – such as Federal Rule of Civil Procedure 7(b)(1), which requires

motions to "state with particularity the grounds for seeking the order," and Federal Rule of Civil Procedure 50(a)(2), which 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* 2A Wright and Miller, *supra* p. 9, § 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. *Russello v. United States*, 464 U.S. 16, 23 (1983). And the advisory committee's note directly expresses 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.

It is also unfair to defendants and their counsel to announce a different rule after the fact. It is "the absurdity of commanding a man today to do something yesterday." Lon Fuller, *The Morality of Law* 59 (1964), *quoted in United States v. Portillo*, 633 F.2d 1313, 1321 (9th Cir. 1980). And failure to make a specific objection at the time of trial was not a careless mistake, but wise strategy. There is good reason for a defendant not to make specific arguments in a motion for judgment of acquittal, because making specific arguments waives other arguments. *Compare Navarro Viayra*, 365 F.3d at 793 (general motion preserves all grounds), *with United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) (stating specific ground waives all other grounds). For all the Court and appellate counsel know, trial counsel considered the argument made in *Rehaif* and refrained from specifically making it, in reliance on the foregoing general rule, only because he did not want to forfeit other arguments he might not have thought of.

The case law cited in *Johnson* does not compel its holding, moreover. First, *United States v. Weems*, 49 F.3d 528 (9th Cir. 1995), and *United States v. Kim*, 65 F.3d 123 (9th Cir. 1995), which *Johnson* cited in support of its conclusion that the *Rehaif* sufficiency challenge is "best understood not as a challenge to the sufficiency of the evidence, but rather as a claim that the district court applied the wrong legal standard," *id.*, 979 F.3d at 636 (citing *Weems* and *Kim*), do not compel that conclusion. Those cases held only that the Double Jeopardy Clause does not preclude a retrial where the law at the time of the first trial gave the government no reason to introduce evidence required by subsequent case law. *See Weems*, 49 F.3d at 530-31. *See also Kim*, 65 F.3d at 126-27 (simply following *Weems*). This appropriately prevents unfairness to the government in the form of not requiring evidence that was not required at the time of trial. But it does not require unfairness to the defense in the form of overriding the well established effect of a general motion for judgment of acquittal. A general motion for judgment of acquittal should not have a greater effect than it would in the absence of the new case law, but it should not have a lesser effect either.

Johnson also overstated the holdings of cases such as *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016), when it stated a district court's legal error regarding the elements of the offense in a bench trial "is reviewed in the same way we review an erroneous jury instruction regarding the elements of the offense." *Johnson*, 979 F.3d at 636 (citing *Argueta-Rosales*, 819 F.3d at 1156). The jury cases are not directly applicable, but are merely "analogous" and furnish "guideposts." *Wilson v. United States*, 250 F.2d 312, 324 (9th Cir. 1957), *cited in Argueta-Rosales*, 819 F.3d at 1156. The only jury instruction standard the

cases have actually carried over to bench trials is the demanding standard requiring it to be "clear beyond a reasonable doubt" the error did not affect the verdict. *Argueta-Rosales*, 819 F.3d at 1156 (quoting *United States v. Liu*, 731 F.3d 982, 992 (9th Cir. 2013)). *See also United States v. Wallen*, 874 F.3d 620, 633 (9th Cir. 2017).

The requirement of legal objections has not been carried over, and it should not be in light of its source. That source is Rule 30 of the Federal Rules of Criminal Procedure, which governs only jury instructions, and requires "request[s] in writing that the court instruct the jury on the law," Fed. R. Crim. Pro. 30(a); requires "specific objection and the grounds for the objection" to erroneous instructions, Fed. R. Crim. Pro. 30(d); and provides that "[f]ailure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b) [for plain error]," *id.* This contrasts with the rule governing nonjury trials – Rule 23(c) – which requires only a request for "findings of *fact*." Fed. R. Crim. Pro. 23(c) (emphasis added). *See Cesario v. United States*, 200 F.2d 232 (1st Cir. 1952) (noting with apparent approval trial judge's refusal to rule on "requests for rulings" because "superfluous to give such instructions to himself," and describing Rule 30 as "a rule which obviously has reference only to cases tried to a jury"), *cited with approval in Wilson*, 250 F.2d at 325; 2 Wright and Miller, *supra* p. 9, § 374 ("A request for special findings of fact is the appropriate way to preserve for appeal a contention that the court applied an erroneous standard of law.").

C. THE COURT SHOULD GRANT EN BANC REVIEW BECAUSE *JOHNSON*'S HOLDING SHOULD NOT BE EXTENDED TO JURY TRIALS EVEN IF IT IS APPROPRIATE FOR BENCH TRIALS.

A final reason to grant en banc review is that *Johnson*'s holding should not be extended to jury trials even if it is appropriate for bench trials. The defense made this argument in its supplemental brief, and the panel too readily dismissed it. The panel simply stated, "We fail to see how the difference between a jury trial and a bench trial would require us to view these identical legal challenges differently." *Door IV*, 996 F.3d at 618.

There is a difference, however. *Johnson* treats the question of whether the district court applied an incorrect legal standard in a bench trial as the equivalent of a jury instruction issue, as just discussed. Where the defendant objected to the district court's legal error, the "clear beyond a reasonable doubt" standard applies, *supra* p. 12, but where the defendant did not object to the legal error, the plain error standard applies, at least according to *Johnson*, *see id.*, 979 F.3d at 636.

But it is at most "in a bench trial," *Johnson*, 979 F.3d at 636, that a district court's legal error regarding the elements of the offense is reviewed in the same way as an erroneous jury instruction. In a jury trial, the issues of sufficiency of evidence and jury instructions are separate issues. Applying the plain error standard to the jury instruction issue is appropriate because it is well established that objections to jury instructions must be made at the time the jury is instructed. *See* Fed. R. Crim. Pro. 30(d). Applying the plain error standard to the sufficiency of evidence issue is not appropriate because there is a different well established

rule – that such a motion does *not* need to state the grounds upon which it is based, *see supra* p. 9. And a request for special findings of fact is required only in nonjury trials, *see* Fed. R. Crim. Pro. 23(c). The equivalent in a jury trial – a special verdict – is not only not required, but disfavored. *See United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

III.

CONCLUSION

The Court should review en banc the holding that a general motion for judgment of acquittal does not preserve a sufficiency of evidence challenge based on a post-trial change in the law. The holding creates a circuit split; the other circuits' view is the better one and the one consistent with well established law; and the issue is important because it will affect the vast majority of sufficiency of evidence claims based on *Rehaif* – and every other post-trial decision narrowing the scope of a criminal statute.

Respectfully submitted,

DATED: July 15, 2021

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

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32 of the Federal Rules of Appellate Procedure, Circuit Rule 32-1, and Circuit Rule 40-1, that this petition is 4,188 words in length.

DATED: July 15, 2021

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

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 21st day of September, 2021, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

September 21, 2021

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