No. _____

IN THE
Supreme Court of the United States

LUKE JOSEPH BURNING BREAST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 20-1450

United States of America

Plaintiff - Appellee

v.

Luke Joseph Burning Breast

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Central

Submitted: December 18, 2020
Filed: August 11, 2021

Before GRUENDER, ERICKSON, and KOBES, Circuit Judges.

ERICKSON, Circuit Judge.

Luke Joseph Burning Breast appeals his conviction for being a felon in possession of a firearm, arguing the government failed to show he (1) possessed a "firearm" that traveled in interstate commerce, and (2) knew of his status as a

prohibited person. Burning Breast also argues the district court[1] failed to properly instruct the jury on both issues. We affirm.

I. BACKGROUND

In 2007, Burning Breast pled guilty in federal court to being a drug user in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). He received a three-year probationary sentence. Twelve years later, on July 28, 2018, Burning Breast purchased an AR-15 style rifle from his mother, Georgia Hackett ("Hackett"). Hackett, on April 9, 2019, reported a domestic incident between Burning Breast and his girlfriend that occurred at Hackett's residence in Rosebud, South Dakota. As Burning Breast was being arrested, the officers asked him where to find his car keys so Hackett could move his vehicle. Burning Breast stated the keys were outside next to his rifle. Aware of Burning Breast's prior criminal record, when one of the officers questioned Burning Breast, Burning Breast admitted he was a felon but believed his conviction had been expunged since it was more than ten years old. The officer told Burning Breast that under federal law he continued to be a felon unless he received a pardon. Burning Breast responded, "Well, that's what must have happened."

The officers seized the rifle, a loaded magazine found near the rifle, and another magazine located inside the residence. Burning Breast's rifle was distinctive, as portions had been spray-painted blue. After Burning Breast was released on the domestic assault charge, he filed a motion in tribal court to recover the rifle. He produced the bill of sale from July 2018, and the tribal court ordered the rifle be returned to Burning Breast.

[1]The Honorable Roberto A. Lange, United States District Judge for the District of South Dakota.

On August 14, 2019, Burning Breast was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The indictment alleged that Burning Breast knowingly possessed a Smith & Wesson, model M&P 15 semi-automatic rifle, which had been shipped and transported in interstate and foreign commerce. Before trial, the government filed a motion *in limine* to exclude evidence regarding Burning Breast's "mistake of law" as to his status as a prohibited person and Burning Breast's possible belief that the prior conviction had been expunged. After a hearing, the district court granted the motion and, relying on Rehaif v. United States, 588 U.S. ___, 139 S. Ct. 2191 (2019), determined the government did not have to prove Burning Breast knew he was prohibited from possessing a firearm, but only that he knew he belonged to the relevant category of persons barred from possessing a firearm.

At trial, the court received into evidence a certified copy of the judgment from Burning Breast's prior felony conviction along with the plea agreement and transcript from the plea hearing. The transcript and plea agreement each outlined the maximum penalty for the offense as exceeding one year. Special Agent Brent Fair of the Bureau of Alcohol, Tobacco, Firearms and Explosives testified that the rifle found in Burning Breast's possession was an AR-15 style rifle with an upper and lower receiver, and, consistent with federal regulations, only the lower receiver was marked with a serial number. Special Agent Fair further testified that he traced the lower receiver, which was manufactured in Illinois and thereafter shipped to Massachusetts, "where it was assembled as a finished rifle by Smith & Wesson." From Massachusetts the firearm was shipped to Louisiana before being shipped to a gun dealer in Nebraska. The firearm was sold in 2014 to an individual in South Dakota. Several years later, the firearm was recovered in Burning Breast's possession. Special Agent Fair opined the firearm in Burning Breast's possession was a complete firearm manufactured by Smith & Wesson and the parts that had been subsequently painted, or swapped out, or added (the evidence before the jury was that the only known changes to the rifle

were a scope and a light[2]) did not change the fact that it was a firearm that had been shipped and transported in interstate commerce.

Burning Breast moved for judgment of acquittal, asserting the government failed to meet its burden because it did not prove the entire firearm traveled in interstate commerce, only the lower receiver. The district court denied the motion, finding the jury could infer that the fully assembled firearm crossed state lines. Burning Breast requested a theory of defense instruction, which highlighted the definition of a receiver. While the district court did not instruct the jury exactly as Burning Breast requested, it added a definition of receiver to the instructions. The district court declined to give Burning Breast's other requested instruction, which stated that Burning Breast had to know his prior conviction was not expunged. After deliberating for 46 minutes, the jury found Burning Breast guilty. The district court sentenced him to a 16-month term of imprisonment. Burning Breast timely appealed.

II. DISCUSSION

We review *de novo* the denial of a motion for judgment of acquittal "viewing the evidence in a light most favorable to the verdict and accepting all reasonable

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[2]Hackett testified about the changes to the rifle as follows:

Q. Do you know when he painted [the firearm] approximately?
A. No. I don't. We live separately. He is a grown man.
Q. Sure. Do you - - can you see some of the components on here that might have changed during the time that you saw him with his rifle?
A. Well, the scope.
Q. Okay. The sight back here?
A. Yeah. And the - -
Q. The light? You saw those things added?
A. Yeah, uh-huh.

(Trial Tr. Vol. II pp. 63–64).

inferences supporting the verdict." United States v. Colton, 742 F.3d 345, 348 (8th Cir. 2014). We reverse "only if no reasonable jury could have found guilt beyond a reasonable doubt." United States v. Mabery, 686 F.3d 591, 598 (8th Cir. 2012).

In order to be convicted of being a felon in possession of a firearm, the government must prove beyond a reasonable doubt that (1) Burning Breast had been previously convicted of a crime punishable by a term of imprisonment exceeding one year; (2) Burning Breast knowingly possessed a firearm; (3) the firearm was in or affecting interstate commerce; and (4) Burning Breast "knew he belonged to the relevant category of persons barred from possessing a firearm." United States v. Coleman, 961 F.3d 1024, 1027 (8th Cir. 2020) (cleaned up); see 18 U.S.C. § 922(g). Burning Breast challenges the third and fourth elements, arguing that the evidence was insufficient to sustain a conviction under § 922(g).

With regard to the interstate nexus requirement, we have explained that "[t]he government need not produce the firearm in question to satisfy this element; proof that the firearm was manufactured outside the state of possession will suffice." United States v. Cox, 942 F.2d 1282, 1286 (8th Cir. 1991) (citation omitted). As relevant in this case, 18 U.S.C. § 921(a)(3) defines a "firearm" as "(A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [or] (B) the frame or receiver of any such weapon." The frame or receiver is defined by regulation as the "part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 27 C.F.R. § 478.11. Burning Breast argues that, because the government did not prove the upper receiver traveled in interstate commerce, the evidence was insufficient to convict him of being a felon in possession of a firearm.

The dissent, and Burning Breast, focus exclusively on whether the lower receiver is a receiver within the regulatory definition of receiver and whether the

government had to prove the upper receiver also traveled in interstate commerce. Those issues are simply red herrings under the circumstances of this case. The dissent mistakenly asserts that if the lower receiver is not a "receiver" under the regulation, it cannot be a firearm. Consistent with 18 U.S.C. § 921(a)(3), the jury was instructed, in relevant part, that a firearm includes:

> 1. Any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; or
>
> 2. The frame or receiver of any such weapon; . . .

Special Agent Fair explained to the jury that "[t]here's more than one definition under federal law for a rifle or a firearm." A frame or receiver is simply one way to meet the definition. Another way is if the weapon will, is designed to, or may readily be converted to expel a projectile by the action of an explosive. Notwithstanding the lack of evidence establishing the upper receiver had, in fact, been swapped out, there was no evidence that at any point the firearm was anything but a weapon that could, or was designed to, or may readily be converted to expel a projectile by the action of an explosive. Here, it is immaterial whether there was proof that the upper receiver traveled in interstate commerce when the evidence established a completed rifle capable of being shot traveled in interstate commerce prior to Burning Breast's possession of it.

As the government argued during closing arguments, the uncontroverted evidence established this AR-15 style rifle was a firearm under the first part of the statutory definition because it was capable of being shot and no evidence was presented to dispute this testimony. The government could meet its burden in a manner broader than the limitation imposed by the dissent, which requires proof that the upper and lower halves of the receiver traveled in interstate commerce.

The trial transcript refutes the dissent's characterization of the government's case as relying solely on the receiver traveling in interstate commerce. The government specifically questioned Special Agent Fair as to whether the entire firearm traveled in interstate commerce:

> Q: If this firearm was taken to a dealer in Nebraska and then later recovered in South Dakota, does it meet the interstate nexus?
>
> A: Yes it does. Traveled interstate commerce.

(Trial Tr. Vol. II p. 86). During cross-examination, Burning Breast's counsel spent significant time questioning Special Agent Fair about Burning Breast's gun, and whether certain parts may have been swapped out or personalized. He also questioned Special Agent Fair about the definition of "receiver" in the ATF regulations, and whether Special Agent Fair was able to trace the upper receiver in this case. Whether the upper receiver could be traced with certainty to establish it traveled in interstate commerce was the defense theory of the case, not a theory propounded by the government or exclusively relied on to prove the charge. Special Agent Fair maintained throughout his testimony that the finished firearm traveled in interstate commerce:

> A: I will tell you that I do not know who made the upper. . . . But the lower is manufactured by LW Schneider in the State of Illinois; shipped to Massachusetts as a complete firearm manufactured in Massachusetts; shipped to Lipsey's in Baton Rouge, Louisiana; shipped to Nebraska; and found here in South Dakota.
>
> Q: That's not this firearm, is it?
>
> A: This is a firearm. And this firearm transported – was transported in interstate commerce.

(Trial Tr. Vol. II p. 107). The government reiterated its position on redirect when Special Agent Fair confirmed his opinion that the finished firearm traveled in interstate commerce.

> Q: [I]t was your testimony that that was a complete firearm, meaning that the entire firearm was manufactured by Smith & Wesson?
>
> A: Correct. At one point this was -- the serialized receiver frame was part of a complete firearm, sold as a firearm, manufactured in the State of Illinois and the State of Massachusetts, to be a whole and a functioning firearm.

(Trial Tr. Vol. II p. 110-11). And the Government argued during rebuttal closing argument by specifically asking the jury to find that the firearm was 'a completed rifle when it left Massachusetts.'" (Trial Tr. Vol. II p. 188).

Viewing the evidence in the light most favorable to the verdict, as we must, we conclude the evidence in the record is sufficient for the jury to find that Burning Breast's finished rifle meets the first part of the definition of firearm as set forth in § 921(a)(3). The jury apparently rejected Burning Breast's defense theories. That Burning Breast might have "personalized" the rifle by adding a scope or light, or by partially painting it blue, does not in itself negate its status as a firearm capable of being shot. Whether the finished rifle Special Agent Fair traced and testified about at trial is the firearm later found in Burning Breast's possession is a fact question for the jury to decide, not a legal question for the court. Unlike the dissent, we believe there was sufficient evidence from which the jury could draw a reasonable inference, beyond a reasonable doubt, that the finished rifle traveled in interstate commerce arriving in Burning Breast's possession unchanged.

The jury was properly instructed that the interstate commerce element of the offense is satisfied if the firearm was transported in interstate commerce "at some time during or before the defendant's possession of it." See Eighth Circuit Manual

of Model Jury Instructions (Criminal) 6.18.922B (2017). The jury could reasonably infer from the evidence that the rifle in question was at all times a fully functioning firearm that traveled in interstate commerce before Burning Breast's possession of it.

Burning Breast's challenge to the fourth element regarding his knowledge of his status as a prohibited person also fails. The court received into evidence the judgment, plea agreement, and plea transcript from Burning Breast's prior felony conviction, which established Burning Breast's status as a prohibited person. "While Rehaif makes clear that the government must prove that a defendant knew he was in the category of persons prohibited under federal law from possessing firearms, Rehaif did not alter the 'well-known maxim that 'ignorance of the law' (or a 'mistake of law') is no excuse.'" United States v. Robinson, 982 F.3d 1181, 1187 (8th Cir. 2020) (quoting Rehaif, 139 S. Ct. at 2198).

Burning Breast makes two arguments regarding his belief that his right to possess firearms had been restored. He first argues mistake of law. Burning Breast asserts that he erroneously, but genuinely, believed he no longer qualified as a prohibited person because his gun rights were restored under tribal law. See 18 U.S.C. § 921(a)(20) (stating that convicted felons are not prohibited from possessing firearms if their civil rights had been restored). But, because Burning Breast's prior conviction was under federal law, only a restoration of rights under federal law, not tribal law, qualifies. See Beecham v. United States, 511 U.S. 368, 373–74 (1994). Accordingly, Burning Breast's mistake of law argument is unavailing. See Robinson, 982 F.3d at 1187.

Second, Burning Breast claims mistake of fact, arguing he erroneously, but genuinely, believed that his conviction had been expunged or he had received a presidential pardon. See 18 U.S.C. § 921(a)(20). For support, Burning Breast points to record evidence indicating he voluntarily revealed his gun ownership to police and told police that, when he had applied to the Navy, the Navy had no record of his prior

conviction. When an officer informed Burning Breast that only a presidential pardon could excuse his prior felony conviction, Burning Breast responded "well, that must have happened." Burning Breast did not testify at trial and points to no direct evidence supporting his alleged belief. The evidence Burning Breast offered to support his alleged belief that he was not a prohibited person is insufficient for us to conclude that "no reasonable jury could have found guilt beyond a reasonable doubt." See Mabery, 686 F.3d at 598.

Finally, Burning Breast argues the jury instructions were improper on the questions of interstate nexus and his knowledge of being a prohibited person. We review the rejection of a defendant's proposed instruction for abuse of discretion, United States v. Vore, 743 F.3d 1175, 1181 (8th Cir. 2014), and we review *de novo* the district court's interpretation of the law, United States v. Farah, 899 F.3d 608, 614 (8th Cir. 2018). While a defendant is entitled to a theory of defense instruction if it is timely requested, is supported by the evidence, and is a correct statement of the law, a defendant is not entitled to particular wording if the instruction actually given by the trial court adequately and correctly covers the substance of the requested instruction. United States v. Solis, 915 F.3d 1172, 1178 (8th Cir. 2019) (cleaned up). In other words, there is no abuse of discretion if the instructions "as a whole, by adequately setting forth the law, afford counsel an opportunity to argue the defense theory and reasonably ensure that the jury appropriately considers it." United States v. Gilmore, 968 F.3d 883, 886 (8th Cir. 2020) (quoting United States v. Christy, 647 F.3d 768, 770 (8th Cir. 2011)).

The district court accurately instructed the jury on the definitions of "firearm" and "receiver." Burning Breast was able to argue to the jury his theory that the firearm did not travel in interstate commerce. We find no error or abuse of discretion as to the interstate nexus element. Likewise, the jury was properly instructed on the elements of the crime in a manner that tracked the statute and was consistent with Rehaif:

> The government must prove, beyond a reasonable doubt, both that the defendant was convicted of a felony offense and that the defendant knew that he had a felony conviction at the time he allegedly possessed a firearm that had traveled in interstate or foreign commerce. That is, the government must prove beyond a reasonable doubt that the defendant knew of his status as a person previously convicted of a felony.

As to the issue of expungement or restoration of civil rights, the court instructed the jury as follows:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of the felon in possession of a firearm charge, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not . . . possess, or receive firearms. Therefore, it is a defense to the charge of a felon in possession of a firearm that the defendant had his civil rights substantially restored. . . . However, if a defendant's conviction was under federal law, no state or tribe has the authority to expunge, set aside, or pardon such a prior federal felony conviction.

This instruction was an accurate statement of the law and maintained Burning Breast's ability to argue that he lacked the requisite knowledge of being a prohibited person. See Gilmore, 968 F.3d at 886. Burning Breast's requested instruction would have added a fifth element to the crime, unsupported by the law. It was neither error nor abuse of discretion for the district court to decline to give Burning Breast's requested instruction on knowledge.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment.

KOBES, Circuit Judge, dissenting.

Contrary to 18 U.S.C. §§ 921(a)(3) and 922(g)(1), the court does not require proof beyond a reasonable doubt that a firearm or its receiver moved across state lines. Instead, it upholds a verdict backed by little more than an ATF agent's mistaken testimony that a single gun part, an AR-15 lower receiver, is a firearm under ATF regulations. It is not. Because the Government failed to satisfy even its *own* understanding of what the law required, I think the evidence was insufficient. I respectfully dissent.

The relevant evidence in this case came from one ATF expert witness. His testimony was based on ATF records that traced one serialized part on Burning Breast's gun: the lower receiver. The records showed that the lower receiver was made in Illinois and shipped to Massachusetts, where it was assembled with other parts into a Smith & Wesson M&P 15, an AR-15-style rifle. The Massachusetts rifle with the traced lower receiver was shipped to Louisiana and sold by a dealer in Nebraska to "Arlene Paulson of Mission, South Dakota" in 2014. Trial Tr. 86. Five years later, police found the lower receiver on Burning Breast's gun.

Given these facts, there are two ways the Government could get a conviction. First, it could have proven that the lower receiver found on Burning Breast's gun is a "receiver," and so a "firearm" as a matter of law. 18 U.S.C. § 921(a)(3)(B). That was what the ATF agent repeatedly told the jury,[3] and that was the Government's

[3]The ATF agent's testimony in this case is problematic. The court misreads the trial transcript when it concludes that the ATF agent "maintained throughout his testimony that the finished firearm traveled in interstate commerce," Maj. Op. at 7. A deeper review of the record shows he did no such thing. The ATF agent incorrectly told the jury several times that the lower receiver alone was itself a firearm under ATF regulations. *See, e.g.*, Trial Tr. 82–83 ("So this frame or receiver [referring to the lower receiver] . . . . itself is a firearm. That firearm was shipped to

theory at trial. *See, e.g.*, Trial Tr. 188 ("[W]e're talking about the upper receiver and the lower receiver. That was a complete firearm."); *see also id.* ("Maybe it was just the lower receiver . . . . Even then, the interstate nexus requirement is met."). There is just one problem: an AR-15's lower receiver does not meet the Government's own definition of a "receiver."

To be a "receiver," ATF regulations require the part to "provide[] housing for the hammer, bolt or breechblock, and firing mechanism." 27 C.F.R. § 478.11. But only two of those are in an AR-15 lower receiver. *See* Trial Tr. 97–99. The third is in an AR-15 upper receiver, and the gun can't shoot without both receivers.[4] If the lower receiver is not a receiver under the regulation and if it cannot perform the function of a "receiver," then it is not a receiver under § 921(a)(3)(B). That means an AR-15 lower receiver is not a "firearm," and the Government's theory at trial was a non-starter.

The Government could also have proven that Burning Breast's complete rifle moved across state lines. *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995)

Massachusetts where it was assembled as a finished rifle . . . ."). The ATF agent doubled down on his error when he told the jury again that the lower receiver "is a firearm" that "was transported in interstate commerce," Trial Tr. 107, and that complete receivers only "usually," but do not have to, house the bolt—even though housing for the bolt is listed in 27 C.F.R. § 478.11 as an element of a "receiver." Trial Tr. 108–09. And at the close of cross-examination, he repeated that the "part [that was] manufactured in the State of Illinois," *i.e.*, the lower receiver alone, "is the firearm." Trial Tr. 113. This misstated the ATF regulation and was materially misleading.

[4]The lower receiver of an AR-15-style rifle "provides housing for the hammer and the firing mechanism." *United States v. Rowold*, 429 F. Supp. 3d 469, 471 (N.D. Ohio 2019). The lower receiver does not house the rifle's bolt—which is instead housed by the upper receiver—and the rifle cannot fire without both halves of the complete receiver. *Id.*

(per curiam).[5] But the Government did not support that theory at trial.[6] It based its entire argument that the whole rifle moved interstate on a single interchangeable component—a component that is not a firearm under § 921(a)(3) because it is not a weapon. The court nonetheless concludes the Government carried its burden, saying that "[t]he jury could reasonably infer from the evidence that the rifle in question was at all times a fully functioning firearm that traveled in interstate commerce before Burning Breast's possession of it." Maj. Op. at 9.[7]

I grant that Burning Breast possessed a functional rifle. But it is not so clear that a jury could reasonably infer that it traveled in interstate commerce. In order for

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[5]Other courts have adopted the reasonable rule that it is enough to prove that a gun's "principal parts" moved in interstate commerce. *United States v. Verna*, 113 F.3d 499, 503 (4th Cir. 1997).

[6]The court disagrees. It points to the Government's closing argument, where the Government asked the jury to find that Burning Breast's rifle was "a completed rifle when it left Massachusetts." Maj. Op. at 8 (quoting Trial Tr. 188). But, as I explain below, the Government introduced no evidence about the whole rifle. The Government's closing argument either advanced a last-minute position it never supported with evidence, or was based on the mistaken belief that the lower receiver was itself a complete firearm as a matter of law. Regardless, the Government's closing argument cannot whisk sufficient evidence into existence.

[7]The court overplays its hand when it casts this as a simple case where the ATF traced a "finished rifle" across state lines and that same rifle was found in the defendant's possession. Maj. Op. at 8. To be clear, the ATF did not trace a rifle. *See* Trial Tr. 108–09 (Q: "The trace doesn't tell you where any of the rest of the components of this gun [besides the lower receiver] came from, does it?" A: "No. The trace just identifies the serialized part on the firearm . . . ."). As the court itself recognizes, the only part that was serialized on Burning Breast's rifle was the lower receiver. Maj. Op. at 3. So no rifle was ever traced, and all the evidence of interstate travel concerns just one component. The only evidence about whether the whole rifle traveled anywhere is Burning Breast's mother's testimony that neither she nor her son took the gun out of South Dakota. Trial Tr. 65–66.

an inference to be reasonable, there must be some evidence to support it. But there is no evidence that anything other than the lower receiver moved in interstate commerce. The ATF agent admitted as much. Trial Tr. 108 (explaining that "there is no way to know" where any part on the gun besides the lower receiver came from). Even the Government conceded as much. Trial Tr. 188 ("There is no way to know whether that upper or lower receiver was swapped out."). The only thing tying Burning Breast's rifle to the Massachusetts rifle was the lower receiver. If this were a typical case with evidence that (1) a functional firearm that was indisputably stock from an out-of-state manufacturer; (2) a complete receiver; or (3) the principal parts of an assembled rifle traveled in interstate commerce, the evidence may have been enough. But that kind of evidence was not presented here.

In fact, the evidence here made it less likely that Burning Breast's rifle was the Massachusetts rifle. The ATF agent told the jury that AR-15 parts "are mix and match," Trial Tr. 102, and that "there is [a] hobby industry, cottage industry about making these things your own." Trial Tr. 89. Burning Breast's mother testified that because her son personalized another rifle as a teenager, he could have built this rifle himself from components he bought. While she did not know how Burning Breast got the rifle—or, critically, whether it was a complete, stock rifle at that time—she saw her son add parts to it in between the short-term loans she made when he offered the rifle to her as collateral.

The Government did not dispute that testimony, and even said that it was not "clear exactly [at] what point [Burning Breast] came into possession of that firearm." Trial Tr. 165. After examining Burning Breast's rifle again at trial, the ATF agent agreed that it was different from a stock M&P 15: many of the stock parts of an M&P 15 were either not on the gun at all or had been "swapped out."[8] Trial Tr. 111. Plus,

[8]The ATF agent's answer presumed that Burning Breast's rifle was the Massachusetts rifle and that Burning Breast "swapped out" the parts on it, leaving

the ATF agent remarked that the upper receiver and handguard were painted a different color than the rest of the gun—and he said that while he did not know who made either part, he could have found out who made the upper receiver.

When the ATF agent was finally asked whether Burning Breast's rifle was a different gun than the Massachusetts rifle, the agent pointed to the lower receiver in front of him and told the jury that he knew they were the same because "the frame or receiver, [the] serialized part, this is the firearm . . . . I'm talking about the frame or receiver." Trial Tr. 113. That is, the ATF agent told the jury that the only part that mattered in this case was the lower receiver because the lower receiver is itself a firearm. He was wrong. And because of that mistake, he did not trace any other part. This is not a case where someone merely "add[ed] a scope or light" to a pre-existing stock firearm. Maj. Op. at 8. This is a complete lack of evidence that anything other than one part on Burning Breast's rifle traveled in interstate commerce.

The court struggles to find anything in the record that could make the inference that Burning Breast's rifle moved across state lines reasonable. It instead approvingly quotes the ATF agent's testimony that "[t]his is a firearm," and that "this firearm transported—was transported in interstate commerce." Maj. Op. at 7 (quoting Trial Tr. 107). But the court's quote proves my point: it is clear and unambiguous from the surrounding testimony that the ATF agent was answering questions about the "lower [receiver]" and told the jury that single part was a "complete firearm" when he said "[t]his is a firearm." Trial Tr. 107; *see also* n.1, *supra*.

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just the original lower receiver on the rifle. But the agent could not have known that the rifle in front of him was an M&P 15 from the start, let alone that it was the same M&P 15 that originally contained the lower receiver. All he knew for certain was (1) that Burning Breast's rifle had an M&P 15 lower receiver on it that crossed state lines; and (2) that Burning Breast's rifle was missing other parts that would be found on a stock M&P 15. That makes it less likely that Burning Breast's rifle was the Massachusetts rifle.

The court also points to the ATF agent's answer to a hypothetical scenario. *See* Maj. Op. at 7. It is of course true, as the ATF agent said, that if a firearm crosses over state lines, it "meet[s] the interstate nexus [requirement]." *Id.* (quoting Trial Tr. 86). But his testimony there didn't answer the critical question of whether Burning Breast's rifle was the same gun that originally contained the lower receiver and crossed state lines. The Government had to show that it was the same gun in order to prove that Burning Breast's entire gun moved in interstate commerce. But none of the Government's evidence ever drew that connection.

Finally, the court relies on the ATF agent's testimony that "at one point . . . the [lower receiver] was part of a complete firearm" to conclude that the Government showed that Burning Breast's entire rifle traveled in interstate commerce. Maj. Op. at 9 (quoting Trial Tr. 111). But saying that the lower receiver was once a part of the Massachusetts rifle does not establish that Burning Breast's gun is that rifle. That is especially true when the ATF agent had already acknowledged that he didn't know the origin of any other part on Burning Breast's gun and the other evidence in this case all tended to show that the rifles were not the same. To the extent the ATF agent's testimony could be read as opining about the travel history of Burning Breast's whole rifle, his prior statements revealed that he had no basis to do that.

Without context, the court's selected quotes make it seem like the ATF agent knew Burning Breast's rifle was the Massachusetts rifle and it moved in interstate commerce. But the reality is that the ATF agent tried to bootstrap his limited knowledge about a single part into evidence about the whole rifle. The record does not support a reasonable inference that Burning Breast's gun moved across state lines.

The Government's whole case hinged on the lower receiver. That part is not a "receiver" under the regulation. And as for the statute, the lower receiver is not a weapon that will or is designed to shoot a bullet on its own. So it fails to meet the definition of a "firearm" in 18 U.S.C. § 921(a)(3)(A). And the Government presented

no evidence about whether the lower receiver "may readily be converted" to shoot a bullet. § 921(a)(3)(A); *see also United States v. Mullins*, 446 F.3d 750, 755–56 (8th Cir. 2006) (upholding a conviction where expert testimony established that the defendant's starter gun could be modified to shoot bullets in "less than an hour" with common tools and so that gun "may be considered 'readily convertible'"). So I would apply the rule of lenity and conclude that a lower receiver is not a "firearm" under the statute, either. Without more evidence that the firearm Burning Breast possessed traveled in interstate commerce, he could not have been convicted under § 922(g)(1) merely because he possessed a single interchangeable part that traveled across state lines.

There are other problems with this case that go to the core of separation of powers. An executive agency is not empowered to write and enforce "[its] own criminal code." *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *see also Aposhian v. Wilkinson*, 989 F.3d 890, 898–99 (10th Cir. 2021) (Tymkovich, J., dissenting from denial of rehearing). As Judge Tymkovich explained, "[w]hen an agency can define criminal conduct, there is a genuine concern that 'if [they] are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency.'" *Id.* at 899 (quoting *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) (Sutton, J., concurring)). Justice Gorsuch recently expressed the same concern, asking how "ordinary citizens [can] be expected to keep up" if we defer to the agency in cases like this. *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari).

Not only does the Government try to evade the rule of lenity by defining a term in a criminal statute, the court also lets it enforce that interpretation without batting an eye, dismissing the critical issue as a "red herring[]." Maj. Op. at 6. The Government also got away with misleading the jury about its own interpretation of the statute. Despite the ATF agent's knowledge that the lower receiver did not

contain all three components the ATF requires in a "receiver," he repeatedly called that single part "the firearm," and the Government referred to that testimony several times in closing arguments. *See* n.1, *supra*. The agent's testimony might have succeeded in getting the jury to speculate that a firearm crossed state lines, but "[s]peculation cannot be the basis for proof in the civil context[,] much less the basis for proof beyond a reasonable doubt." *United States v. Groves*, 470 F.3d 311, 324 (7th Cir. 2006) (reversing a § 922(g) conviction because ATF agent expert testimony was too vague to establish that a gun traveled across state lines beyond a reasonable doubt).

As Justice Scalia reminded us, "legislatures, not executive officers, define crimes" and "[c]riminal statutes are for the courts, not the Government, to construe." *Whitman v. United States*, 135 S. Ct. 352, 352–53 (2014) (Scalia, J., dissenting from denial of certiorari) (cleaned up) (citation omitted). Deferring to the prosecuting branch's interpretations of criminal statutes "replac[es] the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment). And that is particularly salient in areas of criminal law where it "seems agencies change their statutory interpretations almost as often as elections change administrations." *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement regarding denial of certiorari).[9]

Had the Government proven that Burning Breast's rifle or its complete receiver traveled in interstate commerce rather than just one part, that evidence may have been sufficient. *See United States v. Hill*, 835 F.3d 796, 800 (8th Cir. 2016) (holding that "ammunition assembled from components which had traveled in interstate commerce was in commerce for purposes of 18 U.S.C. § 922(g)(1)"). That wouldn't be hard to

[9] *See, e.g.*, Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27720 (proposed May 21, 2021) (expanding the definition of "receiver" to include partial or incomplete receivers that "may readily be completed, assembled, converted, or restored to a functional state.").

show. But where the Government fails to supply proof of a defendant's guilt beyond a reasonable doubt and the jury still convicts, we should reverse the conviction.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LUKE JOSEPH BURNING BREAST, Defendant.	3:19-CR-30110-RAL OPINION AND ORDER GRANTING MOTION IN LIMINE

Defendant Luke Joseph Burning Breast (Burning Breast) faces one count of felon in possession of a firearm in this case. Doc. 1. On November 25, 2019, the Government filed a motion in limine, Doc. 22, seeking to prohibit evidence that Burning Breast had committed a "mistake of law." Specifically, the Government sought to prohibit evidence of Burning Breast's "incorrect belief that he was no longer a felon or alternatively that his right to possess a firearm was restored." Doc. 22 at 6.

At the request of both counsel, this Court held a motion hearing on November 27, 2019, at which this Court heard argument, provided a summary of its understanding of the law, indicated that the motion in limine likely would be granted, and described Burning Breast's argument as persuasive in urging lenience at any possible sentencing but not a defense to the charge. Since that hearing, Burning Breast has filed a response, Doc. 27, opposing the motion in limine and a proposed jury instruction that, if given, would require the Government to prove beyond a reasonable doubt that Burning Breast "knew that [his prior felony conviction] prohibited him from possessing firearms or that he could not reasonably believe his civil rights had been restored."

Doc. 28-1 at 1–2. Either this Court was not sufficiently clear in its ruling on the record, or Burning Breast is simply making sure of his record for appeal on the issue. Regardless, this Court deems it worthwhile to reduce to writing what it stated during the November 27 hearing.

In 2007, Burning Breast pleaded guilty and in turn was convicted in this Court under 18 U.S.C. § 922(g)(3) to being a drug user in possession of a firearm. United States v. Burning Breast, 07-CR-30062.[1] Twelve years after that felony conviction, in April 2019, an officer of the Rosebud Sioux Tribal Law Enforcement Services arrested Burning Breast for domestic violence at a residence in Rosebud. During his arrest, Burning Breast reportedly admitted that he had an assault-style rifle and that he had been convicted of "user of narcotics in possession of a firearm." Doc. 22 at 2. He reportedly told officers that he was no longer a felon, however, because his conviction was more than ten years old. He later filed a motion in tribal court saying that he owned the assault-style rifle seized during his arrest and requesting that it be returned to him. A grand jury indicted Burning Breast in this case under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) for being a felon in possession of a firearm.

Section 922(g)(1) makes it unlawful for any person who has been convicted of "a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. 18 U.S.C. § 922(g)(1). Section 924(a)(2) provides that anyone who "knowingly violates" § 922(g) can be imprisoned for up to ten years. 18 U.S.C. § 924(a)(2).

The case at the heart of the parties' dispute over Burning Breast's proposed defense is Rehaif v. United States, 139 S. Ct. 2191 (2019). In Rehaif, the Supreme Court held that in prosecutions under §§ 922(g) and 924(a)(2), the government "must prove both that the defendant

[1]Burning Breast received three years of probation, but probation later was revoked with Burning Breast then serving a nine-month sentence, followed by two years of supervised release. 07-CR-30062-1, Docs. 113, 127.

knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." Rehaif, 139 S. Ct. at 2200. The defendant in Rehaif was charged with violating 18 U.S.C. § 922(g)(5), which makes it illegal for an alien who is "illegally or unlawfully in the United States" to possess a firearm. Relying on the maxim that "'ignorance of the law' (or a 'mistake of law') is no excuse," the government argued that whether an alien was illegally or unlawfully in the United States was a question of law. Id. at 2198. The Supreme Court acknowledged that ignorance of the law is normally not a defense "where a defendant has the requisite mental state in respect to the elements of the crime but claims to be unaware of the existence of a statute proscribing his conduct." Id. at 2198 (citation omitted). As the Supreme Court explained however, the ignorance-of-the-law maxim "does not normally apply where a defendant has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct, therefore negating an element of the offense." Id. (citation omitted); see also id. (explaining that the confusion surrounding the maxim "stems from the failure to distinguish between these two quite different situations"); Wayne R. LaFave, Criminal Law § 5.6(a) (6th ed. 2017) ("[I]gnorance or mistake of fact or law is a defense when it negates the existence of a mental state essential to the crime charged."). The Supreme Court recognized that the defendant's status as an illegal alien was a "legal matter," but classified it as a "collateral" question of law. Rehaif, 139 S. Ct at 2198. It concluded that a "defendant who does not know that he is an alien 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purposes require." Id.; see also LaFave, Criminal Law § 5.6 (explaining that a man charged with larceny would have a defense under a hypothetical where the man took another's umbrella from a restaurant but, under a mistake of law, believed that his prior dealings had vested him with

ownership of the umbrella). Importantly to this case, the Supreme Court explained at the end of its Rehaif opinion that it was "express[ing] no view . . . about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here." Rehaif, 139 S. Ct. at 2200.

After Rehaif, circuit courts have interpreted §§ 922(g)(1) and 924(a)(2) to require the government to prove that the defendant "knew he was a felon," United States v. Benamor, 937 F.3d 1182, 1186 (9th Cir. 2019), or knew that he had been "convicted" of a crime "punishable by imprisonment for a term exceeding one year," United States v. Smith, 939 F.3d 612, 614 (4th Cir. 2019). Just last month, the Eighth Circuit explained that under Rehaif, the government must show that the defendant knew "he had been convicted of a crime punishable by imprisonment for a term exceeding one year at the time he possessed the firearms." United States v. Davies, 2019 WL 5849500, at *3 (8th Cir. Nov. 8, 2019); see also id. at *2 (citing Rehaif and stating that the "relevant category of persons" banned from possessing a firearm under § 922(g)(1) is "anyone 'who has been convicted of[] a crime punishable by imprisonment for a term exceeding one year").

Rehaif did not require the government to prove that the defendant knew he was prohibited from possessing a firearm, but only that "he knew he belonged to the relevant category of persons barred from possessing a firearm." Rehaif, 139 S. Ct. at 2200. After Rehaif, several courts have held that the government does not need to prove that the defendant knew his status barred him from possessing a firearm. United States v. Bowens, 938 F.3d 790, 797–98 (6th Cir. 2019) (concluding that Rehaif does not require the government to prove that the defendant knew he was prohibited from possessing a firearm); United States v. Kueth, 2019 WL 6037078, at *1–2 (D. Neb. Nov. 14, 2019) ("In a prosecution under §§ 922(g) and 924(a)(2), the defendant's knowledge of his status is the crucial element, not whether he knew his status barred him from possessing a

firearm or ammunition under federal law."); United States v. Phyfier, 2019 WL 3546721, at *3 (M.D. Ala. Aug. 8, 2019) ("[W]hile the government must prove that [the defendant] had knowledge with respect to the status element of being a convicted felon, it need not prove that he had knowledge with respect to being prohibited from possessing a firearm—which, again, is not an element of the crime."); United States v. Gear, 2019 WL 4396139, at *8 (D. Hawaii Sept. 13, 2019) (explaining that Rehaif does not require the government to prove that the defendant "knew that he could not possess a firearm"). Relatedly, after Rehaif, courts have held that evidence that a defendant didn't know he was prohibited from possessing a firearm is irrelevant in a prosecution under § 922(g). Phyfier, 2019 WL 3546721, at *3–4 (holding that the defendant could not offer evidence that he had a concealed carry permit from a sheriff's office to show that he didn't know he was prohibited from possessing a firearm because that fact was irrelevant to felon-in-possession charge)[2]; United States v. Collins, 2019 WL 3432591, at *2–3 & n.2 (S.D. W. Va. July 30, 2019) (holding that evidence about defendant's mistaken belief that he could possess a firearm was irrelevant to charge under § 924(g)(4)) of illegal possession of a firearm after having been involuntarily committed to a psychiatric hospital); see also Kueth, 2019 WL 6037078, at *1–2 (denying defendant's motion in limine asking that he be allowed to argue that the government must prove that he knew it was illegal for him to possess ammunition).

In short, as the Eighth Circuit stated in Davies, Rehaif only requires the government to show that the defendant knew "he had been convicted of a crime punishable by imprisonment for a term exceeding one year at the time he possessed the firearms." 2019 WL 5849500, at *3. Evidence that Burning Breast either didn't know the law prohibited him from possessing a firearm

[2]The Phyfier court did note, however, that evidence tending to disprove that the defendant knew he was a felon would theoretically be relevant. 2019 WL 3546721, at *4 n.3.

or mistakenly thought himself exempt from the law would not negate the requisite mental state and is not a defense. This approach is consistent with Eighth Circuit law predating Rehaif. In United States v. Lomax, 87 F.3d 959 (8th Cir. 1996), the Eighth Circuit held that evidence that the defendant believed that his civil rights had been restored was irrelevant to the "mens rea" of being a felon in possession of a firearm. Id. at 962. The Eighth Circuit explained that the "'knowingly' element of section 922(g) applies only to the defendant's underlying conduct, not to his knowledge of the illegality of his actions." Id. In short, Burning Breast's proposed jury instruction is an incorrect statement of the law in placing on the government the burden to show that Burning Breast knew that he could not possess a firearm because of his status as a convicted felon and further knew that his civil rights had not been restored. Of course, if Burning Breast had a state felony conviction that had been expunged, set aside, or pardoned, or had his civil rights restored, then he would not have a qualifying felony conviction. See 18 U.S.C. § 921(a)(20); 18 U.S.C. § 922(g)(1); see also United States v. Knapp, 2019 WL 6493467, at *2 (D. Mont. Dec. 3, 2019). But Burning Breast's conviction was for a federal offense in federal court, so his restoration of rights would have to be under federal law. Beecham v. United States, 511 U.S. 368, 371–72 (1994). There is no evidence in the record of any such restoration of civil rights or any pardon, expungement, or setting aside of that conviction. Therefore, it is

ORDERED that the Government's motion in limine, Doc. 22, is granted to the extent set forth in this Opinion and Order.

DATED this 6th day of December, 2019.

BY THE COURT:

Roberto A. Lange

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA,	*	CR. 19-30110
Plaintiff,	*	JURY TRIAL
-vs-	*	VOLUME II OF II
LUKE JOSEPH BURNING BREAST,	*	PAGES 44-199
Defendant.	*	

* *

TIME AND PLACE:	December 10, 2019 - Day 2 of 2 U.S. District Court 225 S. Pierre St. Pierre, SD 57501
BEFORE:	HON. ROBERTO A. LANGE U.S. District Court 225 S. Pierre St. Pierre, SD 57501
APPEARANCES:	MR. MICHAEL J. ELMORE U.S. Attorney's Office P.O. Box 7240 Pierre, SD 57501 ATTORNEY FOR THE GOVERNMENT
	MR. RANDALL BRIGGS TURNER Federal Public Defender's Office P.O. Box 1258 Pierre, SD 57501-1258 ATTORNEY FOR THE DEFENDANT
ALSO PRESENT:	MR. LUKE JOSEPH BURNING BREAST - DEFENDANT
COURT REPORTER:	MS. CHERYL A. HOOK, RMR, CRR U.S. District Court 225 S. Pierre St. #420 Pierre, SD 57501

THE COURT: All right. The Court needs to take a recess before we start with any defense case. This will be probably about 15 minutes.

All rise for the jury.

(Jury excused.)

THE COURT: Please be seated. We are outside the hearing of the jury. Mr. Turner, do you wish to make a motion at this time?

MR. TURNER: Your Honor, at 2 in the morning last night after working for a written Rule 29 motion for judgment of acquittal, I went to hit print and the software crashed, and I lost the entire motion, and I went to bed.

I know what I wrote, for the most part, and I've got a case, if the Court wants to take this under advisement, of the *U.S. versus Jimenez*, which is the only case that I could find that addresses this issue, but it addresses it in a slightly different context, but the issue is absolutely four square with the issue that I raised with the ATF agent.

In addition to a general motion for judgment of acquittal on sufficiency of the evidence, I would like to make the following argument: In order to be in this courtroom and in order to prove their case, both under the constitutional law, the minimum nexus in -- I think it's *Cavanaugh versus United States*. It's a Supreme Court case. I've got it here. I'll find it. Well, maybe I don't have it exactly on hand.

Damn it. Says that in order to meet the very minimal nexus required with commerce under the commerce clause, the only thing the Government has to show is that the firearm traveled in interstate commerce.

Federal law defines "'firearm' as any weapon which will or is designed to or may be readily converted to expect -- to expel a projectile by the action of an explosive, or the frame or receiver of any such weapon, or --" and there is a couple others that don't apply here.

In order to have a firearm which is traveling in interstate commerce, you either need the portions available to make a working firearm together readily assemblable as they travel in interstate commerce or a completely built firearm that can expel a projectile as it crosses state lines.

The problem was that all you had to do was break down a couple of different things and avoid that statute and build the firearm in a given state; and as long as it didn't leave the state, it had no nexus to interstate commerce.

So the -- congress also included the frame or receiver of any such weapon. What are the basic working parts that make it fire? Only "frame and receiver" isn't defined. So ATF did that. And ATF did it in 27 CFR Section 478.11, which says, "The part of the firearm which provides housing for the hammer, comma, bolt or breechblock, comma, and firing mechanism, comma, and which is usually threaded at its forward

portion to receive the barrel."

This case looks at that definition in order to determine whether or not an AR-15 style weapon, with a split upper and lower receiver -- in that case a lower receiver -- constituted a firearm. And what that case said is the lower receiver does not constitute a firearm. And if the lower receiver doesn't, the upper receiver certainly doesn't. You know, Agent Fair's statement of "Well, I see the word 'usually' and the word 'or'" It does not --

THE COURT: Actually, this district court case does comment on the "usually" threaded to a barrel and says, you know, that isn't required.

MR. TURNER: Right. But --

THE COURT: So to that extent, the case supports Agent Fair. And "or," is that in the language of the CFR?

MR. TURNER: It is. And it's in one of the three: hammer, bolt or breechlock -- breechblock. I keep saying that wrong. And firing mechanism. All three have to be together or readily assemblable at the time the firearm crosses state lines, or it's not a firearm.

See, there is no question that anyone can build a firearm. And as long as it doesn't cross state lines and as long as he's legal on the reservation, he can build a firearm on the reservation. And he can -- as long as it doesn't leave the State of South Dakota, he's not in violation of federal

law. That's what happened in this case. He got a lower and an upper and put them together.

THE COURT: There is actually no evidence of that.

MR. TURNER: Well, there is no evidence that that didn't happen, and the Government has the burden to prove that it didn't happen.

THE COURT: Ah --

MR. TURNER: Well, the Government has the burden to prove that it traveled across state lines as a firearm, and they can't do that.

THE COURT: Right, right, right. Mr. Turner, the evidence of the Government is that the lower receiver was manufactured in Illinois.

MR. TURNER: True.

THE COURT: And then sent to Massachusetts where Smith & Wesson assembled it into whatever else. He couldn't say "whatever else" because nothing else has serial numbers on it, but that it was a firearm at that point; that it transferred then to -- I believe he said Louisiana -- but ultimately to Nebraska, where it was sold as a firearm from a store in Valentine, Nebraska, to a woman in Mission, South Dakota. Sold as a firearm at that point. It doesn't then suddenly magically lose its status as a firearm because possibly -- if we're speculating. And maybe based on Georgia Hackett's testimony, it's maybe more than speculation -- that

your client may have changed out other devices. I expected the United States to ask whether there is any manufacturer in the State of South Dakota that had -- that could make -- or makes an upper like what this is. It certainly doesn't seem to be handmade. I think the jury can infer that it wasn't handmade.

But I -- I see this as different than the situation that the district court in California was dealing with in *United States versus Jimenez*. At best your argument strikes the Court as a jury argument that likely needs a little more evidence to have legs.

The Court is going to deny the Rule 29 motion, concluding that the evidence of the United States, if believed, does establish evidence on each of the four elements of the crime of felon in possession of a firearm.

MR. TURNER: May I make a short record, Your Honor?

THE COURT: You may.

MR. TURNER: The firearm which was built -- the lower receiver which was built in Illinois, shipped to Massachusetts, and the finished product there is not this firearm. The --

THE COURT: Well, how -- how can you say that with certainty? Isn't there, at least, a question of fact on that? Or are you saying the fact that a flashlight was added and a sight renders it a completely different firearm?

MR. TURNER: The fact that the upper and lower -- no. It has everything to do with only the upper and lower

receivers. The upper and lower receivers --

THE COURT: What evidence is there that the upper receiver is not the same one that was placed by Smith & Wesson? I don't know that we have any evidence either way.

MR. ELMORE: There is no way to know, Your Honor.

THE COURT: Right.

MR. ELMORE: That's what Brent Fair testified to, because the upper receiver isn't marked. None of them there. That's not a requirement of the ATF.

THE COURT: Right. So are we just --

MR. TURNER: Well --

THE COURT: I mean, it seems like you can argue -- and, my goodness, are there doughnut holes in our gun laws, but, you know, that's the way at least the majority of South Dakota certainly wants it. And -- but you certainly can argue away at this to a jury but -- I mean, the Court has to take and credit the testimony of the Government's witnesses when ruling on a Rule 29 motion, including Special Agent Fair.

All right. The motion is denied. Do you need some additional time before we proceed with the defense case, Mr. Turner?

MR. TURNER: I do, Your Honor.

THE COURT: Okay. Just let the Court know. Do you have witnesses available this morning, or should the Court let the jury go?

conversation.

MR. ELMORE: It wasn't. I think that's a good course.

THE COURT: All right. Anything further then? Court is in recess for the noon hour.

(Recess at 12:12 p.m.)

(In open court at 1:44 p.m.:)

THE COURT: Anything before the jury is brought in?

MR. TURNER: Yes.

THE COURT: Okay.

MR. TURNER: Thank you, Your Honor. I had indicated to Mr. Elmore that we were going to rest. He said he had rebuttal, and I asked what it was. He said it was transcripts of plea and plea agreement back in the original case. I -- just based on how the Court works, I could see me saying, "Rest." "Do you have any rebuttal?" And then I don't have the opportunity to object away from the jury.

As long as we're in this position, I would argue that that's not proper rebuttal at this point because Terry Pechota was the only defense witness, and his testimony was that everything he did was not only after the original conviction but -- everything he testified to was not only after the original conviction but even after the arrest in this case.

THE COURT: True. However, Mr. Pechota had said in response to Mr. Elmore's questioning that not only did

Mr. Pechota not know that it was disqualifying as a felony but he didn't think that the defendant knew. I sustained an objection, told the jury to disregard the second half because it wasn't responsive to the question Mr. Elmore asked. But then on redirect, Mr. Pechota did make that comment again. There was no objection. So it did come in that Mr. Pechota did not know if it was a felony or misdemeanor, and he did not think that the defendant knew.

So it does seem to the Court that it would be rebuttal to that portion of Mr. Pechota's testimony to allow in the plea agreement. And what was the other thing?

MR. ELMORE: There are a few lines from the change of plea hearing. I have a certified copy where Judge Moreno advised the defendant of the penalties and the rights, and that he was advised of those rights or the implications of that.

THE COURT: So is it the entire change of plea transcript?

MR. ELMORE: I have the entire change of plea transcript. I only want Special Agent Kettell to read a few lines of it.

MR. TURNER: Well, Your Honor, if that's the case, I've got the entire change of plea transcript, and I would put it into evidence anyway.

THE COURT: All right. Then I think it's better that the entire transcript go in, than having a Rosebud Sioux Tribe

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1450

United States of America

Appellee

v.

Luke Joseph Burning Breast

Appellant

Appeal from U.S. District Court for the District of South Dakota - Central
(3:19-cr-30110-RAL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 30, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Transcript of
Sgt. Richard Kumley - 1 Body Camera
4/9/2019

Government Exhibit 1
Transcript of body cam video

(radio noise)

Sgt. Richard Kumley:	Is it, is Luke here? Is this Norman's? Hello.
Female:	Hi.
Sgt. Richard Kumley:	Looking for Cateri Cox's.
Female:	Who?
Sgt. Richard Kumley:	Cateri Cox.
Female:	Uh, no this is the wrong house.
Sgt. Richard Kumley:	Who's house is this?
Female:	Uh, _____.
Sgt. Richard Kumley:	Who lives back there?
Female:	Georgia Hackett.
Sgt. Richard Kumley:	Dortha Hackett?
Female:	Georgia Hackett.
Sgt. Richard Kumley:	Georgia Hackett? Okay. Jesus. Yeah, there it is.

(knocking)

Sgt. Richard Kumley:	Hello.
Georgia Hackett:	Hi.
Sgt. Richard Kumley:	What's going on?
Georgia Hackett:	It was a bad, bad, bad, night.
Luke Burning Breast:	I don't want her in my house. I'm tired of her. She said she wanted to fucking kill herself. She said she didn't want to feed my fucking daughter anymore, so I said she can get the fuck out of my house.
Sgt. Richard Kumley:	Whoa, calm down Luke. Where is she at?
Luke Burning Breast:	I don't know. I went for a long walk. I just came back after three hours. I fucking couldn't stand her shit

	anymore. I just don't want it around my daughter, man. You know what, she, all she does is feed my daughter man, I go home, I fucking cook, I fucking clean. I fucking do everything, yo. We're paying for that fucking trailer. And she has the fucking audacity to say that I'm the one that's, that's the problem. Last night some, one of her friends drank four sodas and she said she didn't want to fucking live anymore. Said she didn't want to feed my daughter anymore, said she didn't give a fuck. So what am I supposed to do with that, man?
Sgt. Richard Kumley:	I got you. She took off walking or what?
Luke Burning Breast:	I hope so.
Sgt. Richard Kumley:	Okay.
Georgia Hackett:	It was bad, it was just shouting and throwing things at each other. In the meantime we have this grandchild you know -
Sgt. Richard Kumley:	Are you-
Georgia Hackett:	I'm his son, I'm his, he's my son, I've lived here forty years.
Sgt. Richard Kumley:	(coughs) okay. Calm down, it's okay, I get you.
Georgia Hackett:	I feel bad for both of them and I've asked them both to go to couples counseling, they don't have to be together, they have to decide how to raise the child.
Luke Burning Breast:	And I've said that to her multiple times man, and she doesn't want to fucking go to counseling, 'cause I'm the problem. But, hey when I leave then I have to be right back over you know what, there's always something, but you know what, she never does anything herself. You know, I've been fucking applying, I try to get my job back at the ambulance service. I'm trying to get any job that I can. She's passed up three jobs. You know what I mean, I don't know what I can do. And I just had it yo. I don't know what the fuck to do. I'm at the end of my mother fucking rope here.
Georgia Hackett:	They really are exposing

Luke Burning Breast:	All she keeps doing is causing me fucking grief. And-and-and saying, she's going to take my daughter and saying, "oh they'll believe me, over you." And this and that, and then the audacity to fucking use all that shit against me, you know, hey I've lost my father, my brother you know, several close friends to bullshit suicides man, and I don't fucking need her bringing that shit around my fucking daughter, man. Hey, like I said, if she wants to fucking -
Sgt. Richard Kumley:	Do you know which way she walked, Georgia?
Luke Burning Breast:	- get the fuck out of here then she can get the fuck out of here.
Georgia Hackett:	I don't know if she's sitting in the truck.
Luke Burning Breast:	No, I locked it.
Georgia Hackett:	She was just here, maybe ten minutes I mean.
Officer Gerald Dillon:	Okay.
Sgt. Richard Kumley:	So, you guys, it just blew up and you were throwing stuff at each other?
Luke Burning Breast:	Yeah, I threw some water at her.
Sgt. Richard Kumley:	Okay. We got, we got told that you guys were physically striking each other.
Luke Burning Breast:	Yeah.
Georgia Hackett:	Yeah, they were hitting each other.
Luke Burning Breast:	She hits me and I fucking hit her back.
Sgt. Richard Kumley:	Tonight?
Georgia Hackett:	They were slapping each other more than
Luke Burning Breast:	Yeah,
Georgia Hackett:	It wasn't any closed fists
Luke Burning Breast:	I don't fucking punch her or anything even though I fucking want to.
Sgt. Richard Kumley:	Okay.
Georgia Hackett:	I can't have it. I wasn't raised like that, I didn't raise him this - jeez.

Sgt. Richard Kumley:	Okay, now, Luke, you understand. I just want to be very clear. If we find her and you know we get the story and everything like that you did tell us that you did touch her -
Luke Burning Breast:	Yeah
Sgt. Richard Kumley:	- but she touched you back
Luke Burning Breast:	Now, touched me first.
Sgt. Richard Kumley:	Okay, but you understand there might be the possibility of an arrest.
Luke Burning Breast:	Yeah, oh that's fine.
Sgt. Richard Kumley:	Okay,
Luke Burning Breast:	She's got fucking failures -
Sgt. Richard Kumley:	Okay,
Luke Burning Breast:	- to appear, I don't have
Sgt. Richard Kumley:	I un- I'm just, I'm just, I'm just being very clear and very honest with you okay.
Luke Burning Breast:	Yeah, that's fine
Sgt. Richard Kumley:	Okay.
Georgia Hackett:	They need some help to get something straight about how to take care of their daughter without being together.
Sgt. Richard Kumley:	So, but, the report will still be submitted with, the - and ultimately it's probably going to be one of those things where we are going to let the courts decide if we can't find her, okay. But we just need to get her side, you know, obviously we see you're physically okay, and make sure she's physically, but more importantly mentally okay, if she's saying she's going to kill herself.
Georgia Hackett:	She has, she really, I said that she may be having some post-partum depression you know.
Sgt. Richard Kumley:	How old is the baby?
Luke Burning Breast:	She's about three months.

Georgia Hackett:	Two months, almost three months.
Luke Burning Breast:	Almost three months.
Sgt. Richard Kumley:	About three months. So she's at that real delicate stage when hormones are starting to kick back in
Luke Burning Breast:	Well, she really does, she like I said, it's-it's two sides of the story all the time, man. Everything's okay and her doing okay and then it's, then it's like -
Sgt. Richard Kumley:	Then it's all hell.
Luke Burning Breast:	Then she, yeah. You know it doesn't matter what happens, the other day I went to go turn in an application and she called me, baby was crying in the background and she was all sobbing and shit and I'm, you know? And I was go- you know and that was what it was, "oh now you're gone" and that's all she could say, "no you're out there smoking meth with your cousin's, out there smoking meth" and I'm like
Sgt. Richard Kumley:	What's, what's your daughter's name?
Luke Burning Breast:	Lucia.
Sgt. Richard Kumley:	Lucia?
Luke Burning Breast:	Lucia Joyce Burning Breast.
Sgt. Richard Kumley:	That's a cool name, I actually like that. We're going to go walk around, see if we can find Cateri, make sure she's okay more importantly, okay.
Georgia Hackett:	Yeah. Yeah, really.
Sgt. Richard Kumley:	So.
Georgia Hackett:	She was okay with me and then I went to just kind of bring up some wood get ready for the storm and then when I came back I heard shouting and then I couldn't stop it. I can't have them hurting each other.
Sgt. Richard Kumley:	I know. I understand, ma'am.
Georgia Hackett:	In front of the child.
Sgt. Richard Kumley:	Okay, we're going to go see if we can't get her found and see how, what her story is.

(walking outside)

Sgt. Richard Kumley:	(on the radio) Where you at?
Ofc. Gerald Dillon:	(radio response) back at the house. I'll be coming around soon.
(walking)	
Sgt. Richard Kumley:	What's that?
Ofc. Bryan Waukazoo:	I'll tell you, she's a mess.
Sgt. Richard Kumley:	What?
Ofc. Gerald Dillon:	She's a mess.
Cateri Cox:	(crying) It's so bad, Telling me to go fucking kill myself, bitch. Leave my fucking daughter here. Fucking leave, get the fuck out of here. He started slapping me and pushing me down. He slapped my glasses off my face. He slapped –
Sgt. Richard Kumley:	Duel?
Ofc. Gerald Dillon:	Sounds like it.
Sgt. Richard Kumley:	Do you want to grab her and we'll go grab him?
(walking)	
Sgt. Richard Kumley:	Okay. Well, we did find her.
Georgia Hackett:	Where was she.
Sgt. Richard Kumley:	Still here. Um, under tribal law, domestic violence law, you both are going to be placed under arrest today, okay. Are you okay with baby?
Georgia Hackett:	Well, she -
Luke Burning Breast:	She breast-feeds her.
Georgia Hackett:	Breast-feeds her.
Luke Burning Breast:	That's where –
Georgia Hackett:	And she's only pumped a little bit. You know, geez. Yeah, I'm okay with the baby, but I don't have any way to feed her. She probably put it in her bag, but it's just enough for maybe half of a feeding.
Sgt. Richard Kumley:	Well, they do allow, they do have the pumping facilities at the ACF. Um,

Luke Burning Breast:	She probably spilled it out.
Georgia Hackett:	No. I don't know, I was getting -
Sgt. Richard Kumley:	But, uh, the concern is the fact that you're telling us that -
Georgia Hackett:	Here's her glasses.
Sgt. Richard Kumley:	She's going to kill herself.
Luke Burning Breast:	Yeah.
Georgia Hackett:	Yeah.
Luke Burning Breast:	She's said that more than once. She said that she's, she said she attempted to hang herself in
Sgt. Richard Kumley:	And that she's
Luke Burning Breast:	February of 2000 -
Sgt. Richard Kumley:	and that she's not going to feed the baby anymore. That's a concern.
Luke Burning Breast:	Yeah. That is the concern.
Georgia Hackett:	There's no milk here. She, there's the bottle that she used, but, maybe she fed her or something, not that's not it. Well here's her glasses. She's gonna
Sgt. Richard Kumley:	She's not going to be able to have them there anyways.
Georgia Hackett:	Well, what are we going to do here?
Luke Burning Breast:	Tell her to fucking pump down there. I mean, I don't know.
Georgia Hackett:	So what happens?
Luke Burning Breast:	I thought about this the other night, of just going to the fucking hospital and asking them to get or what to do, you know what I mean? I just want to – I don't know what the fuck to do, man.
Sgt. Richard Kumley:	As, even as a father, um, to you can still contact the WIC office to get everything necessary for a baby. Okay, even as the father.
Georgia Hackett:	We have dia- we have diapers too. Everything except
Luke Burning Breast:	We just don't have formula.

Georgia Hackett:	The formula or she said, she told me she wanted to nurse her until she was one. To me, that's her decision. She's the mother, but she's started pumping and we fed her, they come out pretty often. And so she took a bottle the other day real good. I don't know sometimes Luke's at the trailer, they do live
Sgt. Richard Kumley:	Okay. Hold on a second ma'am.
Georgia Hackett:	Right now there's no, there's no breast milk.
Sgt. Richard Kumley:	She's breast-feeding, that's the only way to feed the baby.
Ofc. Bryan Waukazoo:	Yeah, that's what she said out there.
Sgt. Richard Kumley:	Yet again, there's concerns for her mental state of mind.
Georgia Hackett:	I have asked her and I have asked Luke to see someone.
Sgt. Richard Kumley:	And they've, we're going to have to, we can't just let her go free.
Ofc. Bryan Waukazoo:	They do at the jail.
Sgt. Richard Kumley:	Okay, um, we can't let her go free. The arrests have got to be made on both parties and that's under ordinance of law, but I'll make some phone calls about getting you guys some about getting you some formula.
Georgia Hackett:	Alright.
Sgt. Richard Kumley:	So, I'm obligated by the way the law is written, ma'am.
Georgia Hackett:	I-I understand.
Luke Burning Breast:	That's fine.
Georgia Hackett:	Yeah, and then what happens? They are arraigned and then they're released or what happens?
Sgt. Richard Kumley:	They can be bonded out after 12 hours. That's going to be domestic abuse against both parties. They can be bonded out. After 12, more than likely they'll be cut loose in the morning, she on the other hand, she might be a longer stay, they might have mental health come speak to her first. Because you're telling us

Ofc. Bryan Waukazoo:	She was saying that too. She wanted to.
Sgt. Richard Kumley:	Kill herself, so?
Ofc. Bryan Waukazoo:	Yeah, saying she was tired of it.
Sgt. Richard Kumley:	So, we have, so we have no choice, we have that obligation as well.
Georgia Hackett:	I understand. I can take care of her. It's going to be a storm and all I do is,
Sgt. Richard Kumley:	I understand.
Georgia Hackett:	But I do have,
Luke Burning Breast:	You can always go to the trailer.
Georgia Hackett:	No, we stay.
Sgt. Richard Kumley:	You'll be out before the storm comes in. Because it's not supposed to start snowing until -
Georgia Hackett:	Okay.
Sgt. Richard Kumley:	Until tomorrow afternoon. So you'll be out before then.
Luke Burning Breast:	Can I leave my belt and knife and shit here?
Sgt. Richard Kumley:	Yeah.
Georgia Hackett:	Where's you saw? Where is
Luke Burning Breast:	yeah, it's over there by my tailgate.
Sgt. Richard Kumley:	No other weapons or anything like that with you?
Luke Burning Breast:	No, huh-uh. I don't even have anything else.
Sgt. Richard Kumley:	Okay.
Georgia Hackett:	Where is the keys?
Luke Burning Breast:	Uh, fuck I don't
Sgt. Richard Kumley:	Don't tell me she took them.
Luke Burning Breast:	No, they're down there, somewhere. In the fucking. Yeah, I didn't want her to fucking get ahold of them. Yeah, I kind of just like take a walk straight down from here. I don't fucking know, I fucking didn't expect to get arrested.
Sgt. Richard Kumley:	We'll, we'll take a walk down there.

Luke Burning Breast:	Then my fucking rifle is down there. And fucking my magazine
Georgia Hackett:	Okay, when you say that, where? What, down there, where?
Luke Burning Breast:	Remember where that, where that fucking tree is, where that, where there is a drop off. There's the rifle and then it's right down from here, there's that, there's the keys and then that's, and then the magazines like half way in there,
Georgia Hackett:	Okay. I can't go anywhere.
Luke Burning Breast:	I didn't fucking want any of that shit involved in this fucking shit.
Sgt. Richard Kumley:	You have a rifle down there, Luke?
Luke Burning Breast:	Yep.
Sgt. Richard Kumley:	Aren't you a felon?
Luke Burning Breast:	Nope. Not after ten years. And I joined, I tried to join the Navy and they can't find a record of my felony arrest.
Sgt. Richard Kumley:	You're a felony for life unless it's been expunged by the President of the United States.
Luke Burning Breast:	Well, that must have happened.
Georgia Hackett:	Well, the tribal law it says after five years.
Luke Burning Breast:	Yeah, and tribal law says that after 10 years, or 5 years from you release of terms you
Sgt. Richard Kumley:	You still, you still abide by federal law. This way bud. But we're not worried about that, okay. Hop on in, man. I'll go find the keys real quick for your mom.
Ofc. Bryan Waukazoo:	(inaudible)
Sgt. Richard Kumley:	Okay, keys should be right around in there, somewhere then. Yeah. This must be the tree with the drop off he's talking about. He said rifle, but, truck keys, I don't see them.
(radio noise)	
Ofc. Gerald Dillon:	(inaudible)

Sgt. Richard Kumley:	I don't know, but looking for keys out here is going to be like looking for a needle in a haystack.
Ofc. Gerald Dillon:	___ down the hill further.
Sgt. Richard Kumley:	I don't know, man. You find the keys? Oh you found, oh.
Ofc. Gerald Dillon:	I don't have my camera on.
Sgt. Richard Kumley:	Are the keys there? Should be right by, he said the keys would be right by the gun.
Ofc. Gerald Dillon:	Has a mag in it.
Sgt. Richard Kumley:	Does it?
Ofc. Gerald Dillon:	What's he a felon for?
Sgt. Richard Kumley:	Uh, narcotics.
Ofc. Gerald Dillon:	Well, it's not like he just threw it down here, he had to have walked it, someone had to have walk down here, so the keys should be
Sgt. Richard Kumley:	Serial number is covered up. Oh, here it is. (shouting) BRYAN!
Ofc. Bryan Waukazoo:	I'm coming.
Sgt. Richard Kumley:	No keys though, that's what we're out here looking for, though. I don't see any keys. And his truck's kind of blocking his mom.
Ofc. Gerald Dillon:	He said the keys would be right be the gun.
Sgt. Richard Kumley:	It was placed there, for whatever reason, I don't know.
Ofc. Bryan Waukazoo:	He must have got it painted like a Sim gun.
Sgt. Richard Kumley:	Well, I don't see the keys.
Ofc. Bryan Waukazoo:	That gun almost looks like, yeah, but it almost looks like that one Skaggs was missing, in-it? (laughs)
Sgt. Richard Kumley:	The blue gun from Artesia.
(radio noise)	
Sgt. Richard Kumley:	(on the radio) 10-16 firearm, Smith and Wesson, caliber .223 – Sam-Union-3-9-6-1-6 (off the radio) This

	one's loaded. 5-5-6. Well, I'm not going to look around anymore for the keys.
Ofc. Bryan Waukazoo:	That's twice we got him with a gun.
Sgt. Richard Kumley:	Well, at this point –
Ofc. Bryan Waukazoo:	I kind of feel bad, almost like we should have hauled that wood up for her, but it's too big to go in her fireplace anyway.
Sgt. Richard Kumley:	Yeah.
Ofc. Bryan Waukazoo:	Don't you know they
Ofc. Gerald Dillon:	___ are out front, that's kind of unusual.
Sgt. Richard Kumley:	It's kind of a mutual. But she's got to go in for her own mental health though. From what I gather, they both blew up at each other. And it just got out of hand. He's saying that she did. Yeah. Though he admitted to striking her too.
(knocking)	
Sgt. Richard Kumley:	No keys.
Georgia Hackett:	No keys.
Sgt. Richard Kumley:	Is these, is this your mag or his.
Georgia Hackett:	That, that's his.
Sgt. Richard Kumley:	That's his?
Georgia Hackett:	Yeah.
Sgt. Richard Kumley:	Okay, a felon's a felon.
Georgia Hackett:	Well, you know according to the tribal law.
Sgt. Richard Kumley:	Tribal law doesn't supersede Federal law.
Georgia Hackett:	It does say –
Sgt. Richard Kumley:	Tribal law means anyone convicted of a Class A offense
Georgia Hackett:	But it says in there, regardless of your, regardless of what court you were, after five years you have your tribal rights back.
Sgt. Richard Kumley:	Tribal rights, but not federal.

Georgia Hackett:	Well then, we have all these guys out here hunting.
Sgt. Richard Kumley:	I know, but he's going to have to answer for the firearm, he's a prohibited person.
Georgia Hackett:	But you don't have the keys?
Sgt. Richard Kumley:	No ma'am we couldn't find the keys.
Georgia Hackett:	Alright, so how am I supposed to
Sgt. Richard Kumley:	We're going to see if we can't get ahold of some, of some formula for you too.
Georgia Hackett:	Well, how would that work?
Sgt. Richard Kumley:	So, we'll get ahold of you, the number, did you, are you the one who called?
Georgia Hackett:	Yeah.
Sgt. Richard Kumley:	Is that a working phone number?
Georgia Hackett:	Yeah, it's my house.
Sgt. Richard Kumley:	Okay. We'll give you a call, okay. Alright ma'am, sorry.

END

Transcript of
Sgt. Richard Kumley - 2 Body Camera
4/9/2019

Government Exhibit 2
Transcript of body cam video

Sgt. Richard Kumley:	He's going to have to answer for the firearms.
Ofc. Bryan Waukazoo:	It says it's not coming back on file, I don't know if they're running it right.
Sgt. Richard Kumley:	Well, if it's not coming back on file means there's no 16 for it. Unless they do a further in depth check through the ATF, it won't tell you who it was registered to.
Ofc. Bryan Waukazoo:	Yeah.
Sgt. Richard Kumley:	Yeah, She's so suicidal we can't have this gun here.
Luke Burning Breast:	Hey man, that's fucking, let my mom keep it.
Sgt. Richard Kumley:	Because.
Luke Burning Breast:	Now, you know that crime that I was convicted of, isn't a crime anymore. So I'm not a felon.
Sgt. Richard Kumley:	What was your felony for?
Luke Burning Breast:	At the time it was drug user in possession of a firearm but it was changed and when the law was rewritten, my conviction fucking disappeared.
Sgt. Richard Kumley:	That's actually still a federal statute sir.
Luke Burning Breast:	It's, it's prohibited person in the language of the law was –
Sgt. Richard Kumley:	No, no, a user in, a user in possession Luke, we just sent somebody up for it, man.
Luke Burning Breast:	Well, this is what I'm saying, is that there's no record of my conviction or arrest.
Sgt. Richard Kumley:	That's fine man, but the reason why the guns being taken more importantly is because she's suicidal, she can't be around any guns right now.
Luke Burning Breast:	Well, no.

Sgt. Richard Kumley:	You can have your
Luke Burning Breast:	I don't keep the gun around her, man. That's why I took it down in the creek.
Sgt. Richard Kumley:	You'll have your day in court, Luke, okay.
Luke Burning Breast:	Fine. That's like my one worldly possession, dude.
(radio noise)	
Sgt. Richard Kumley:	Do you have another set of keys for your truck at your house, man?
Luke Burning Breast:	I could have showed you where the keys were.
Sgt. Richard Kumley:	We went all over there, man. We couldn't find it.
Luke Burning Breast:	Well, like I said, I could have showed you were they were, they were right on the fence line. Did you find that magazine down there?
Sgt. Richard Kumley:	Yeah.
Luke Burning Breast:	Well they were right next to it. Like maybe three feet from it, but they were in the fuck, like right there. Like the next two sticks over.
Sgt. Richard Kumley:	(on the radio) He's saying that those keys were right by that loaded mag we found next to that fence line. Could you take a quick glance for me please? (off the radio) Luke, you are saying that one mag, that mag that was right by the tree that was loaded?
Luke Burning Breast:	Yeah.
Sgt. Richard Kumley:	That
Luke Burning Breast:	There's uh, it's uh up.
Sgt. Richard Kumley:	It's right along where that fence is down, it's right there. Follow that uh, that fence line that's down.
Luck Burning Breast:	It's right there, though, like you're, like you have to be looking at me looking up at the house.
Sgt. Richard Kumley:	And it's right against, and then it's right next to a tree.
Luke Burning Breast:	But you know my mom has another set of keys.
Sgt. Richard Kumley:	Your mom does?

Luke Burning Breast:	Yeah, she's got keys for that
Sgt. Richard Kumley:	I guess he said that his mom's got keys for the truck. We're gonna, um, we're gonna figure out who we can call to get formula for you guys too.
Luke Burning Breast:	Alright, right on.
Sgt. Richard Kumley:	(on the radio) Alright, shot in the dark, can you do me a huge favor. Could you call out to White Buffalo Calf and see if they have uh, extra can of formula that we could get from them, so that we can feed a baby that's being breast-fed. Grandma is going to watch 'em here. (off the radio) Either White Buffalo Calf might have a can for you guys or uh, I'm sure the Children's Home will. If all else fails I'll get ahold of Missy Bartlett, she's the director of WIC, she might have one on hand.

END

ROSEBUD SIOUX TRIBAL COURT
ROSEBUD INDIAN RESERVATION
ROSEBUD, SOUTH DAKOTA

IN TRIBAL COURT

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

LUKE BURNING BREAST,

Defendant.

CR 19-0863/0864

MOTION FOR RETURN OF FIREARM

Luke Burning Breast, through his counsel, Terry L. Pechota, moves the Court to enter an Order authorizing the release of a rifle with scope that was taken when he was arrested in the above matter. At all times relevant, defendant was the buyer and owner of the firearm. This matter has now been resolved. Attached to this motion is defendant's birth certificate for identification and a copy of the purchase documents for the firearm. Defendant prays that the firearm be released to him.

Dated April 29th, 2019.

Terry L. Pechota
Attorney for Defendant
1617 Sheridan Lake Road
Rapid City, SD 57702
605-341-4400
tpechota@1868treaty.com

CERTIFICATE OF SERVICE

I certify that on the above month and day, I caused to be served upon Travis Wooden Knife a true and correct copy of the above motion.

Terry L. Pechota

ORDER RETURNING FIREARM

A motion being made to return firearm and good cause appearing, IT IS HEREBY ORDERED that the firearm taken from defendant upon his arrest in the above matter be return to him.

LeRoy Grieves
Tribal Court Judge

ATTEST:

Clerk of Courts

(SEAL)

STATE OF SOUTH DAKOTA
ROSEBUD SIOUX TRIBAL COURT
ROSEBUD RESERVATION
I HEREBY CERTIFY THAT I HAVE CAREFULLY EXAMINED THE WITHIN DOCUMENT AND COMPARED THE SAME WITH THE ORIGINAL NOW ON FILE AND OF RECORD IN THIS OFFICE AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME AND THAT THE ABOVE IS A CORRECT COPY OF THE FILING THEREON, DATED THIS 3 DAY OF Dec. 2019
CLERK
ROSEBUD SIOUX TRIBAL COURT

July 28, 2018

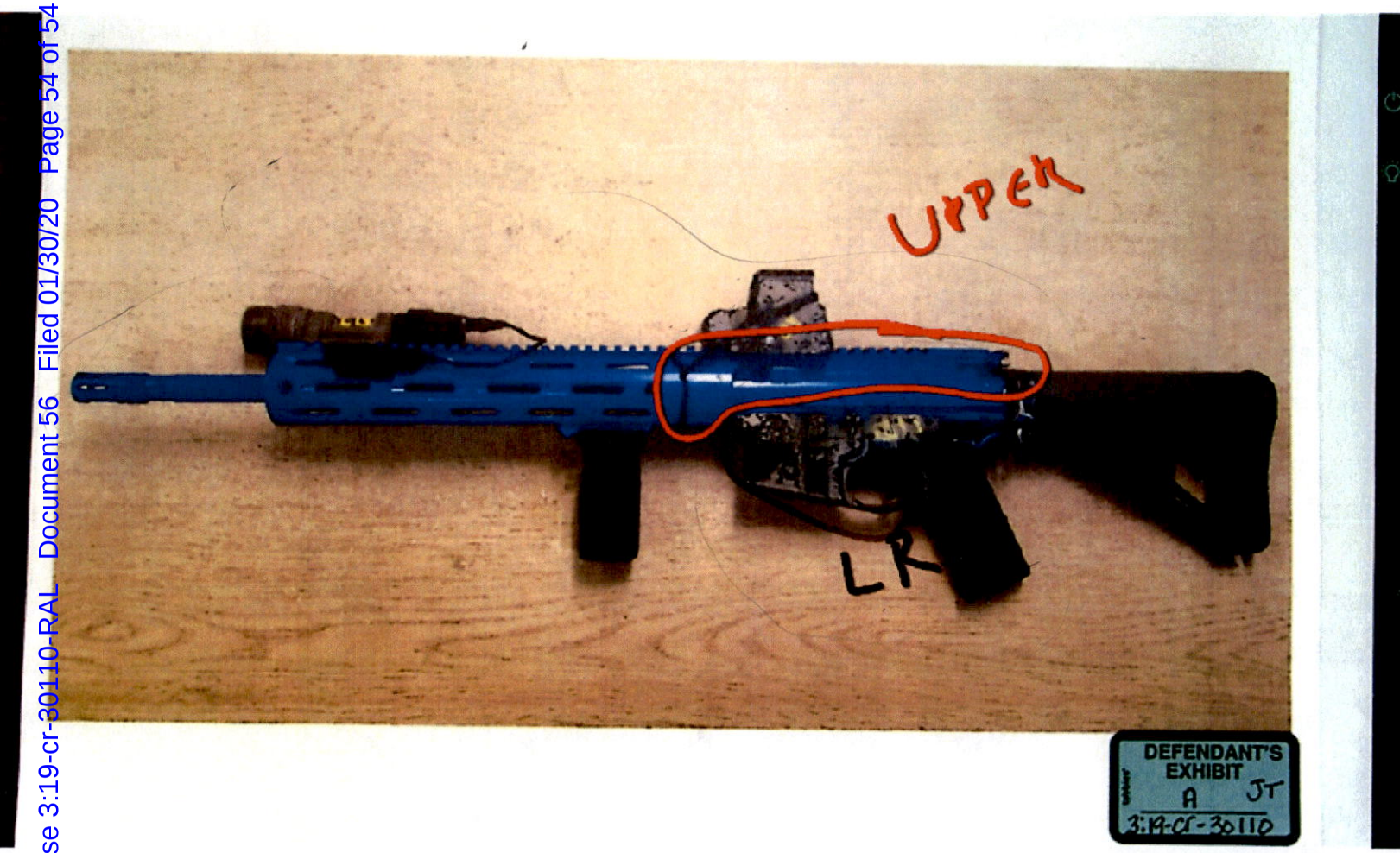
I, George M. Hackett, agree to sell SDW 15 to Luke J. Burns Trust.

George M. HACKETT

George M. Hackett

Luke Burns Trust

12/10/2019 10:49:24 AM



DEFENDANT'S EXHIBIT A JT 3:19-CR-30110

DEFENDANT'S EXHIBIT A-1 JT 3:19-CR-30110

PENGAD-Bayonne, N. J.