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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2022

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ALISBEY SANTILLON GATA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION FOR WRIT OF CERTIORARI

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MICHAEL CARUSO  
Federal Public Defender  
TRACY DREISPUL\*  
R. D'ARSEY HOULIHAN  
Assistant Federal Public Defenders  
*\*Counsel of Record*  
150 W. Flagler Street, Suite 1500 Miami,  
FL 33130  
305-536-6900

August 29, 2023

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## **APPENDIX**

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**A-1**

2023 WL 2663888

Only the Westlaw citation is currently available.  
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Alisbey Santillon GATA, a.k.a. Alexs  
Santillon, Defendant-Appellant.

No. 22-11514

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Non-Argument Calendar

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Filed: 03/28/2023

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:21-cr-20368-BB-1

#### Attorneys and Law Firms

Scott Dion, DOJ-USAO, Miami, FL, Yeney Hernandez, Lisa Tobin Rubio, U.S. Attorney Service—Southern District of Florida, U.S. Attorney Service—SFL, Miami, FL, for Plaintiff-Appellee.

Raymond D'Arsey Houlihan, III, Michael Caruso, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before Wilson, Luck, and Lagoa, Circuit Judges.

#### Opinion

PER CURIAM:

\*1 Alisbey Santillon Gata appeals his conviction for possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and argues that § 922(g) is unconstitutional under the Commerce Clause and the Tenth Amendment. Santillon Gata argues that § 922(g) is unconstitutional because it does not require that the possessed firearm substantially affect interstate commerce. Santillon Gata also argues that § 922(g) violates the Tenth Amendment. Because both of these issues have been addressed and foreclosed by this Court's prior precedent, we affirm. See *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003) (under our prior precedent rule, we must follow a prior binding precedent “unless and until it is overruled by this [C]ourt en banc or by the Supreme Court”).

#### I.

On May 21, 2021, Santillon Gata robbed a boutique store, during which he brandished and pointed a revolver firearm at the cashier and demanded her to open the jewelry case. Santillon Gata then fled the scene. Later that day, police officers identified Santillon Gata as the robber because he left his phone number at the pawn shop where he pawned some of the stolen items. Police officers obtained a warrant for Santillon Gata's residence, and upon arrival, searched Santillon Gata's person and found two guns.

Santillon Gata was subsequently indicted by a grand jury for Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (“Count 1”); brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (“Count 2”); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (“Count 3”). Pursuant to a written plea agreement, Santillon Gata agreed to plead guilty to Count 3, and the parties agreed to jointly recommend a sentence of eight years’ imprisonment. Santillon Gata stipulated in the factual proffer to the plea agreement that the two firearms that he possessed were manufactured outside the state of Florida and traveled in interstate commerce. At the change-of-plea hearing, the government stated in summarizing the factual basis for his guilty plea that the two firearms that Santillon Gata possessed were manufactured outside the state of Florida and affected interstate commerce. And Santillon Gata admitted that the proffered facts were true and pled guilty to Count 3.

A probation officer prepared a presentence investigating report (“PSI”). The PSI determined that Santillon Gata had a base offense level of 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(B). The PSI added four levels because Santillon Gata possessed the gun in connection with another felony, pursuant to U.S.S.G. § 2K2.1(b)(6)(B), raising his total offense level to 24. The PSI stated that Santillon Gata had prior convictions for uttering a forgery, grand theft, possession of MDMA, resisting an officer with violence, battery on a law enforcement officer, disorderly intoxication, and battery, and these convictions resulted in a criminal history score of four and a criminal history category of III. Santillon Gata also had the following charges against him that had been *nolle prossed*: possession of marijuana, possession of cannabis, threatening law enforcement, driving on a suspended license, and throwing a deadly missile.

\*2 The PSI calculated Santillon Gata's sentencing guidelines range as 63 to 78 months of imprisonment, with the statutory maximum imprisonment term being 120 months.

Santillon Gata objected to the four-level enhancement, arguing that he was suspected of committing the robbery but did not commit it. He also objected to the failure to include the reduction for acceptance of responsibility. He argued that if the reduction was applied and his objection to the enhancement was sustained, his total offense level would be 17 with a guidelines imprisonment range of 27 to 33 months. And he noted that this would not alter the 96-month recommended sentence agreed upon in the plea agreement.

At the sentencing hearing, Santillon Gata reiterated his objection to the four-level enhancement for possession of a firearm in connection with another felony offense and argued that it was unclear who committed the robbery. After hearing arguments from counsel and testimony from an officer, the district court overruled the objection to the enhancement. At the hearing, however, the government conceded that the three-level reduction for acceptance of responsibility applied.

The district court then determined that Santillon Gata's total offense level was 21, with his guidelines range being 46 to 57 months of imprisonment. After hearing from the owner of the robbed boutique, Santillon Gata, and the parties' counsels, the district court sentenced Santillon Gata to 96 months of imprisonment and 3 years of supervised release. The court also dismissed Counts 1 and 2. This appeal ensued.

## II.

Generally, we review the constitutionality of a statute *de novo*, as it is a question of law. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). However, if the issue is raised for the first time on appeal, we review for plain error only. *Id.* Plain error occurs only if (1) there was error, (2) it was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States v. Jones*, 289 F.3d 1260, 1265 (11th Cir. 2002)).

## III.

As Santillon Gata concedes, decisions by this Court "have clearly held that 18 U.S.C. § 922(g) is constitutional under the

Commerce Clause." *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017) (citing *United States v. McAllister*, 77 F.3d 387, 391 (11th Cir. 1996)). We have also rejected as-applied challenges to 18 U.S.C. § 922(g), holding that the government proves a "minimal nexus" to interstate commerce where it demonstrates that the firearms were manufactured outside of the state where the offense took place and, thus, necessarily traveled in interstate commerce. *Wright*, 607 F.3d at 715–16. And we have specifically rejected constitutional challenges to § 922(g) under *United States v. Lopez*, 514 U.S. 549 (1995), concluding that "[n]othing in *Lopez* suggest[ed] that the minimal nexus test should be changed." *McAllister*, 77 F.3d at 390 (quotation marks omitted); *see also Lopez*, 514 U.S. at 561–62 (holding that the Gun-Free School Zones Act was unconstitutional because it did not "substantially affect" interstate commerce and lacked a jurisdictional element to ensure each "firearm possession in question affects interstate commerce").

\*3 We have also held that Congress does not violate the Tenth Amendment when it enacts legislation through the constitutionally permissible exercise of its Commerce Clause power. *See Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995). Further, we have held that § 922(g) does not violate the Tenth Amendment. *See Hiley v. Barrett*, 155 F.3d 1276, 1277 (11th Cir. 1998), *aff'g*, *Nat'l Ass'n of Gov't Emps. v. Barrett*, 968 F. Supp. 1564, 1577–78 (N.D. Ga. 1998) (noting that because § 922(g) is a valid exercise of Congress's commerce authority, it cannot violate the Tenth Amendment).

Here, Santillon Gata did not object to the constitutionality of § 922(g) under either the Commerce Clause or the Tenth Amendment in the district court. Therefore, we review his arguments only for plain error. And, as Santillon Gata concedes, his arguments that § 922(g) is unconstitutional<sup>1</sup> are barred by our prior panel precedents holding that § 922(g) is constitutional under the Commerce Clause, even when the gun was only manufactured outside the state of conviction, and under the Tenth Amendment because it does not invade the province of the states. Indeed, Santillon Gata admitted that the guns that he possessed were manufactured outside of Florida.

We therefore affirm his conviction.

## AFFIRMED.

## All Citations

Not Reported in Fed. Rptr., 2023 WL 2663888

## Footnotes

1 When a defendant makes only passing references to an issue in his brief, it constitutes a failure to devote a discrete section of his argument in his appellate brief to an issue, and that issue is deemed abandoned on appeal. *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003), abrogated on other grounds by *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). Here, while Santillon Gata mentioned an as-applied challenge to § 922(g) in an issue statement and in the opening sentence of his Tenth Amendment argument of his brief, he does not otherwise make an as-applied argument about the facts in his case and only addresses the facial constitutionality of the statute. But, as explained above, even if Santillon Gata did not abandon an as-applied challenge to § 922(g), it is foreclosed by our precedent.

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**A-2**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 22-11514-DD

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ALISBEY SANTILLON GATA,  
a.k.a. Alexs Santillon,

Defendant - Appellant.

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Appeal from the United States District Court  
for the Southern District of Florida

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**ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC**

BEFORE: WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

**A-3**

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF FLORIDA**  
**MIAMI DIVISION**

UNITED STATES OF AMERICA

v.

**ALISBEY SANTILLON GATA****JUDGMENT IN A CRIMINAL CASE**

§

§

§

§ Case Number: **1:21-CR-20368-BB(1)**§ USM Number: **02399-506**

§

§ Counsel for Defendant: **Raymond D'Arsey Houlihan**§ Counsel for United States: **Nardia Haye****THE DEFENDANT:**

<input checked="" type="checkbox"/>	pleaded guilty to:	<b>Count Three of the Indictment</b>
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:922Q.F; Possession Of A Firearm By A Convicted Felon	10/20/2020	3

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

The defendant has been found not guilty on count(s)  
 Count(s)  is  are dismissed on the motion of the United States

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

April 14, 2022

Date of Imposition of Judgment

Signature of Judge

**BETH BLOOM**  
**UNITED STATES DISTRICT JUDGE**

Name and Title of Judge

April 14, 2022

Date

DEFENDANT: ALISBEY SANTILLON GATA  
CASE NUMBER: 1:21-CR-20368-BB(1)

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

**Ninety-six (96) months as to Count 3.**

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

The Court recommends the Defendant be designated to a South Florida Facility or as close as possible and RDAP.

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

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

at  a.m.  p.m. on

as notified by the United States Marshal.

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

before 2 p.m. on

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to

at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALISBEY SANTILLON GATA  
CASE NUMBER: 1:21-CR-20368-BB(1)

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (3) years.**

## MANDATORY CONDITIONS

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

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

DEFENDANT: ALISBEY SANTILLON GATA  
CASE NUMBER: 1:21-CR-20368-BB(1)

## STANDARD CONDITIONS OF SUPERVISION

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

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

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at [www.flsp.uscourts.gov](http://www.flsp.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

DEFENDANT: ALISBEY SANTILLON GATA  
CASE NUMBER: 1:21-CR-20368-BB(1)

## SPECIAL CONDITIONS OF SUPERVISION

**Mental Health Treatment:** The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

**Permissible Search:** The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

**Substance Abuse Treatment:** The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

**Surrendering to Immigration for Removal After Imprisonment:** At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

**Unpaid Restitution, Fines, or Special Assessments:** If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: ALISBEY SANTILLON GATA  
 CASE NUMBER: 1:21-CR-20368-BB(1)

## CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
<b>TOTALS</b>	\$100.00	\$0.00	\$0.00		

The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

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

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

<input checked="" type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input checked="" type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **\$0.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

\*\* Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

\*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ALISBEY SANTILLON GATA  
CASE NUMBER: 1:21-CR-20368-BB(1)

## SCHEDULE OF PAYMENTS

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

**A**  Lump sum payments of \$100.00 due immediately, balance due

**It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 3, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:**

**U.S. CLERK'S OFFICE  
ATTN: FINANCIAL SECTION  
400 NORTH MIAMI AVENUE, ROOM 8N09  
MIAMI, FLORIDA 33128-7716**

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

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

Joint and Several

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

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

**FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.