No. _____

9th Cir. No. 22-10212
D.C. No. 4:19-cr-01094-JGZ-JR-1

IN THE

Supreme Court of the United States

ISAIAS DELGADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Government Violated Mr. Delgado's Right to Due Process and a Fair Trial by Withholding Evidence?

II. Whether The Improper Admission of Evidence Deprived Mr. Delgado of a Fair Trial and Violated the Confrontation Clause?

III. Whether The Court Violated Mr. Delgado's Fifth Amendment Right Against Self Incrimination?

IV. Whether Mr. Delgado Was Sentenced in Violation of Federal Law?

V. Whether Mr. Delgado Received Constitutionally Ineffective Assistance of Counsel?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

RELATED CASES

- *United States v. Isaias Delgado*, No. CR-19-01094-001-TUC-JGZ (JR), U.S. District Court for the District of Arizona. Judgment entered Aug. 24, 2022.

- *United States v. Isaias Delgado*, No. 4:19-cr-01094-JGZ-JR-1, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 24, 2024.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Isaias Delgado ("Delgado"), prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit denying Mr. Delgado's Petition for Panel Rehearing and Petition for Rehearing En Banc was not published, but is annexed as Appendix A. The Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming Mr. Delgado's conviction and sentence was not published, but is annexed as Appendix B. The Judgment of the United States District Court for the District of Arizona was but published, but is annexed as Appendix C.

JURISDICTION

The United States Court of Appeals, Ninth Circuit decided this case on April 24, 2024. The Petition for Panel Rehearing and Petition for Rehearing En Banc was denied on May 31, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. §922(a)(1)(A)

   (a) It shall be unlawful—

   (1) for any person—

   (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce

2. U.S.S.G. §2K2.1(b)(5)

(b) Specific Offense Characteristics

…

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by 2 levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by 2 levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i), increase by 5 levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

3. U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 24, 2019, Mr. Delgado was charged with one count (Count 1) of Engaging in the Business of Dealing Firearms Without a License in violation of 18 U.S.C. §922(a)(1)(A) and three counts (Counts 2-4) of Knowingly Making False Statements in Connection with the Purchase of Firearms in violation of 18 U.S.C. §924(a)(1)(A). 2-ER-018.

ATF agents alleged Mr. Delgado was engaging in the business of firearms dealing without a dealer's license. The Agents alleged that on March 14th and 15th, 2019, Mr. Delgado paid $14,693.25 to a licensed federal firearms dealer out of Illinois for two rifles. Mr. Delgado purchased the rifles from an on-line auction site. The rifles were mailed to N&N Firearms in Tucson for transfer to Mr. Delgado. On March 20, 2019, Mr. Delgado took possession of the two rifles and completed and signed ATF Form 4473. He also purchased a pistol directly from N&N Firearms.

On March 23, 2019, Mr. Delgado purchased two more firearms from an online auction site from out of state licensed federal firearms dealers to be shipped to N&N Firearms. Mr. Delgado paid a licensed federal firearms dealer in North Dakota for the two rifles.

On March 27, 2019, Mr. Delgado purchased two belt-fed rifles from a licensed federal firearms dealer in Michigan. On the same date, he purchased three upper receivers and three multi-caliber lower receivers via an online auction site from a licensed federal firearms dealer in Kentucky. The purchases were to be delivered to N&N Firearms.

On April 4, 2019, Mr. Delgado went to N&N Firearms to take possession of his firearm purchases. Mr. Delgado left the store without the firearms and planned to return to retrieve them later that day. As he exited the store, ATF agents – who had Mr. Delgado under surveillance – approached Mr. Delgado in the parking lot and questioned him about his firearms purchases and sales. Mr. Delgado stated he had returned to the United States from Mexico that morning (he had a girlfriend – his now wife – in Mexico). Mr. Delgado told the agents he purchases and shoots firearms as a hobby and sometimes sells his firearms via Armslist.com in private party sales.

The ATF agents seized the five firearms at N&N Firearms and arrested Mr. Delgado on a belief he had lied about his address because he had just returned from Mexico after being there for several days.

Mr. Delgado's trial took place from August 9-12, 2021. Counts 2-4 were dismissed one week before trial. 1-ER-009. A jury found Mr. Delgado guilty of the

remaining single count of Engaging in the Business of Dealing Firearms Without a License on August 12, 2021. *Id*. Mr. Delgado was sentenced on August 23, 2022, to thirty-six (36) months imprisonment followed by twenty-four (24) months of supervised release. 1-ER-009.

Mr. Delgado timely filed a notice of appeal on August 24, 2022. 5-ER-859. On April 24, 2024, the Ninth Circuit affirmed Mr. Delgado's conviction and sentence. On May 31, 2024, the Ninth Circuit denied Mr. Delgado's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Government Violated Mr. Delgado's Right to Due Process and a Fair Trial by Withholding Evidence.

Fed.R.Crim.P. 16 provides the defendant with "a broad right of discovery." *United States v. Stever,* 603 F.3d 747, 752 (9th Cir. 2010). Under the rule, the government has a "continuing duty" to disclose: (1) the defendant's oral, written or recorded statements, (2) the defendant's prior criminal record, (3) documents and tangible objects within the government's possession that (i) are material to the preparation of the defendant's defense, (ii) are intended for use by the government as evidence in chief at the trial, or (iii) were obtained from or belong to the defendant; (4) reports of examinations and tests that are material to the preparation of the defense; and (5) written summaries of expert testimony that the government intends to use during its case in chief at trial. Fed.R.Crim.P. 16(a), (c). Rule 16 is a product of fairness. It is not limited to what the government intends to use at trial. It permits the defendant to obtain

discovery that is "relevant" to the development of a possible defense. *United States v. Clegg,* 740 F.2d 16, 18 (9th Cir.1984).

The Due Process Clause provides criminal defendants with a second discovery mechanism. *Brady v. Maryland,* 373 U.S. 83 (1963). It imposes "an ongoing duty" on the government to (1) "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles v. Whitley,* 514 U.S. 419, 432 (1995), and (2) disclose exculpatory evidence and other evidence that is favorable to the accused, including impeachment evidence. *Giglio v. United States,* 405 U.S. 150, 154–55 (1972). To obtain discovery under *Brady,* the information sought must be "material" or "favorable" to the defense. *Woods v. Sinclair,* 764 F.3d 1109, 1127 (9th Cir.2014). Favorable information need not be admissible if the information could reasonably lead to admissible evidence. *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239 (D. Nev. 2005). If a *Brady* request places a prosecutor in doubt, disclosure is the rule. *Cone v. Bell,* 556 U.S. 449, 470 n. 15 (2009).

The Ninth Circuit concluded Mr. Delgado failed to demonstrate the government's withholding of evidence was a violation of *Brady*. Specifically, that Exhibit 97 and the border crossing chart were favorable to the defense and material to guilt or punishment.

1. Report on Border Crossings

Four months after Mr. Delgado's trial, on November 18, 2021, the Government made additional disclosures to the defense (3 pages of officer case reports and 70 pages of border crossings). At the sentencing hearing, the Government described the report as

"analyzing a great deal of records, the border crossing records, the firearm purchases." 5-ER-641. The Government concedes the report disclosed after trial contained a synopsis and analysis of date correlations that brought new information to light. 5-ER-641. The Government admitted during the sentencing hearing the report "was helpful for me as well to see those correlations brought to light." 5-ER-641. The report brought forth new information even the Government was not aware of by reviewing the raw data. The Government argues several times the report and data was "relevant in a number of ways." 5-ER-640-41. Therefore, the Government agrees it failed to disclose relevant information to Mr. Delgado. According to the Government's own statements, the border crossing chart was material to sentencing.

Under *Brady* if the Government suppresses evidence favorable to the accused, this violates due process where the evidence is material either to guilt or to punishment**.** The fact the disclosures were relevant to Mr. Delgado's sentencing still falls under *Brady*. The border crossing chart was also favorable to Mr. Delgado. The Ninth Circuit construes too narrowly what constitutes "favorable." "Whether evidence is 'useful,' 'favorable,' or 'tends to negate the guilt or mitigate the offense' are semantic distinctions without difference in a pretrial context." *United States v. Acosta,* 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005). Internal and investigatory records created or maintained by the prosecution or law enforcement—including reports produced by law enforcement—are, by their nature, unique and potent impeachment evidence. *Blumberg v. Garcia*, 687 F. Supp. 2d 1074, 1136 (C.D. Cal. 2010).

Even the district court acknowledged the border crossing analysis and report had the potential to contain exculpatory information. As the district court pointed out:

> "So we have here an individual, Mr. Delgado, who travels frequently to Mexico, and the defense objection is we can't tell from what's been provided…that trips to Mexico aren't related to other business or reasons for Mr. Delgado being there versus something that has to do with the sale of weapons...So it seems to me that if the government is seeking an enhancement based on trafficking in Mexico or false statements as to where Mr. Delgado lives, then I think we probably need to hear that evidence and to see the chart that you've described, because I imagine there's an argument, based on when the trips occurred in relation to the purchases, whether or not they would support the inference either that he didn't reside there or that he did reside in Mexico and/or that he was trafficking weapons. I think the summary that's in this report probably isn't sufficient, given the facts as a whole." 5-ER-642-43.

In other words, the border crossing chart would have been favorable to the defense if the data showed Mr. Delgado was in Mexico for valid reasons unrelated to the sale of firearms. For example, Mr. Delgado was traveling once a week to Mexico to visit his girlfriend (now wife) and child, who resided there. (District Ct. Doc. #166). Where doubt exists as to the usefulness of evidence, the Government should resolve such doubts in favor of full disclosure. *United States v. Van Brandy*, 726 F.2d 548, 552 (9th Cir. 1984).

2. Transcript of Defendant's Statements

The Government also failed to disclose the transcript of Mr. Delgado's statements (Exhibit 97) until the morning of trial. 4-ER-330; 5-ER-577-78. Although the Government did not play the recording of Mr. Delgado's statements during trial, they used the transcript of the conversation to refresh the law enforcement agent's recollection about the statements in the booking area. 4-ER-330. The Ninth Circuit

pointed out Mr. Delgado already possessed the audio recording of the conversation prior to trial, but the audio recording was not used during the trial. The Government conceded the transcript was not disclosed, which the Government did use at trial. The transcript of Mr. Delgado's statements, which the Government used to enhance the agent's testimony, should have been disclosed prior to trial.

The transcript was material to the agent's testimony. 4-ER-351-53. The agent identified Exhibit 97 as "the transcription of the defendant's statements in the booking area." 4-ER-352. The agent then used the transcript to testify about a statement attributed to Mr. Delgado that he has knowledge of ATF laws, spoke of machine guns and silencers in the booking area, and the ATF rules and requirements for transferring those types of items. 4-ER-353. The transcript itself, aside from the audio, could have been used to impeach the ATF agent's testimony had it been disclosed prior to trial and defense counsel had the time to review it and compare it with the audio version. 4-ER-577. Any discrepancies between the audio and the transcript could have been used to impeach the agent's recollection of the conversation (that he was only able to recall after reviewing the transcript). Defense counsel felt the Government intentionally utilized the transcript only (Exhibit 97), and not the corresponding audio, to keep the defense from presenting the whole story regarding Mr. Delgado's statements and the context for them (which the district court had previously ruled could not be admitted by the defense as it constituted hearsay). 4-ER-577-78. That context was favorable to the defense. Defense counsel wasn't even aware the Government would be introducing Mr. Delgado's statements contained in Exhibit 97 until the morning of trial when the

Government disclosed – for the first time – Exhibit 97. 4-ER-577. The Government admitted it did not disclose the subject of the agent's testimony – that it was going to introduce Mr. Delgado's statements through the testimony of the agent – until the beginning of trial. 4-ER-578. Mr. Delgado was prejudiced because, due to the late disclosure of the transcript, defense counsel was unable to counter the Government's narrative by getting a redacted version of the audio admitted showing the whole context of Mr. Delgado's statements and not just those cherry-picked from the transcript by the Government. *Id*. at 577-78. Internal and investigatory records created or maintained by the prosecution or law enforcement—such as records of interviews—are, by their nature, unique and potent impeachment evidence. *Blumberg v. Garcia*, 687 F. Supp. 2d 1074, 1136 (C.D. Cal. 2010).

The Government failed in its disclosure duties in this case. The Government should not be allowed to violate Mr. Delgado's constitutional rights to due process and a fair trial by conducting a trial by surprise.

II. The Improper Admission of Evidence Deprived Mr. Delgado of a Fair Trial and Violated the Confrontation Clause.

1. Firearms Admitted Into Evidence

Federal Rule of Evidence 403 is designed to protect against the unnecessarily prejudicial presentation of evidence. The use of manipulated or altered evidence raises a number of legal issues, including authenticity, reliability, and materiality. The authentication of evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Harrington*, 923

F.2d 1371, 1374 (9th Cir. 1991) (quoting Fed. R. Evid. 901(a)). The burden is on the government to "introduce sufficient proof so that a reasonable juror could find that [the evidence is] in 'substantially the same condition' as when [it] was seized." *Id*. (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)).

The Ninth Circuit found no error by the district court's admission of firearms seized by ATF agents because "the record does not support Delgado's contention that the government tampered with the evidence." That assertion is false as supported by the Government's own testimony, which contradicts itself on whether the firearms were altered before they were shown to the jury.

On Trial Day 2, before the physical firearms were shown to the jury and admitted into evidence, the agent testified about a photograph. 3-ER-172. The agent testified the photograph depicted three firearms seized from the dealer. *Id*. When the agent asked if the firearms depicted in the photograph appeared as they were delivered to the dealer, the agent responded, "So again, he had ordered the lowers and he had ordered the matching uppers. I can't recall that they were put together, but they all arrived together. We may have just assembled the upper on the lower." 3-ER-172.

In contrast, when the actual firearms were later admitted into evidence and paraded in front of the jury, the agent in no way indicated the weapons came disassembled when they were seized but were later assembled by ATF agents. 3-ER-216-22. The witness did refer to matching "lower" and "uppers" but did not indicate the lowers and uppers were not assembled when they were seized. *Id*. at 222-23. Instead, the agent contradicted the earlier testimony by stating the weapons had not been

"altered in any way" other than being rendered safe for storage. 3-ER-214. The jury was then shown completely functioning .50 caliber weapons, rather than the disassembled pieces that Mr. Delgado had ordered. Neither during nor after this testimony did the witness clarify that the agents assembled the weapons *after* they were seized, and that the weapons being shown to the jury were in a different condition than when they were ordered.

The district court also admitted a photograph of the weapons (Exhibit 53) over objection. Defense counsel's objection to Exhibit 53 (the photograph) was only overruled by the district court with the "limitation in the question" that the firearms in the photograph were in the same state as when ATF took possession except the agents "may have just assembled the upper on the lower." 3-ER-172-73. The actual, physical weapons shown to the jury were not admitted with the same qualification or limitation. Instead, they were admitted pursuant to the false testimony of the agent that the weapons had not been altered in any way. The Government deliberately engaged in a prejudicial and inflammatory display of the fully assembled weapons to the jury, rather than showing them to the jury in the disassembled condition in which they were seized. The prejudicial effect of such a display is inherent in the difference between showing a juror ten fully assembled, fully functioning high caliber rifles, versus showing them the disassembled parts. This was done deliberately by the Government.

2. Hearsay Evidence

The Ninth Circuit concluded there was no abuse of discretion when the district court overruled Mr. Delgado's hearsay objection to Agent Bort's testimony about his

conversation with Mr. Delgado. The Ninth Circuit found Mr. Delgado had not shown the statements of the gun dealer were testimonial in nature or offered for the truth of the matter asserted.

Mr. Delgado's hearsay objections include statements alleged to have been made by Mr. Delgado to a firearms store employee and the employee's statements back to Mr. Delgado. 4-ER-335-38. Agent Bort, who testified about the conversations between Mr. Delgado and the store employee, was not present for the conversations. Hearsay within hearsay, or double hearsay, is only admissible if each statement qualifies under an exemption or exception to the hearsay rule. *U.S. v. Arteaga*, 117 F.3d 388, 396 n.12 (9th Cir. 1997).

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). In this case, the district court admitted the alleged statements of Mr. Delgado to the store employee, and the store employee's statements to Mr. Delgado, as evidence against Mr. Delgado even though he had no opportunity to cross-examine the employee. That alone is sufficient to make out a violation of the Sixth Amendment. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. *Id.* at 68–69, 124 S. Ct. at 1374.

The district court admitted (over objection) several alleged statements by Mr. Delgado to the store employee, and the store employee's statements to Mr. Delgado.

This includes the statement that the store employee "offered to transfer a gun through his business to Mr. Delgado." That statement was clearly offered by the Government for the truth of the matter asserted. Prior to the admission of that statement, the Government argued, and Agent Bort testified, that Mr. Delgado had "other options" available to him other than private sale if he was unhappy with a gun he had purchased from an online auction. 4-ER-337-38. When asked what those other options were, Agent Bort then testified to the employee's statement that one of those "other options" was to transfer the gun through the store. 4-ER-338.

3. Mr. Delgado's Statements About Firing The Guns

The Ninth Circuit found Agent Bort's testimony about Mr. Delgado's statements on the rifle jamming issue was not misleading and, consequently, did not trigger the rule of completeness. During direct examination, the Government elicited testimony from the agent about the jamming of the gun and that a person who had fired the gun would be able to describe the process of jamming, what he did to fix it, etc. This implied that because Mr. Delgado did not provide those details or explanation, then he must not have fired the gun. That implication was misleading. Without the statements about Mr. Delgado having fired the gun, the jury was left with the impression that the agent's testimony told the whole story. Instead, the agent's testimony left the jury with the impression that Mr. Delgado had never shot the gun. If the district court had allowed the defense to admit the remaining portions of Mr. Delgado's recorded statement, the jury would have learned that he did, in fact, fire approximately 200 rounds through it and had used it for shooting.

The Confrontation Clause of the Sixth Amendment, which "guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him,'" includes "the right of effective cross-examination." *United States v. Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007). Effective cross-examination is critical to a fair trial because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105 (1974). The Ninth Circuit has "emphasized the policy favoring expansive witness cross-examination in criminal trials." *Larson*, 495 F.3d at 1102.

The rule of completeness, Fed.R.Evid. 106, applies to written and recorded statements. The testimony elicited by the Government on direct examination involved Mr. Delgado's recorded statements to law enforcement, and therefore the rule of completeness applies. Under Rule 106, if a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time. One commentator has aptly summarized Fed.R.Evid. 106 as follows:

> Basically, the rule prevents a party from achieving an unfair result by introducing all or part of a writing or recording out of its context. When the trial court finds that fairness requires the admission of additional evidence, the proponent must decide between allowing all of the evidence to be admitted and withdrawing the originally proffered portions.
> ....
> The party who wants to complete the record is entitled under the Rule to compel the offer of the additional information at the time the proponent offers the partial evidence, rather than waiting until a later stage of the trial.... As such, the rule reduces the risk that a writing or recording will be taken out of context and that this initial misleading impression will take hold in the mind of the jury. The opponent has discretion, of course, to wait to offer the completing evidence until

> a later point. But the rule recognizes that sometimes waiting until later to put an unfair presentation of harmful evidence in context is just not good enough.

2 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 106.02 (11th ed. 2015) (footnotes omitted); *see also* 1 Kenneth S. Broun, *McCormick on Evidence* § 56 (7th ed. 2013) (recognizing that Fed. R. Evid. 106 permits "the adversary ... to require the proponent to introduce both the part which the proponent desires to introduce and other passages which are an essential part of its context"); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:42 (4th ed. 2015) ("[S]ometimes the party who offers a written or recorded statement (or part of one) may himself be required in appropriate cases to present additional parts, rather than leaving the task of providing necessary context to other parties. In both cases, the aim is to prevent distortion and consequent misleading.").

The Government cited to *United States v. Ortega*, 203 F.3d 675 (9th Cir. 2000) for the proposition that a defendant's self-inculpatory statements, when offered by the government, are admissions by a party-opponent and therefore are not hearsay, but the non-self-inculpatory statements are inadmissible hearsay. But that position is not the uniform view. *See, e.g.*, *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (A hearsay objection "does not block [information's] use when it is needed to provide context for a statement already admitted."); *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) ("[O]ur case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence."); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately

fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials and creates difficulties for both litigants and the trial court."); *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (Under Rule 106, otherwise inadmissible evidence is admissible where it "is necessary to correct a misleading impression.").

By excluding Mr. Delgado's statements in violation of the rule of completeness, the district court was essentially requiring Mr. Delgado to take the stand and testify in violation of his right to remain silent and presumption of innocence. In fact, in excluding the statements on the basis of hearsay the district court stated, "And certainly your client can testify as to why he wanted the gun, why he fired the gun…" 4-ER-397-98. And later, when defense counsel stated he would object to any indication by the government in closing that Mr. Delgado did not shoot or use the guns, the district court again stated, "So as far as the government preventing you for admitting that kind of testimony…Mr. Delgado could testify to that if he chose to do so or not." 4-ER-418.

The Ninth Circuit has identified three factors that should be considered in determining whether a defendant's Confrontation Clause right to cross-examination was violated:

(1) whether the excluded evidence was relevant;

(2) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and

(3) whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness.

United States v. Larson, 495 F.3d 1094, 1103 (9th Cir. 2007). First, the excluded evidence regarding Mr. Delgado's recorded statements to law enforcement about whether he had fired the gun were relevant. During direct examination, the Government elicited testimony from the agent about the jamming of the gun and that a person who had fired the gun would be able to describe the process of jamming, what he did to fix it, etc. This implied that because Mr. Delgado did not provide those details or explanation, then he must not have fired the gun. That implication was incorrect. Therefore, the statements from Mr. Delgado to the agents that he had, in fact, fired the gun were relevant given the misleading impression given by the agent in his direct examination.

There was no other legitimate interests outweighing the defendant's interest in presenting the evidence. In fact, the statements by Mr. Delgado about having fired the gun went directly to the Government's assertions throughout the trial that Mr. Delgado was not a hobbyist and doesn't like guns for their use, but only as a commodity to buy and sell. The fact that Mr. Delgado did actually shoot the guns undermines the Government's theory.

Finally, the exclusion of the statements did not leave the jury with sufficient information to assess the credibility of the agent because without the statements about Mr. Delagdo having fired the gun, the jury was left with the impression that the agent's testimony told the whole story of the interaction. In fact, the agent's testimony about Mr. Delgado's statements left the jury with the impression that Mr. Delgado had never

shot the gun. If the court allowed the defense to admit the remaining portions of Mr. Delgado's recorded statement, the jury would have learned that he did, in fact, fire approximately 200 rounds. Defense counsel informed the district court that because of the impression left by the agent's testimony (that remained incomplete and went uncorrected), counsel would object to any indication by the government in closing that Mr. Delgado did not shoot or use the guns because Mr. Delgado's full recorded statement (Exhibit 97) shows Mr. Delgado talks about shooting the weapons.

4. Agents Cunningham's Testimony

The Government elicited improper expert testimony from a non-qualified expert, Agent Cunnigham, about Mr. Delgado's tax returns. The agent also gave expert testimony about the firearms. The Ninth Circuit found the Agent's lay opinion testimony about certain "red flags" in her investigation, income thresholds for dealers, and observations of Mr. Delgado's shooting range video "were permissibly based on her involvement in the investigation." The testimony about Mr. Delgado's tax returns, his business income, the percentage of income earned from firearm sales, taxes owed, etc, constitutes improper expert testimony. Many courts have treated testimony such as the Government elicited from its agents as expert testimony. *See, e.g., United States v. Tarwater*, 308 F.3d 494, 502, 512-14 (6th Cir. 2002) (approving a district court's decision to allow an IRS agent to testify as an expert regarding a defendant's under-reporting of income); *United States v. Pedroni*, 45 Fed. Appx. 103, 109 (3d Cir. Apr. 18, 2002) (Unpub. Disp.) (approving a decision to allow an IRS agent to testify as an expert regarding tax returns and financial transactions, the taxing structure as it pertained to motor fuel

excise tax, and methods of evasion or tax fraud); *United States v. Stokes*, 998 F.2d 279, 280-281 (5th Cir. 1993) ("Michael Susano, a revenue agent and eighteen year employee of the IRS, was permitted by the district court to testify as an expert in the calculation and compilation of income and taxes "); *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986) ("Expert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence").

Agent Cunningham also testified about the variety and quantity of firearms purchased, whether she thought Mr. Delgado was a collector or enthusiast, the pattern of weapons purchased, Mr. Delgado's percentage of income from firearm sales, and whether Mr. Delgado was an expert shooter. Such testimony constitutes expert testimony because it was based upon Agent Cunningham's specialized knowledge about firearms, firearm dealers, firearm sales, and expert shooters. These were not simply facts learned or observed during the investigation, but to form such opinions requires specialized and extensive knowledge of the specific firearms involved, expert shooters and the gun industry.

III. The Court Violated Mr. Delgado's Fifth Amendment Right Against Self Incrimination.

During Agent Bort's testimony, the Government attempted to shift the burden to Mr. Delgado to prove his innocence. Defense counsel objected, and the district court overruled the objection:

> "BY MS WOOLRIDGE: Q And, sir, at any point, did the defendant provide you any information, you know, recordings, photographs of license plates, or anything that he claimed to have maintained?

> MR. ROACH: Objection, burden-shifting.
>
> THE COURT: Overruled.
>
> THE WITNESS: We received no videos, photos, bills of sale. During the booking process, Mr. Delgado indicated that any bills of sale that he had were vacuumed up at a car wash.
>
> THE COURT: All right. And I did overrule that objection, but I'll remind you jurors that it is the government that has the burden of proving each of the elements of the offense beyond a reasonable doubt." 4-ER-323.

Defense counsel then moved for a mistrial, which was denied. *Id*.

The prosecutor's questions and the agent's testimony about Mr. Delago's failure to produce evidence of his innocence constituted improper burden shifting. In *Griffin v. California*, this Court held the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. 609, 615 (1965). The Fifth Amendment right to remain silent contains an implicit assurance "that silence will carry no penalty." *Doyle v. Ohio,* 426 U.S. 610, 618, 96 S.Ct. 2240 (1976). "[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007) (citing *Doyle*).

The rule against Fifth Amendment violations is not as narrow as the Government would like this Court to construe it. A prosecutor's comment that the government's evidence on an issue is "uncontradicted," "undenied," "unrebutted," "undisputed," etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could have contradicted, denied, rebutted or disputed the government's evidence

was the defendant himself. *United States v. Cotnam,* 88 F.3d 487, 497 (7th Cir. 1996). In this case, not only was the only person who could have contradicted or disputed the Government's evidence Mr. Delgado, but the Government specifically pointed to Mr. Delgado as the person who should have provided that evidence. 4-ER-360 ("…at any point, did the defendant provide you any information…"); *See id*. at 499 (prosecutor's remarks about uncontroverted evidence unconstitutionally infringed upon defendant's Fifth Amendment right not to testify).

The Ninth Circuit concluded "the government's single question about whether Delgado had produced certain records of sale was not so prejudicial as to render his trial fundamentally unfair" because the court issued a curative instruction. The denial of a motion for a mistrial will be upheld if a "curative jury instruction rendered the prosecutorial error harmless beyond a reasonable doubt." *United States v. Twitchell*, 69 F. App'x 892, 893 (9th Cir. 2003). The district court gave the following curative instruction in this case after the jury returned from its break:

> "So just before we broke for the morning break, there was a question that was asked of the witness about whether or not the defendant provided the witness with any recordings, photos, bills of sales, videos, et cetera. There was an objection, and I informed the jurors that the government has the burden of proof as to every element of the offense. I'm going to take my ruling a step further and I'm going to instruct you to disregard that question and disregard the answer. The government does have the burden of proof, and that particular testimony will be irrelevant to your determinations." 4-ER-370.

The district court's curative instruction did not render the Government's Fifth Amendment violations harmless beyond a reasonable doubt. Although the district court repeated that the Government had the burden of proof, the court did not instruct the

jury about the presumption of innocence, nor that Mr. Delgado had no affirmative duty to prove his innocence, nor that Mr. Delgado's failure to provide any proof of sales was not indicative of his guilt. Therefore, the curative instruction was deficient.

Further, the error was not harmless. Mr. Delgado was convicted of one count of Engaging in the Business of Dealing Firearms Without a License. 18 U.S.C. §922(a)(1)(A) does not require the defendant to produce evidence of the private sales of his guns such as photos, records, bills of sale, etc, as the Government's questions implied during the trial. 4-ER-360-61. Purchasing firearms in this country is not a crime, nor is the subsequent private sale of some of those firearms indicative of a crime. Purchasing or owning 10 firearms does not, by itself, indicate that a person is in the business of dealing firearms without a license. Mr. Delgado's purchase of the firearms was legal, and he was legally allowed to own them. There was no evidence otherwise.

IV. Mr. Delgado Was Sentenced in Violation of Federal Law

Although the Sentencing Guidelines are now advisory under *United States v. Booker*, a sentencing court shall consult them in helping to determine an appropriate sentence. 543 U.S. 220 (2005); *United States v. Cantrell*, 433 F.3d 1269, 1278-79 (9th Cir. 2006). The district court must calculate the Guidelines range accurately, and must comply with Fed. R. Crim. P. 32. *See United States v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006).

The district court applied a four-level sentencing enhancement pursuant to U.S.S.G. §2K2.1(b)(5) for trafficking in firearms. At sentencing, the district court ruled:

> "I'm going to sustain the government's objection to the enhancement for trafficking of firearms under 2K2.1(b)(5). The Court finds the government has proved by a preponderance of the evidence that the defendant engaged in

> trafficking of firearms by transferring firearms to an individual that the defendant knew or had reason to believe would lawfully possess or use the firearm, and that again is proved by the evidence as to the manner in which the guns were transferred, as far as those factors I just read, with the volume, the types of guns, the repetitive nature of purchases of the same types of guns in a very short time period." 4-ER-822.

Despite the district court's use of the preponderance of the evidence standard, the Ninth Circuit has held that when "the challenged sentencing factors had an extremely disproportionate effect on [the defendant's] sentence relative to the offense of conviction," "clear and convincing evidence is required for proof of the disputed enhancements." *United States v. Parlor*, 2 F.4th 807, 816–17 (9th Cir. 2021), *citing United States v. Jordan*, 256 F.3d 922, 927, 929 (9th Cir. 2001). The relevant factors to be considered are:

> (1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment; (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (4) whether the increase in sentence is based on the extent of a conspiracy; (5) whether the increase in the number of offense levels is less than or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence.

Id. at 817. The Ninth Circuit's cases have specifically focused on the last two factors (5 & 6). *Id*., *see also United States v. Valle*, 940 F.3d 473, 479-80 (9th Cir. 2019) (discussing cases and noting how recent decisions had disregarded the first four factors).

Regarding whether the increase in the number of offense levels is less than or equal to four, the gun trafficking enhancement alone increased Mr. Delgado's offense level by four levels. Combined, all sentencing enhancements increased Mr. Delgado's

offense level by fourteen levels, more than doubling his offense level and far exceeding the threshold set by the Ninth Circuit's cases. Regarding the sixth factor, Mr. Delgado's authorized initial sentencing guideline range without the enhancements was 10 to 16 months, but with the fourteen level increase the guideline range increased to 63 to 78 months (over six times the lower end of the range and over four times the higher end). Therefore, the relevant factors require application of the heightened burden of clear and convincing evidence.

The Government did not present evidence at the trial or thereafter that met its burden of proving the gun trafficking enhancement. The Government opted not to go forward with charging Mr. Delgado with trafficking because the Government knew that it did not have sufficient evidence to do so. Instead, the Government used the mechanism of sentencing enhancement to push its trafficking allegation without giving Mr. Delgado the benefit of testing such a charge at trial. During the forfeiture hearing, the Government admitted it chose not to charge Mr. Delgado with a trafficking offense, and the district court admitted the issue "wasn't really addressed at trial…":

> MS. WOOLRIDGE: ... And quite frankly, Your Honor, the other thing I think we have to note is that there were several references throughout not the trial but the case and the investigation itself to trafficking firearms to Mexico. Ultimately the defendant was not charged, the government chose not to charge him with that crime, but I do think that there is sufficient evidence that all of these firearms were -- at least a good number of these firearms were trafficked. The two that were recovered were recovered in Mexico.
>
> THE COURT: Well, I don't think I can rely on that, can I? Aren't I relying on the evidence that was presented at trial? Isn't that what the parties agreed?
>
> MS. WOOLRIDGE: That is true, Your Honor, and I apologize. I --

> THE COURT: I just want to be clear for the record. So it would be my intention not to consider any of the connections with Mexico or any -- the suggestion of trafficking is that the guns were going to be used in illegal activity. That wasn't really addressed at trial either, so I won't take those two things into account and determine if there is evidence to support them or not.

2-ER-043-44.

Applying the trafficking enhancement was an abuse of discretion. First, there was no evidence at trial produced regarding trafficking. Secondly, the arguments advanced at the sentencing phase make no sense given the back-and-forth lifestyle between Mr. Delgado's girlfriend (now wife) in Mexico and his home in Tucson. Essentially, one could argue that virtually anything Mr. Delgado did such as going to the store, gassing up his vehicle, picking up his mail, all were done on or around dates he traveled to and from Mexico. It would be a different argument if, for instance, Mr. Delgado traveled infrequently to that country and purchases of weapons occurred around those times. There is no evidence to suggest that the Government's list of border crossings and weapon purchases are in any way related to each other. Even the United States Probation Department did not find the Government convincing in its argument that Mr. Delgado's travel evidenced he was involved in trafficking considering his travel to visit family.

Further, in the case of *United States v. Henry*, 819 F.3d 856 (6th Cir. 2016), the Sixth Circuit found a trafficking enhancement did not apply because the enhancement "appears to be aimed at defendants who provide multiple firearms to at least one buyer or other transferee—i.e., parties engaging in bulk transfers." Not only are those facts not present in Mr. Delgado's case, but the Government did not even allege them.

The Ninth Circuit concluded the district court permissibly made additional factual findings when applying the enhancement and declined to reach Mr. Delgado's remaining arguments "which he raised for the first time in his reply brief." In his Opening Brief, Mr. Delgado argued the district court assumed he was trafficking in firearms to the benefit of prohibited possessors in the US, which was a fact not proven at trial. In its Answering Brief, the Government argued the district court correctly found it had established the 2K2.1(b)(5) trafficking enhancement by a preponderance of the evidence. In response, it was proper for Mr. Delgado to argue in his Reply Brief that use of the preponderance of evidence standard was incorrect. The record does not support the conclusion that the Government proved by clear and convincing evidence, or even through a preponderance of the evidence, that Mr. Delgado provided multiple firearms to at least one buyer as required for the enhancement to apply. Further, the Probation Department found no evidence of such an element.

V. Mr. Delgado Received Constitutionally Ineffective Assistance of Counsel

Mr. Delgado acknowledges that appellate courts do not generally review ineffective assistance of counsel claims on direct appeal because, in most cases, such claims are better suited to adjudication in post-conviction proceedings. *Massaro v. United States*, 538 U.S. 500, 504 (2003). However, there are exceptions to this general rule: 1) where the record on appeal is sufficiently developed to permit determination of the issue; or 2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel. *United States v. Daychild*, 357 F.3d 1082, 1095 (9th Cir. 2004).

The Ninth Circuit declined to consider on direct review Mr. Delgado's claim of ineffective assistance of counsel. Mr. Delgado contends the record is sufficiently developed to address his ineffective assistance of counsel claim on direct appeal. Mr. Delgado's claim of ineffective assistance of counsel for failure to suppress his statement taken in violation of *Miranda* is a very narrow one. Mr. Delagado was cornered outside of the gun store. His car was blocked in, and the agents interrogated him for several minutes before officially arresting him. Mr. Delgado was transferred to a federal facility. The next day, on the courthouse steps, agents finally issued Mr. Delgado his *Miranda* warnings. It was clear that Mr. Delgado's statement was taken during a custodial interrogation, without *Miranda* warnings, and should have been suppressed. But Mr. Delgado's counsel never sought to suppress the statement. Even so, defense counsel questioned Agent Bort about whether Mr. Delgado was under arrest when he made the statements and whether he was free to leave. The exchange went on for seven pages. 4-ER-375-82. It is clear that defense counsel should have moved for suppression of the statements. The trial record is sufficiently developed through Agent Bort's testimony and accompanying sidebar on the record to allow the issue to be addressed on direct appeal. Therefore, Mr. Delgado requests this Court review the record to address his claim of ineffective assistance of counsel.

CONCLUSION

This case involves questions of exceptional importance involving both federal statutory and constitutional law. The violations set forth herein deprived Mr. Delgado of due process and a fair trial, and resulted in an erroneous sentence. Therefore, Mr. Delgado respectfully requests this Court grant certiorari.

RESPECTFULLY SUBMITTED this 9th day of July 2024.

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