

No. _____

**In the
Supreme Court of the United States**

Roger Acosta, Michael Terrell Beale, Jason Michael Boykins, Dean Anthony Carter,
Jesse James Feehan-Jones, Anthony Charles Gray, Devin Ray Kelbch, Shaelon
Dawnee Mitchell, Clifton George Newman, Jr., Andrew Deng Pham, Deonte
Marquis Strouble, David Torres, Romie Le'mon Turner, Tajh Dion Weatherspoon,
Christopher James Wilder, Ronald Williams III,

Petitioners,
v.

United States of America,

Respondent.

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

**Appendix
Volume 1 of 2**

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United States Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROGER ACOSTA, AKA Rogelio

Acosta, Defendant-Appellant.

No. 20-17450

I

03/30/2022

D.C. No. 2:20-cv-01086-APG

D.C. No2:17-cr-00118-APG-CWH-1

District of Nevada, Las Vegas

Before: CALLAHAN and MILLER, Circuit Judges.

ORDER

***1** The stay entered on March 12, 2021 (Docket Entry No. 3) is lifted.

The request for a certificate of appealability (Docket Entry Nos. 2 and 4) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff

v.

Roger ACOSTA, Defendant

Case No.: 2:17-cr-00118-APG

|

Signed 10/16/2020

Attorneys and Law Firms

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ORDER DENYING MOTION TO VACATE

[ECF No. 34]

ANDREW P. GORDON, UNITED STATES DISTRICT JUDGE

*1 Defendant Roger Acosta pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He moves under 28 U.S.C. § 2255 to vacate his conviction and sentence. ECF No. 34. He argues that, based on the Supreme Court's holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), his indictment was fatally defective because the government failed to allege that he knew he was a felon when he possessed the firearm.

I deny Acosta's motion. The indictment's failure to allege that Acosta knew he was a felon did not deprive this court of jurisdiction. And Acosta cannot show that he is actually prejudiced by that defect.

Background

In 2003, Acosta was convicted of first degree residential burglary, a California state felony. He was sentenced to four years in state prison, and eventually served all four years after violating his parole on four separate occasions. In 2010, Acosta was sentenced to 16 months in prison for grand theft of personal property. In 2012, he was sentenced to 16 months

in prison for being a felon or addict in possession of a firearm. In 2014, Acosta was sentenced to two years' imprisonment for inflicting corporal injury.

The indictment in the present case alleged that in January 2017, Acosta:

having been convicted of crimes punishable by imprisonment for a term exceeding one year ... did knowingly possess a firearm ... said possession being in and affecting interstate commerce and said firearm having been shipped and transported in interstate commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

ECF No. 1. In July 2017, Acosta pleaded guilty to that charge. ECF Nos. 24, 26. I sentenced him to 52 months of imprisonment, to be followed by three years of supervised release. Acosta did not appeal his conviction or sentence. In June 2020, Acosta filed the instant motion seeking to set aside his conviction and sentence based on *Rehaif*.

Analysis

Acosta was indicted, pleaded guilty, and was sentenced in 2017 for his possession of a firearm as a convicted felon. At that time, under the law of this circuit and every other circuit, the government was neither required to allege in the indictment nor present evidence and prove at trial that the defendant knew of his status as a convicted felon. Two years later, the Supreme Court held “that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant 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 2200.¹

*2 The indictment against Acosta did not allege that he knew he had been convicted of a crime punishable by more than one year of imprisonment. Acosta argues that this defect stripped this court of jurisdiction and violated his rights under the Fifth

and Sixth Amendments. None of these theories warrants § 2255 relief.²

This court “has jurisdiction of all crimes cognizable under the authority of the United States....” *Lamar v. United States*, 240 U.S. 60, 65 (1916). “The objection that the indictment does not charge a crime against the United States goes only to the merits of the case” and does not deprive the court of jurisdiction. *Id.*; see also *United States v. Cotton*, 535 U.S. 625, 630 (2002) (citing *Lamar* for the proposition that “defects in an indictment do not deprive a court of its power to adjudicate a case.”). The Ninth Circuit has repeatedly cited *Cotton* for this principle. See, e.g., *U.S. v. Velasco-Medina*, 305 F.3d 839, 845 (9th Cir. 2002) (rejecting the argument that the indictment’s failure to allege the specific intent required for attempted reentry deprived the district court of jurisdiction). It applies even when considering appeals based on *Rehaif*. See, e.g., *United States v. Espinoza*, 816 F. App’x 82, 84 (9th Cir. 2020) (“[T]he indictment’s omission of the knowledge of status requirement did not deprive the district court of jurisdiction.”). Thus, this court had and has jurisdiction over Acosta’s case.

“To challenge a conviction in a § 2255 proceeding based upon a claim of error that could have been raised on direct appeal but was not, a defendant must demonstrate both cause to excuse the procedural default, as well as actual prejudice resulting from that error.” *United States v. Seng Chen Yong*, 926 F.3d 582, 590 (9th Cir. 2019). For purposes of this motion only, I will assume Acosta can show cause to excuse the default. But he cannot show prejudice because the government could re-indict him and the same result would occur.

“[I]f properly challenged prior to trial, an indictment’s complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.” *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999); see also *United States v. Qazi*, No. 18-10483, 2020 WL 5553323, at *2 (9th Cir. Sept. 17, 2020) (“If a defendant properly challenges an indictment before trial and, on de novo appellate review, we determine the indictment omitted an essential element, *Du Bo* requires automatic dismissal regardless of whether the omission prejudiced the defendant.”). But if the indictment is challenged post-trial, dismissal is not automatically required.

The Ninth Circuit recently reviewed an appeal of a § 922(g) conviction based on *Rehaif*. *United States v. Johnson*, 963 F.3d 847 (9th Cir. 2020). The indictment in that case, as with this one, did not include a knowledge-of-status allegation, in violation of *Rehaif*. The Ninth Circuit declined to dismiss the case and instead affirmed the conviction. The court determined that Johnson could be retried for the same crime because the evidence at trial “was rendered insufficient only by the Supreme Court’s subsequent decision in *Rehaif*....” *Id.* at 852. Because retrial was available, the court was authorized to review the entire record on appeal, not just the record adduced at trial. *Id.* Reviewing for plain error, the court held that a retrial would result in the same conviction because the defendant could not offer a plausible basis for a different outcome. *Id.* at 852.

*3 [I]f the hypothetical retrial is certain to end in the same way as the first one, then refusing to correct an unpreserved error will, by definition, not result in a miscarriage of justice. Indeed, choosing to correct the error in those circumstances would produce the very sort of wasteful reversals that [Federal Rule of Criminal Procedure] 52(b) aims to avoid.

Id. (internal quotation and citation omitted).³ The record on appeal (including the Presentence Report) showed that Johnson had several prior felony convictions and had already served three prison sentences of over one year. “In light of the sentences imposed in his earlier cases, Johnson cannot plausibly argue that a jury ... would find that he was unaware of his status as someone previously convicted of an offense punishable by more than a year in prison.” *Id.* at 854. That evidence justified affirming the conviction.

The *Johnson* court employed the plain error standard because the case arose on direct appeal. Here, however, Acosta did not appeal his conviction but instead raises this issue in a § 2255 motion. The “cause and actual prejudice” standard for review of a § 2255 motion is a significantly higher burden than the plain error standard on a direct appeal. *United States v. Frady*, 456 U.S. 152, 166-67 (1982) (“We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on

direct appeal.”).⁴ *Johnson* would require me to deny Acosta's motion under a plain error review, so I likewise must deny the motion under the higher hurdle of the cause and prejudice standard.

If I vacate Acosta's conviction because of the defective indictment, the government will be able seek another indictment. *See Johnson*, 963 F.3d at 852 (“The evidence was rendered insufficient only by the Supreme Court's subsequent decision in *Rehaif*, which means the government would be permitted to retry Johnson.”). Thus, as in *Johnson*, I can look to the entire record, including the Presentence Report, to determine whether Acosta can show actual prejudice from the defective indictment. *Id.*

Acosta has been sentenced on four different occasions to terms of imprisonment exceeding one year: in 2003, to a term of four years; in 2010, to a term of 16 months; in 2012, to another term of 16 months; and in 2014, to a term of two years of imprisonment. Acosta served the entire four-year term of imprisonment for his 2003 conviction as the result of parole violations. Acosta offers no evidence or argument disputing this criminal history. He does not claim he was unaware that he had been convicted of a felony or that he actually served years of imprisonment. To the contrary, he admits that “[a]t the time [he] was in possession of the firearm, he had been previously convicted of a crime punishable by a term of imprisonment exceeding one year.” ECF No. 25 at 4. No plausible argument exists that the grand jury would find that he was unaware of his status as a convicted felon. If I dismiss the indictment, he could be reindicted and retried, and the result would be the same.

*4 The overwhelming and uncontroverted evidence establishes that Acosta is not suffering actual prejudice, under any of his constitutional theories, from the indictment's failure to allege that he knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year. I therefore deny his § 2255 motion.

Certificate of Appealability

To appeal this order, Acosta must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1(a). To obtain that certificate, he “must make a substantial showing of the denial of a constitutional right, a demonstration that ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation omitted). This standard is “lenient.” *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

I have denied Acosta's motion based on the Ninth Circuit's decision in *Johnson*. While *Johnson* employed the plain error standard of review, Acosta faces a “significantly higher hurdle” for his § 2255 motion. *Frady*, 456 U.S. at 166. The undisputed facts establish that Acosta is not prejudiced by the defective indictment because he could be reindicted and retried with the same outcome. Reasonable jurists cannot debate that conclusion. I will thus deny Acosta's request for a certificate of appealability.

I THEREFORE ORDER that defendant Roger Acosta's motion under 28 U.S.C. § 2255 (ECF No. 34) is **DENIED**.

I FURTHER ORDER that Acosta is denied a certificate of appealability.

I FURTHER ORDER the Clerk of Court to enter a separate civil judgment denying Acosta's § 2255 motion. The Clerk also shall file this order and the civil judgment in this case and in the related civil case number 2:20-cv-1086-APG.

All Citations

Slip Copy, 2020 WL 6136208

Footnotes

- 1 “It is therefore the defendant's *status*, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful.” *Rehaif*, 139 S. Ct. at 2197 (emphasis original). I reject Acosta's argument that, under *Rehaif*, the government

must also prove that the defendant knew that he was barred from possessing a firearm. See *United States v Dillard*, No. 2:09-cr-00057-JAD-GWF, 2020 WL 2199614, at *4 (D. Nev. May 6, 2020).

- 2 Acosta seeks relief solely on the sufficiency of the indictment. He does not challenge the sufficiency of the evidence supporting his plea or conviction.
- 3 “As the Supreme Court has stated, Rule 52(b) authorizes courts to correct unpreserved errors, but that power is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.” *Johnson*, 963 F.3d at 852.
- 4 Cf. *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (“[T]he concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.”).

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

ROGER ACOSTA
aka Rogelio Acosta

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-cr-00118-APG-CWH-1

USM Number: 53997-048

Heidi A Ojeda

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	1/22/2017	1

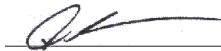
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ 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.

September 28, 2017

Date of Imposition of Judgment



Signature of Judge

ANDREW P. GORDON, UNITED STATES DISTRICT JUDGE

Name and Title of Judge

September 28, 2017

Date

DEFENDANT: ROGER ACOSTA aka Rogelio Acosta
CASE NUMBER: 2:17-cr-00118-APG-CWH-1

IMPRISONMENT

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

52 months from today, to run concurrent with Nevada State cases C316640 and C321192.

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

The Court recommends the defendant be permitted to serve his term of incarceration at FCI Butner or FCI Coleman II for the gang dropout yard, or, another facility with a similar program.

☒ 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 _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROGER ACOSTA aka Rogelio Acosta

CASE NUMBER: 2:17-cr-00118-APG-CWH-1

SUPERVISED RELEASEUpon release from imprisonment, you will be on supervised release for a term of : 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 not to exceed 104 tests annually.
☐ 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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663, 3663A, or any other statute authorizing restitution. *(check if applicable)*

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

DEFENDANT: ROGER ACOSTA aka Rogelio Acosta
CASE NUMBER: 2:17-cr-00118-APG-CWH-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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: ROGER ACOSTA aka Rogelio Acosta
CASE NUMBER: 2:17-cr-00118-APG-CWH-1

SPECIAL CONDITIONS OF SUPERVISION

1. Substance Abuse Treatment – You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program.
2. Drug Testing – You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed 104 tests per year. You must pay the costs of the testing. You must not attempt to obstruct or tamper with the testing methods.
3. Mental Health Treatment – You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
4. No Gang Affiliation – You must not communicate, or otherwise interact, with any known member of the “Vicky’s Town Sureno” gang, without first obtaining the permission of the probation officer.
5. Search and Seizure – You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: ROGER ACOSTA aka Rogelio Acosta
CASE NUMBER: 2:17-cr-00118-APG-CWH-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

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

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____	\$ _____
---------------	----------	----------

☐ 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 Sheet 6 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:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: ROGER ACOSTA aka Rogelio Acosta
CASE NUMBER: 2:17-cr-00118-APG-CWH-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 payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

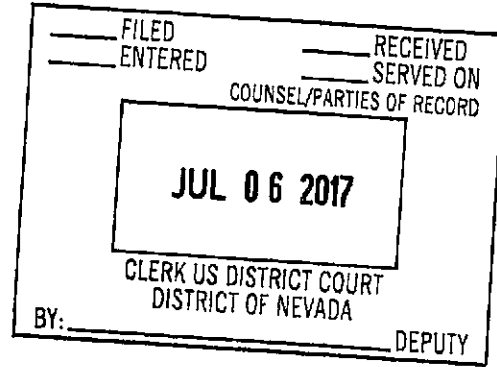
☐ Joint and Several

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROGER ACOSTA,

Defendant.

2:17-cr-118-APG-CWH

**PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11(c)(1)(A) and (B)**

Plaintiff United States of America, by and through STEVEN W. MYHRE, Acting United States Attorney; Phillip N. Smith, Jr., Assistant United States Attorney; the Defendant ROGER ACOSTA; and the Defendant's attorney, Heidi Ojeda, Assistant Federal Public Defender, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and ROGER ACOSTA (the Defendant). This Plea Agreement binds the Defendant and the United States Attorney's Office for the District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

The Plea Agreement sets forth the parties' agreement regarding the criminal charges referenced in the Plea Agreement and the applicable sentence, fine, and restitution. It does not control or prohibit

1 the United States or any agency or third party from seeking any other civil or administrative remedies
2 directly or indirectly against the Defendant.

3 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

4 A. Guilty Plea. The Defendant knowingly and voluntarily agrees to plead guilty to the
5 following charges as set forth in the Criminal Indictment:

6 Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

7 B. Waiver of Trial Rights. The Defendant acknowledges that he has been advised and
8 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
9 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically, the
10 Defendant is giving up:

- 11 1. The right to proceed to trial by jury on all charges, or to a trial by a judge if the
12 Defendant and the United States both agree;
- 13 2. The right to confront the witnesses against the Defendant at such a trial, and to
14 cross-examine them;
- 15 3. The right to remain silent at such a trial, with assurance that his silence could
16 not be used against him in any way;
- 17 4. The right to testify in his own defense at such a trial if he so chooses;
- 18 5. The right to compel witnesses to appear at such a trial and testify in the
19 Defendant's behalf; and
- 20 6. The right to have the assistance of an attorney at all stages of such proceedings.

21 C. Withdrawal of Guilty Plea. The Defendant will not seek to withdraw his guilty plea
22 after he has entered it in court.

23 D. Additional Charges. The United States agrees not to bring any additional charges
24 against the Defendant arising out of the investigation in the District of Nevada that culminated in this

1 Plea Agreement and based on conduct known to the United States except that the United States
2 reserves the right to prosecute the Defendant for any crime of violence as defined by 18 U.S.C. § 16.

3 **III. ELEMENTS OF THE OFFENSE**

4 The elements of Felon in Possession of a Firearm under 18 U.S.C. § 922(g)(1) are:

- 5 1. the Defendant knowingly possessed a firearm;
- 6 2. the firearm had been shipped or transported from one state to another; and
- 7 3. at the time the Defendant possessed the firearm, the Defendant had been previously
8 convicted of a crime punishable by a term of imprisonment exceeding one year.

9 *See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65 (2010 ed.).*

10 **IV. FACTS SUPPORTING GUILTY PLEA**

11 A. The Defendant will plead guilty because he is, in fact and under the law, guilty of the
12 crimes charged.

13 B. The Defendant acknowledges that if he elected to go to trial instead of pleading guilty,
14 the United States could prove his guilt beyond a reasonable doubt. The Defendant further
15 acknowledges that his admissions and declarations of fact set forth below satisfy every element of the
16 charged offenses.

17 C. The Defendant waives any potential future claim that the facts he admitted in this Plea
18 Agreement were insufficient to satisfy the elements of the charged offenses.

19 D. The Defendant admits and declares under penalty of perjury that the facts set forth
20 below:

21 On January 22, 2017, LVMPD Officers B. Nameth and L. Hinkel conducted a vehicle stop on
22 a stolen Chrysler Town and Country with a stolen license plate under LVMPD Event #170113-3397.
23 The driver and three other occupants were removed from the vehicle. ROGER ACOSTA (who was
24 the driver) took several minutes to exit the vehicle. A records check on ACOSTA revealed that he

1 was currently wanted in Clark County District Court for missing a sentencing for attempted possession
2 of a stolen vehicle. ACOSTA was arrested and booked for his warrant. During an inventory of the
3 vehicle, a Jimenez Arms 9mm handgun bearing serial number 072775 was recovered from under the
4 driver's seat.

5 The Defendant admits that he was in possession of the aforementioned firearm. At the time
6 the Defendant was in possession of the firearm, he had been previously convicted of a crime
7 punishable by a term of imprisonment exceeding one year. The firearm had also been shipped and
8 transported in interstate commerce.

9 All of the foregoing occurred in the State and Federal District of Nevada.

10 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

11 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
12 Defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the Defendant does not
13 plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea Agreement shall
14 be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument
15 or representation offered by or on the Defendant's behalf. The Defendant expressly waives all rights
16 under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section
17 IV of this Plea Agreement.

18 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

19 A. Discretionary Nature of Sentencing Guidelines. The Defendant acknowledges that the
20 Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines")
21 in determining the Defendant's sentence, but that the Sentencing Guidelines are advisory, not
22 mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term
23 of imprisonment permitted by statute.

24 B. Offense Level Calculations. The parties stipulate to the following calculation of the

Defendant's offense level under the Sentencing Guidelines, acknowledge that these stipulations do not bind the Court, and agree that they will not seek to apply any other specific offense characteristics, enhancements or reductions:

1. [Felon in Possession of a Firearm]

Base Offense Level [USSG § 2K2.1(a)(4)(A)]: 20

Reductions:

[Acceptance of Responsibility / USSG § 3E1.1(a)]: -2

[Timeliness of Plea / USSG § 3E1.1(b)]: -1

C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG §3E1.1(a), the United States will recommend that the Defendant receive a two-level downward adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false or misleading information to the United States, the Court, Pretrial Services, or the Probation Office; (e) denies involvement in the offense or provides conflicting statements regarding his involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts to withdraw his guilty plea; (g) commits or attempts to commit any crime; (h) fails to appear in court; or (i) violates the conditions of pretrial release.

Under USSG § 3E1.1(b), if the Court determines that the Defendant's total offense level, before operation of § 3E1.1(a), is 16 or higher, the United States will move for an additional one-level downward adjustment for acceptance of responsibility before sentencing because the Defendant communicated his decision to plead guilty in a timely manner that enabled the United States to avoid preparing for trial and to efficiently allocate its resources.

These Sentencing Guidelines provisions, if applied, will result in a total offense level of 17.

1 D. Criminal History Category. The Defendant acknowledges that the Court may base his
2 sentence in part on the Defendant's criminal record or criminal history. The Court will determine the
3 Defendant's Criminal History Category under the Sentencing Guidelines.

4 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
5 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
6 applicable Sentencing Guidelines range and whether to depart from that range.

7 F. Additional Sentencing Information. The stipulated Sentencing Guidelines calculations
8 are based on information now known to the parties. The parties may provide additional information
9 to the United States Probation Office and the Court regarding the nature, scope, and extent of the
10 Defendant's criminal conduct and any aggravating or mitigating facts or circumstances.

11 Good faith efforts to provide truthful information or to correct factual misstatements shall not
12 be grounds for the Defendant to withdraw his guilty plea.

13 The Defendant acknowledges that the United States Probation Office may calculate the
14 Sentencing Guidelines differently and may rely on additional information it obtains through its
15 investigation. The Defendant also acknowledges that the Court may rely on this and other additional
16 information as it calculates the Sentencing Guidelines range and makes other sentencing
17 determinations, and the Court's reliance on such information shall not be grounds for the Defendant
18 to withdraw his guilty plea.

19 **VII. APPLICATION OF SENTENCING STATUTES**

20 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
21 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a 10-year prison sentence, a fine of not more than two-
22 hundred fifty thousand dollars (\$250,000), or both.

23 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in 18
24 U.S.C. § 3553(a) in determining the Defendant's sentence. However, the statutory maximum sentence

limits the Court's discretion in determining the Defendant's sentence.

C. Parole Abolished. The Defendant acknowledges that his prison sentence cannot be shortened by early release on parole because parole has been abolished.

D. Supervised Release. In addition to imprisonment and a fine, the Defendant will be subject to a term of supervised release not to exceed 3 years. 18 U.S.C. §§ 3559(a)(3) and 3583(b)(2). Supervised release is a period of time after release from prison during which the Defendant will be subject to various restrictions and requirements. If the Defendant violates any condition of supervised release, the Court may order the Defendant's return to prison for all or part of the term of supervised release, which could result in the Defendant serving a total term of imprisonment greater than the statutory maximum prison sentence of 10 years.

E. Special Assessment. The Defendant will pay a \$100.00 special assessment per count of conviction at the time of sentencing.

VIII. POSITIONS REGARDING SENTENCE

The parties will jointly recommend that the Court sentence the Defendant to a sentence at the **middle** of the Sentencing Guidelines range determined by the Court, unless the Defendant commits any act that could result in a loss of the downward adjustment for acceptance of responsibility. The Government will also recommend that the sentence imposed in this case be ordered to run concurrently with the sentence imposed in Eighth Judicial District Court case numbers C316640 and C321192, unless the Defendant commits any act that could result in a loss of the downward adjustment for acceptance of responsibility. The Defendant acknowledges that the Court does not have to follow either recommendation. Notwithstanding its agreement to recommend a sentence at the middle of the Sentencing Guidelines range, the United States reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction litigation.

The Defendant will not request a sentence below the Sentencing Guidelines range as calculated

1 by the Court, and will not seek a downward adjustment pursuant to 18 U.S.C. § 3553 or USSG §
2 4A1.3(b)(1) from any sentence the Court may impose.

3 Notwithstanding any other provision of this plea agreement, the parties will jointly recommend
4 that the Defendant receive credit for time served dating back to the date of his arraignment in the
5 instant case, which is April 18, 2017, unless the Defendant commits any act that could result in a loss
6 of the downward adjustment for acceptance of responsibility. The Defendant acknowledges that the
7 Court does not have to follow this recommendation.

8 **IX. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

9 Before or after sentencing, upon request by the Court, the United States, or the Probation
10 Office, the Defendant will provide accurate and complete financial information, submit sworn
11 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
12 Defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
13 release funds and property under his control in order to pay any fine, forfeiture, or restitution ordered
14 by the Court.

15 **X. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

16 A. Plea Agreement and Decision to Plead Guilty. The Defendant acknowledges that:

- 17 (1) He has read this Plea Agreement and understands its terms and conditions;
- 18 (2) He has had adequate time to discuss this case, the evidence, and this Plea
19 Agreement with his attorney;
- 20 (3) He has discussed the terms of this Plea Agreement with his attorney;
- 21 (4) The representations contained in this Plea Agreement are true and correct,
22 including the facts set forth in Section IV; and

1 (5) He was not under the influence of any alcohol, drug, or medicine that would
2 impair his ability to understand the Agreement when he considered signing this
3 Plea Agreement and when he signed it.

4 The Defendant understands that he alone decides whether to plead guilty or go to trial, and
5 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him,
6 his possible defenses, and the benefits and possible detriments of proceeding to trial. The Defendant
7 also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened
8 him to enter into this Plea Agreement.

9 B. Waiver of Appeal and Post-Conviction Proceedings. The Defendant knowingly and
10 expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
11 Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which
12 the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) the right to
13 appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

14 The Defendant also knowingly and expressly waives all collateral challenges, including any
15 claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court
16 adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of
17 counsel.

18 The Defendant reserves only the right to appeal any portion of the sentence that is an upward
19 departure or an upward variance from the Sentencing Guidelines range determined by the Court.

20 The Defendant acknowledges that the United States is not obligated or required to preserve
21 any evidence obtained in the investigation of this case.

22 C. Removal / Deportation Consequences. The Defendant understands and acknowledges that if
23 he is not a United States citizen, then it is highly probable that he will be permanently removed
24 (deported) from the United States as a consequence of pleading guilty under the terms of this Plea

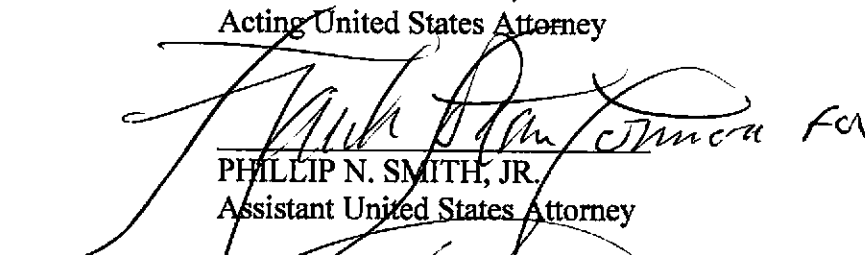
Agreement. The Defendant has also been advised if his conviction is for an offense described in 8 U.S.C. § 1101(a)(43), he will be deported and removed from the United States and will not be allowed to return to the United States at any time in the future. The Defendant desires to plead guilty regardless of any immigration consequences that may result from his guilty plea, even if the consequence is automatic removal from the United States with no possibility of returning. The Defendant acknowledges that he has specifically discussed these removal / deportation consequences with his attorney.

XI. ADDITIONAL ACKNOWLEDGMENTS

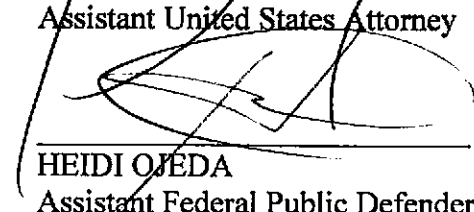
This Plea Agreement resulted from an arms-length negotiation in which both parties bargained for and received valuable benefits in exchange for valuable concessions. It constitutes the entire agreement negotiated and agreed to by the parties. No promises, agreements or conditions other than those set forth in this agreement have been made or implied by the Defendant, the Defendant's attorney, or the United States, and no additional promises, agreements or conditions shall have any force or effect unless set forth in writing and signed by all parties or confirmed on the record before the Court.

STEVEN W. MYHRE,
Acting United States Attorney

DATE 7.6.17


PHILLIP N. SMITH, JR.
Assistant United States Attorney

DATE 6/2/17


HEIDI OJEDA
Assistant Federal Public Defender

DATE 6-2-17


ROGER ACOSTA
Defendant

Attorney for the Plaintiff

-000-

CRIMINAL INDICTMENT

2:17-cr- *118*

VIOLATION:

18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon
in Possession of a Firearm.

THE GRAND JURY CHARGES THAT:

On or about January 22, 2017, in the State and Federal District of Nevada,

ROGER ACOSTA,
Aka: ROGELIO ACOSTA,

defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of California, to wit: First Degree Burglary, in or about 2003; Possession of a Stolen Vehicle, in or about 2007; Grand Theft, in or about 2011; Possession of

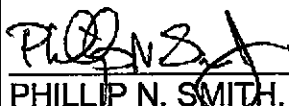
1 a Controlled Substance, in or about (2013); and Inflicting Corporal Injury on Spouse or
2 Cohabitant, in or about 2014, did knowingly possess a firearm, to wit: a Jimenez Arms 9-
3 millimeter handgun bearing serial number 072775, said possession being in and affecting
4 interstate commerce and said firearm having been shipped and transported in interstate
5 commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).
6

7 **DATED:** this 12th day of April, 2017.

8 **A TRUE BILL:**

9
10 /S/
11 FOREPERSON OF THE GRAND JURY

12 STEVEN W. MYHRE
13 Acting United States Attorney
14

15 
16 PHILLIP N. SMITH, JR.
17 Assistant United States Attorney
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2022 WL 1023807

Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael Terrell BEALE, Defendant-Appellant.

No. 21-15591

|

FILED 03/30/2022

D.C. Nos. 2:20-cv-01112-JAD, 2:17-cr-00050-JAD-CWH-1,
District of Nevada, Las Vegas

Attorneys and Law Firms

Elizabeth Olson White, Esquire, Assistant U.S., USRE -
Office of the US Attorney, Reno, NV, for Plaintiff-Appellee.

Amy B. Cleary, Assistant Federal Public Defender, Federal
Public Defender's Office, Las Vegas, NV, for Defendant-
Appellant.

Before: CALLAHAN and MILLER, Circuit Judges.

ORDER

***1** The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 1023807

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2021 WL 325713

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff

v.

Michael Terrell BEALE, Defendant

Case No.: 2:17-cr-00050-JAD-CWH-1

|

Signed 02/01/2021

Attorneys and Law Firms

Michael Terrell Beale, pro se.

Order Denying Motion to Vacate Sentence

[ECF No. 80]

Jennifer A. Dorsey, U.S. District Judge

*1 Michael Beale is serving a 74-month federal prison sentence after pleading guilty to unlawful possession of a firearm by a previously convicted felon.¹ Beale moves under 28 U.S.C. § 2255 to vacate his felon-in-possession conviction under the Supreme Court's recent decision in *Rehaif v. United States*, which clarified that a defendant must be aware of his status as a felon in order to be convicted of this firearm offense.² Despite the complexity of § 2255 habeas proceedings, Beale's case can be summed up simply. Unlike the *Rehaif* defendant, who was unaware that overstaying his visa meant that he was the type of person no longer permitted to own recreational firearms, Beale was a known violent felon who—after being arrested during a domestic-violence call and found in possession of a revolver—cannot reasonably claim that he was unaware that he had been previously convicted of crimes with sentences exceeding one year. So I find that Beale procedurally defaulted his claim because he cannot show that a *Rehaif* error prejudiced his trial, and I deny his motion.

Discussion³

A federal prisoner may attack the legality of his conviction under 28 U.S.C. § 2255 by showing that “the sentence was

imposed in violation of the Constitution or the laws of the United States,” “the court was without jurisdiction to impose such a sentence,” the sentence was in “excess of the maximum authorized by law,” or the sentence is “otherwise subject to collateral attack.”⁴ A prisoner filing a claim for federal habeas relief under § 2255 is entitled to an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.”⁵

Relying on the Supreme Court's decision in *Rehaif v. United States*, Beale argues that his conviction violates the laws of the United States. In *Rehaif*, a defendant successfully challenged his conviction for possessing a firearm as an alien unlawfully in the United States in violation of 18 U.S.C. § 922(g).⁶ Overturning a broad consensus among the circuit courts, the Supreme Court held that, in order to establish a violation of § 922(g), the government “must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.”⁷ But *Rehaif* was a unique case: the defendant—a student who'd overstayed his nonimmigrant visa—was unaware of his status, which precluded him from enjoying the “innocent” activity of owning and shooting firearms at a firing range.⁸ Invoking *Rehaif*'s reasoning, Beale attacks his 18 U.S.C. §§ 922(g)(1) and 924(a)(2) conviction, arguing that it was fatally defective because his indictment failed to allege both that Beale knew at the time of his conviction that he belonged to the “category”⁹ of persons barred from possessing a firearm and that he knew he was barred from possessing a firearm.¹⁰ He claims that these defects robbed this court of jurisdiction and violated his rights under the Fifth and Sixth Amendments.

I. Procedural default

*2 The government argues that Beale procedurally defaulted his claim because he did not challenge the sufficiency of his indictment on direct appeal. The “extraordinary remedy”¹¹ of federal habeas “is not designed to provide criminal defendants multiple opportunities to challenge their sentence.”¹² When a “criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do,” he must demonstrate either “cause excusing his procedural default” and “actual prejudice resulting from the claim of error,” or actual innocence.¹³ Noting that Beale does not assert an actual innocence claim, the government argues that Beale's guilty plea precludes him from asserting this

collateral attack, he cannot show cause excusing his failure to raise these claims on appeal, and he was not prejudiced by a *Rehaif* error.¹⁴ Beale claims that (1) his indictment failed to assert a predicate offense, robbing this court of jurisdiction, excusing any procedural default, and precluding his guilty plea's presumptive waiver of § 2255 attacks; (2) the *Rehaif* decision effected a sea change in the law, excusing his failure to directly appeal his conviction; and (3) he was actually prejudiced or, in the alternative, the structural errors plaguing his conviction relieve him of the obligation to show prejudice.¹⁵

A. This court has jurisdiction over Beale.

Beale argues that his claim is exempt from the procedural-default rule because, under *Rehaif*, the indictment fails to properly allege an “offense” against the United States.¹⁶ This court “has jurisdiction [over] all crimes cognizable under the authority of the United States.”¹⁷ In *United States v. Cotton*, the Supreme Court unequivocally held that “defects in an indictment do not deprive a court of its power to adjudicate a case.”¹⁸ The Ninth Circuit, other circuits, other judges within this district, and this court have repeatedly affirmed that an indictment’s “omission of the knowledge[-]of[-]status requirement d[oes] not deprive the district court of jurisdiction.”¹⁹ So even presuming the validity of Beale’s *Rehaif*-based claim, the deficiency he identifies in his indictment does not preclude this court from exercising its jurisdiction.

B. Beale has shown cause, but not prejudice, to stave off procedural default.

The government correctly notes that Beale did not challenge on direct appeal the indictment’s failure to allege—or the government’s failure to prove—that he knew that he had been previously convicted of a crime punishable by a term of imprisonment exceeding one year.²⁰ But “where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.”²¹ *Rehaif*’s holding is just such a novel claim, given that it “overturn[s] a longstanding and widespread practice to which [the] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.”²² So I find that Beale has sufficiently shown cause to excuse his failure to raise this argument on direct appeal.

*3 Beale has failed, however, to meet his burden of demonstrating that he was prejudiced by the government’s omission.²³ Actual prejudice “requires the petitioner to establish ‘not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage.’”²⁴ To prove a felon-in-possession charge, the government’s obligation is not “burdensome,” and it may be inferred from circumstantial evidence.²⁵ At the time of his guilty plea and subsequent conviction, Beale had been previously convicted of several felonies and sentenced to multiple, concurrent terms of imprisonment exceeding one year.²⁶ Indeed, his criminal history score was 23, which was 10 points more than he needed to achieve the highest criminal history category of VI.²⁷ In his guilty plea, Beale swore that, at the time he possessed this firearm, he had been “convicted of a crime punishable by imprisonment for a term exceeding one year.”²⁸ This evidence proves beyond a reasonable doubt that Beale—unlike the *Rehaif* defendant—well knew that he had been convicted of “a crime punishable by imprisonment for a term exceeding one year.”²⁹ And while Beale argues that a post-hoc review of the evidence is inappropriate when he hasn’t raised a sufficiency-of-the-evidence claim, Beale must still show “actual prejudice” to excuse his default.³⁰ Beale can’t do so with a criminal record and sentencing history like his.³¹ Thus, even if his indictment had stated the mens rea element recognized in *Rehaif*, Beale’s plea and eventual judgment on the felon-in-possession count would have been the same,³² and I find that Beale has failed to show that he was prejudiced by this omission.

C. Beale’s deficient indictment does not present a structural error.

In the alternative, Beale argues that he need not show actual prejudice to overcome procedural default because his indictment’s deficiencies are structural, setting off cascading violations of the Fifth and Sixth Amendments.³³ At the outset, Beale mischaracterizes *Rehaif*’s holding by arguing that it requires the government to both prove that Beale knew that he belonged to the category of persons prohibited from possessing firearms *and* that he himself knew that he was barred from owning firearms. *Rehaif* does not require that a § 924(g) defendant know that he was barred from possessing a firearm; it clarifies that the government must demonstrate that a defendant “knew he belonged to the relevant category of persons barred from possessing a firearm.”³⁴ This subtle

distinction is an important one. As the Ninth Circuit reasoned in *United States v. Singh*, requiring the government to prove that “the defendant knew his or her status prohibited firearm ownership or possession,” and not merely that the defendant belonged to the category of those prohibited from owning a firearm, “would improperly raise the scienter requirement of § 924(a)(2) from ‘knowingly’ to ‘willfully.’”³⁵ So the government “must prove only that [Beale] knew, at the time he possessed the firearm, that he belonged to one of the prohibited status groups enumerated in § 922(g).”³⁶

*4 In light of *Rehaif*’s limited scope, I am not convinced that the government’s failure to include an element of Beale’s § 922(g) charge presents a structural error. “[C]ertain errors, termed structural errors might affect substantive rights regardless of their actual impact on an appellant’s trial.”³⁷ As opposed to simple errors “in the trial process itself,”³⁸ structural errors “go to the framework within which judicial proceedings are conducted,” requiring “‘automatic reversal of the conviction.’”³⁹ The Supreme Court has narrowed the types of errors that may be deemed structural, recognizing errors like deprivation of counsel, lack of an impartial trial judge, violations of the right to self-representation and a public trial, and an erroneous reasonable-doubt instruction as sufficiently egregious to excuse a claimant from proving actual prejudice.⁴⁰ But structural errors must necessarily affect all aspects of a trial; they cannot be merely potentially damaging.⁴¹

While the Ninth Circuit has yet to definitively rule that a *Rehaif* error is not structural,⁴² its recent decisions have repeatedly recognized that *Rehaif*’s reach is limited. In *Tate v. United States*, for example, the Ninth Circuit determined that the *Rehaif* Court announced a statutory rule and “did not invoke any constitutional provision or principle,” thus its holding could not sustain a successive § 2255 challenge.⁴³ And the panels in *United States v. Benamor* and *United States v. Johnson* declined to treat a *Rehaif* error as structural and instead applied plain-error review, declining to overturn sentences when the defendant failed to “show how the fairness, integrity, or public reputation of judicial proceedings would be adversely affected by affirming his conviction.”⁴⁴ Other circuits almost uniformly agree that omission of the knowledge-of-status requirement should not be treated like a structural error.⁴⁵ And the Fourth Circuit, which remains the lone court to hold that this omission is structural,⁴⁶

declined to revisit the issue en banc and, instead, called for the Supreme Court to resolve this rift within the circuits.⁴⁷ I agree with the reasoning of the majority of the circuit courts. Not only has the Supreme Court held that a district judge’s failure to instruct the jury on an offense element (which is similar to an indictment’s omission of an element) does not amount to structural error,⁴⁸ but the *Rehaif* Court remanded for harmless-error review rather than reversing the conviction outright.⁴⁹ So I decline to excuse Beale from making a showing of actual prejudice, and I deny his § 2255 motion.

II. *Tollett v. Henderson* bars Beale’s claims.

*5 Alongside Beale’s procedural default and failed jurisdictional challenge, I also find that he waived his ability to challenge his indictment in his guilty plea. A guilty plea generally constitutes a waiver of all non-jurisdictional defects.⁵⁰ In *Tollett v. Henderson*, the Court held that a guilty plea is “a break in the chain of events” of the criminal process, barring “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea” but excepting those attacks premised on the knowing and voluntary nature of his plea or, relatedly, ineffective assistance of counsel.⁵¹ Like the *Tollett* defendant, Beale’s attack does not challenge this court’s jurisdiction, he “solemnly admitted in open court that he is in fact guilty of the offense with which he is charged,”⁵² and he “knowingly and expressly waive[d] all collateral challenges, including under 28 U.S.C. § 2255, to his conviction.”⁵³ I am also not persuaded by Beale’s assertion that his indictment’s alleged *Rehaif* error presents an exception to *Tollett*’s bar. While the Ninth Circuit has recognized that *Tollett*’s ruling may not apply to cases in which an “indictment failed to state a valid claim,”⁵⁴ the Supreme Court has upheld the bar when the indictment could “have been ‘cured’ through a new indictment.”⁵⁵ The government’s failure to include the knowledge-of-status requirement in Beale’s indictment is exactly the type of error that could have been cured with a new indictment. So I find that Beale has also waived his collateral attack under *Tollett*.

III. Certificate of appealability

To appeal this order, Beale needs a certificate of appealability from a circuit or district judge.⁵⁶ In deciding whether to grant one, I consider if “reasonable jurists could debate whether (or, for that matter, agree that) the petition should

have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.”⁵⁷ Although this standard is “lenient,”⁵⁸ I find that Beale's challenge does not meet it. So I deny him a certificate of appealability.

of Court is **DIRECTED to enter a separate civil judgment denying Beale's § 2255 petition and denying a certificate of appealability.** The Clerk must also file this order and the civil judgment in this case and in the related civil case: 2:20-cv-01112-JAD.

Conclusion

IT IS THEREFORE ORDERED that Beale's motion to vacate under 28 U.S.C. § 2255 [ECF No. 80] is **DENIED**. The Clerk

All Citations

Slip Copy, 2021 WL 325713

Footnotes

- 1 ECF Nos. 76, 78. Beale did not appeal his conviction, which became final on June 27, 2018.
- 2 *Rehaif v. United States*, 139 S. Ct. 2191 (2019).
- 3 Because the parties are familiar with the facts, I do not repeat them here except as necessary to my analysis.
- 4 28 U.S.C. § 2255(a).
- 5 *Id.* § 2255(b); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (“We have characterized this standard as requiring an evidentiary hearing where ‘the movant has made specific factual allegations that, if true, state a claim on which relief could be granted.’”) (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)). I find this motion suitable for resolution without an evidentiary hearing.
- 6 *Rehaif*, 139 S. Ct. at 2191.
- 7 *Id.* at 2200.
- 8 *Id.* at 2194–95.
- 9 For Beale, that category is the class of persons convicted of a crime punishable by imprisonment for a term exceeding one year—in other words, convicted felons. See ECF No. 1 at 1 (indictment charging violations of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)); see also ECF No. 68 (plea agreement).
- 10 ECF No. 80.
- 11 *Bousley v. United States*, 523 U.S. 614, 621 (1998).
- 12 *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).
- 13 *Id.* (citing *United States v. Frady*, 456 U.S. 152, 168 (1982)); *Bousley*, 523 U.S. at 1611 (“Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy ‘has probably resulted in the conviction of one who is actually innocent.’”) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).
- 14 ECF No. 82.

- 15 ECF Nos. 80, 83.
- 16 ECF No. 80 at 14.
- 17 *Lamar v. United States*, 240 U.S. 60, 65 (1916).
- 18 *United States v. Cotton*, 533 U.S. 625, 630 (2002).
- 19 *E.g.*, *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (citing *Cotton*, 535 U.S. at 631); *United States v. Velasco-Medina*, 305 F.3d 839, 845–46 (9th Cir. 2002) (reasoning that *Cotton*'s holding applies where “an indictment[] fail[s] to allege the specific intent required” for a crime); *United States v. Moore*, 954 F.3d 1322, 1336 (11th Cir. 2020) (“[T]he law is clear: the omission of an element in an indictment does not deprive the district court of subject-matter jurisdiction.”); *United States v. Kelbch*, No. 3:17-cr-00040, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021); *United States v. Reynolds*, No. 2:16-cr-000296, 2020 WL 5235316, at *3 (D. Nev. Sept. 2, 2020) (Dorsey, J.). Beale cites no case to the contrary. See, e.g., ECF No. 83 at 13–18.
- 20 ECF No. 82 at 6.
- 21 *Reed v. Ross*, 468 U.S. 1, 16 (1984).
- 22 *Reed*, 468 U.S. at 17.
- 23 Beale, in fact, seemingly concedes this point. Instead of arguing that he could demonstrate that he lacked knowledge of his status, Beale merely asserts that he “lacked notice of the knowledge-of-status element.” ECF No. 83 at 26. This does little to rebut the government's argument that any errors in his indictment are non-prejudicial.
- 24 *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (emphasis omitted).
- 25 *Rehaif*, 139 S. Ct. at 2198.
- 26 Presentence Investigative Report at ¶¶ 29–49. Since age 18, Beale has served lengthy sentences for violent felonies involving possession and distribution of controlled substances, domestic-violence batteries, and battery on a police officer. *Id.*
- 27 *Id.* at 50–57.
- 28 ECF No. 68.
- 29 18 U.S.C. § 922(g)(1).
- 30 *Frady*, 456 U.S. at 168 (“In applying this dual standard to the case before us, we find it unnecessary to determine whether [the § 2255 petitioner] has shown cause, because we are confident he suffered no actual prejudice....”).
- 31 Other courts have reasoned similarly. See, e.g., *Whitley v. United States*, No. 04 CR. 1381, 2020 WL 1940897, at *2 (S.D.N.Y. Apr. 22, 2020) (“[A]ny argument that Whitley was prejudiced therefrom is belied by the sheer implausibility that, after having been convicted of multiple prior felony convictions for which sentences exceeding one year had been imposed, and having in fact served more than a year in prison in connection therewith ..., Whitley nevertheless lacked the requisite awareness of his restricted status.”).

- 32 See, e.g., *United States v. Hollingshed*, 940 F.3d 410, 416 (8th Cir. 2019) (finding defendant not entitled to relief under *Rehaif* when he stipulated at trial that he was a convicted felon and could not show a reasonable probability that the outcome of the proceedings would have been different).
- 33 ECF No. 80 at 12–21; see also *United States v. Withers*, 638 F.3d 1055, 1066 (9th Cir. 2011) (noting that structural errors can satisfy the procedural-default rule's prejudice requirement).
- 34 *Rehaif*, 139 S. Ct. at 2200.
- 35 *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020).
- 36 *Id.* at 728. Given Beale's misreading of *Rehaif*, I decline to consider any alleged errors predicated on the indictment's failure to include an element indicating that Beale needed to know he could not possess a firearm.
- 37 *United States v. Marcus*, 560 U.S. 258, 263 (2010) (citations omitted).
- 38 *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).
- 39 *McKinney v. Ryan*, 813 F.3d 798, 821 (9th Cir. 2015) (en banc).
- 40 See *Marcus*, 560 U.S. at 263.
- 41 *Accord Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017).
- 42 See, e.g., *United States v. Espinoza*, 816 F. App'x 82, 84–85 (9th Cir. 2020) (expressing “no view” on whether “the district court's failure to inform of him of the knowledge[-]of[-]status element constituted a ‘structural error’ that per se affected his substantial rights”).
- 43 *Tate v. United States*, 982 F.3d 1226, 1228 (9th Cir. 2020).
- 44 *United States v. Johnson*, No. 18-10016, 2020 WL 6305981, at *3 (9th Cir. Oct. 28, 2020) (declining, like the *Espinoza* panel, to consider whether a *Rehaif*-style error is structural); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (applying the plain-error test and determining that “an error in not instructing the jury to make such a [*Rehaif*] finding did not affect [the d]efendant's substantial rights or the fairness, integrity, or public reputation of the trial”).
- 45 See, e.g., *United States v. Burghardt*, 939 F.3d 397, 403–05 (1st Cir. 2019); *United States v. Hicks*, 958 F.3d 399, 401–02 (5th Cir. 2020) (rejecting the notion that a *Rehaif* error is structural); *United States v. Coleman*, 961 F.3d 1024, 1029–30 (8th Cir. 2020) (rejecting the argument that a plea suffering from a *Rehaif* error is structural and applying a reasonable-probability standard to the third prong of plain-error review); see also *United States v. Balde*, 943 F.3d 73, 97–98 (2d Cir. 2019) (noting that in some cases a *Rehaif* error may have no effect on a defendant's conviction or decision to plead guilty).
- 46 *United States v. Gary*, 954 F.3d 194, 205–06 (4th Cir. 2020), *cert granted* No. 20-444, 2021 WL 77245 (Mem), 21 Cal. Daily Op. Serv. 214 (Jan. 8, 2021).
- 47 *United States v. Gary*, 963 F.3d 420, 420 (4th Cir. 2020) (en banc) (Wilkinson, J., concurring) (“I concur in the denial of rehearing en banc for one reason and one reason only. The panel's holding is so incorrect and on an issue of such importance that I think the Supreme Court should consider it promptly.... Is it eight—or nine—circuits that disagree with us? I have lost count, but the ranks are growing.”). Beale's attempts to explain why this concurrence's, and the majority of other circuit courts', views should be ignored are unavailing.

- 48 *Neder v. United States*, 527 U.S. 1, 25 (1999); see also *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.6 (2004) (“The omission of a single Rule 11 warning without more is not colorably structural.”).
- 49 *Rehaif*, 139 S. Ct. at 2200.
- 50 *Blackledge v. Perry*, 417 U.S. 21, 29–30 (1974).
- 51 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).
- 52 *Id.* at 267.
- 53 ECF No. 68 at 9.
- 54 *United States v. Johnston*, 199 F.3d 1015, 1020 n.3 (9th Cir. 1999).
- 55 *Class v. United States*, 138 S. Ct. 798, 805 (2018).
- 56 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1).
- 57 *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (internal quotation marks omitted).
- 58 *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

MICHAEL TERRELL BEALE

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-cr-00050-JAD-CWH

USM Number: 50203-048

Raquel Lazo, AFD

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) One of the Indictment [ECF No. 1]☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	5/11/2016	1

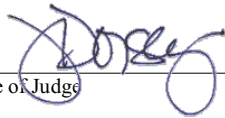
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ 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.

6/12/2018

Date of Imposition of Judgment


 Signature of Judge

JENNIFER A. DORSEY, U.S. DISTRICT JUDGE

Name and Title of Judge

6/13/2018

Date

DEFENDANT: MICHAEL TERRELL BEALE

CASE NUMBER: 2:17-cr-00050-JAD-CWH

IMPRISONMENT

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

74 MONTHS

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

The Court recommends that the defendant be designated to FCI Arizona or FCI Sheridan. The Court further recommends that the defendant be permitted to participate in the RDAP program based on his history of drug abuse as indicated in the presentence investigation report.

☒ 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 12 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 _____

a _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL TERRELL BEALE

CASE NUMBER: 2:17-cr-00050-JAD-CWH

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 YEARS

and must comply with the following standard conditions, mandatory conditions, and special conditions:

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.

DEFENDANT: MICHAEL TERRELL BEALE
CASE NUMBER: 2:17-cr-00050-JAD-CWH

Judgment—Page 4 of 7

MANDATORY CONDITIONS OF SUPERVISION

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, not to exceed 104 tests annually.
 - ☐ 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 cooperate in the collection of DNA as directed by the probation officer.

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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's
Signature

Date

DEFENDANT: MICHAEL TERRELL BEALE

CASE NUMBER: 2:17-cr-00050-JAD-CWH

SPECIAL CONDITIONS OF SUPERVISION

- 1. Substance Abuse Treatment** – You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program.
- 2. Drug Testing** – You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed 104 tests per year. You must pay the costs of the testing. You must not attempt to obstruct or tamper with the testing methods.
- 3. Mental Health Treatment** – You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program.
- 4. Domestic Violence Program** – You must participate in a domestic violence program as approved and directed by the probation officer.
- 5. Search and Seizure** – You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: MICHAEL TERRELL BEALE
CASE NUMBER: 2:17-cr-00050-JAD-CWH**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

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

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____	\$ _____
---------------	----------	----------

☐ 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 Sheet 6 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:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: MICHAEL TERRELL BEALE
CASE NUMBER: 2:17-cr-00050-JAD-CWH

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 payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

DAYLE ELIESON
 United States Attorney
 PHILLIP N. SMITH, JR.
 Assistant United States Attorney
 Nevada State Bar Number 10233
 501 Las Vegas Boulevard South, Suite 1100
 Las Vegas, Nevada 89101
 (702) 388-6503 / Fax: (702) 388-5087
phillip.smith@usdoj.gov

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
FEB - 5 2018	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL TERRELL BEALE,

Defendant.

2:17-cr-050-JAD-CWH

**PLEA AGREEMENT UNDER
 FED. R. CRIM. P. 11(c)(1)(A) and (B)**

Plaintiff United States of America, by and through DAYLE ELIESON, United States Attorney; Phillip N. Smith, Jr., Assistant United States Attorney; the Defendant MICHAEL TERRELL BEALE; and the Defendant's attorney, Raquel Lazo, Assistant Federal Public Defender, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and MICHAEL TERRELL BEALE (the Defendant). This Plea Agreement binds the Defendant and the United States Attorney's Office for the District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

The Plea Agreement sets forth the parties' agreement regarding the criminal charges referenced in the Plea Agreement and the applicable sentence, fine, and restitution. It does not control or prohibit

the United States or any agency or third party from seeking any other civil or administrative remedies directly or indirectly against the Defendant.

II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS

A. Guilty Plea. The Defendant knowingly and voluntarily agrees to plead guilty to the following charge as set forth in the Criminal Indictment:

Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

B. Waiver of Trial Rights. The Defendant acknowledges that he has been advised and understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights guaranteed to all defendants by the laws and the Constitution of the United States. Specifically, the Defendant is giving up:

1. The right to proceed to trial by jury on all charges, or to a trial by a judge if the Defendant and the United States both agree;
2. The right to confront the witnesses against the Defendant at such a trial, and to cross-examine them;
3. The right to remain silent at such a trial, with assurance that his silence could not be used against him in any way;
4. The right to testify in his own defense at such a trial if he so chooses;
5. The right to compel witnesses to appear at such a trial and testify in the Defendant's behalf; and
6. The right to have the assistance of an attorney at all stages of such proceedings.

C. Withdrawal of Guilty Plea. The Defendant will not seek to withdraw his guilty plea after he has entered it in court.

D. Additional Charges. The United States agrees not to bring any additional charges against the Defendant arising out of the investigation in the District of Nevada that culminated in this

1 Plea Agreement and based on conduct known to the United States except that the United States
2 reserves the right to prosecute the Defendant for any crime of violence as defined by 18 U.S.C. § 16.

3 **III. ELEMENTS OF THE OFFENSE**

4 The elements of Felon in Possession of a Firearm under 18 U.S.C. § 922(g)(1) are:

- 5 1. the Defendant knowingly possessed a firearm;
- 6 2. the firearm had been shipped or transported from one state to another; and
- 7 3. at the time the Defendant possessed the firearm, the Defendant had been previously
8 convicted of a crime punishable by a term of imprisonment exceeding one year.

9 *See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65 (2010 ed.).*

10 **IV. FACTS SUPPORTING GUILTY PLEA**

11 A. The Defendant will plead guilty because he is, in fact and under the law, guilty of the
12 crimes charged.

13 B. The Defendant acknowledges that if he elected to go to trial instead of pleading guilty,
14 the United States could prove his guilt beyond a reasonable doubt. The Defendant further
15 acknowledges that his admissions and declarations of fact set forth below satisfy every element of the
16 charged offenses.

17 C. The Defendant waives any potential future claim that the facts he admitted in this Plea
18 Agreement were insufficient to satisfy the elements of the charged offenses.

19 D. The Defendant admits and declares under penalty of perjury that the facts set forth
20 below:

21 On May 11, 2016, LVMPD officers were finishing a domestic violence call at the Sienna Suites
22 located at 6555 Boulder Highway in Las Vegas when they were contacted by a citizen reference
23 another domestic dispute. Officers were advised by a female, who identified herself as A.G., that her
24 ex-boyfriend was in her room and destroying her property. Upon reaching the third floor of building

1 #4 where the apartment was located, officers observed a male, later identified as MICHAEL
 2 TERRELL BEALE, quickly departing the area of A.G.'s apartment. ~~Officers yelled commands to~~ ^{PNS OR MB}
 3 ~~stop, to which BEALE did not comply.~~ Officers eventually caught-up to BEALE on the ground floor
 4 of building #4. BEALE was ultimately taken into custody. During the ensuing investigation, officers
 5 recovered a Colt .38 Special revolver bearing serial number F37536 lying in the path that BEALE had
 6 taken when attempting to leave the scene.

7 The Defendant admits that he was in possession of the aforementioned firearm. At the time
 8 the Defendant was in possession of the firearm, he had been previously convicted of a crime
 9 punishable by a term of imprisonment exceeding one year. The Defendant also admits that he knew
 10 or had reasonable cause to believe that the firearm was stolen. The firearm had also been shipped and
 11 transported in interstate commerce.

12 All of the foregoing occurred in the State and Federal District of Nevada.

13 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

14 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
 15 Defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the Defendant does not
 16 plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea Agreement shall
 17 be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument
 18 or representation offered by or on the Defendant's behalf. The Defendant expressly waives all rights
 19 under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section
 20 IV of this Plea Agreement.

21 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

22 A. Discretionary Nature of Sentencing Guidelines. The Defendant acknowledges that the
 23 Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines")
 24 in determining the Defendant's sentence, but that the Sentencing Guidelines are advisory, not

1 mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term
2 of imprisonment permitted by statute.

3 B. Offense Level Calculations. The parties stipulate to the following calculation of the
4 Defendant's offense level under the Sentencing Guidelines, acknowledge that these stipulations do not
5 bind the Court, and agree that they will not seek to apply any other specific offense characteristics,
6 enhancements or reductions:

7 1. [Felon in Possession of a Firearm]

8	Base Offense Level [USSG § 2K2.1(a)(4)(A)]:	20 ¹
9	Enhancements:	
	[Stolen Firearm / USSG § 2K2.1(b)(4)(A)]:	+2
10	Reductions:	
	[Acceptance of Responsibility / USSG § 3E1.1(a)]:	-2
11	[Timeliness of Plea / USSG § 3E1.1(b)]:	-1

12 C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG §
13 3E1.1(a), the United States will recommend that the Defendant receive a two-level downward
14 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing a
15 factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts establishing
16 the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully admit facts
17 establishing the forfeiture allegations when he enters his guilty plea; (d) provides false or misleading
18 information to the United States, the Court, Pretrial Services, or the Probation Office; (e) denies
19 involvement in the offense or provides conflicting statements regarding his involvement or falsely
20 denies or frivolously contests conduct relevant to the offense; (f) attempts to withdraw his guilty plea;
21 (g) commits or attempts to commit any crime; (h) fails to appear in court; or (i) violates the conditions
22 of pretrial release.

23
24 ¹ Counsel for the parties agree that for the purposes of this plea only that the Government will not assert that the Defendant's prior Nevada felony conviction for Conspiracy to Violate the Controlled Substances Act qualifies as a controlled substance offense under the Sentencing Guidelines.

1 Under USSG § 3E1.1(b), if the Court determines that the Defendant's total offense level,
2 before operation of § 3E1.1(a), is 16 or higher, the United States will move for an additional one-level
3 downward adjustment for acceptance of responsibility before sentencing because the Defendant
4 communicated his decision to plead guilty in a timely manner that enabled the United States to avoid
5 preparing for trial and to efficiently allocate its resources.

6 These Sentencing Guidelines provisions, if applied, will result in a total offense level of 19.

7 D. Criminal History Category. The Defendant acknowledges that the Court may base his
8 sentence in part on the Defendant's criminal record or criminal history. The Court will determine the
9 Defendant's Criminal History Category under the Sentencing Guidelines.

10 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
11 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
12 applicable Sentencing Guidelines range and whether to depart from that range.

13 F. Additional Sentencing Information. The stipulated Sentencing Guidelines calculations
14 are based on information now known to the parties. The parties may provide additional information
15 to the United States Probation Office and the Court regarding the nature, scope, and extent of the
16 Defendant's criminal conduct and any aggravating or mitigating facts or circumstances.

17 Good faith efforts to provide truthful information or to correct factual misstatements shall not
18 be grounds for the Defendant to withdraw his guilty plea.

19 The Defendant acknowledges that the United States Probation Office may calculate the
20 Sentencing Guidelines differently and may rely on additional information it obtains through its
21 investigation. The Defendant also acknowledges that the Court may rely on this and other additional
22 information as it calculates the Sentencing Guidelines range and makes other sentencing
23 determinations, and the Court's reliance on such information shall not be grounds for the Defendant
24 to withdraw his guilty plea.

VII. APPLICATION OF SENTENCING STATUTES

A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a 10-year prison sentence, a fine of not more than two-hundred fifty thousand dollars (\$250,000), or both.

B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in 18 U.S.C. § 3553(a) in determining the Defendant's sentence. However, the statutory maximum sentence limits the Court's discretion in determining the Defendant's sentence.

C. Parole Abolished. The Defendant acknowledges that his prison sentence cannot be shortened by early release on parole because parole has been abolished.

D. Supervised Release. In addition to imprisonment and a fine, the Defendant will be subject to a term of supervised release not to exceed three years. 18 U.S.C. §§ 3559(a)(3) and 3583(b)(2). Supervised release is a period of time after release from prison during which the Defendant will be subject to various restrictions and requirements. If the Defendant violates any condition of supervised release, the Court may order the Defendant's return to prison for all or part of the term of supervised release, which could result in the Defendant serving a total term of imprisonment greater than the statutory maximum prison sentence of 10 years.

E. Special Assessment. The Defendant will pay a \$100.00 special assessment per count of conviction at the time of sentencing.

VIII. POSITIONS REGARDING SENTENCE

The parties will jointly recommend that the Court sentence the Defendant to a sentence within the Sentencing Guidelines range determined by the Court, unless the Defendant commits any act that could result in a loss of the downward adjustment for acceptance of responsibility. The Defendant acknowledges that the Court does not have to follow that recommendation. Notwithstanding its agreement to recommend a sentence within the Sentencing Guidelines range, the United States

1 reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction
2 litigation.

3 The Defendant will not request a sentence below the Sentencing Guidelines range as calculated
4 by the Court, and will not seek a downward adjustment pursuant to 18 U.S.C. § 3553 or USSG §
5 4A1.3(b)(1) from any sentence the Court may impose.

6 **IX. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

7 Before or after sentencing, upon request by the Court, the United States, or the Probation
8 Office, the Defendant will provide accurate and complete financial information, submit sworn
9 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
10 Defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
11 release funds and property under his control in order to pay any fine, forfeiture, or restitution ordered
12 by the Court.

13 **X. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

14 A. Plea Agreement and Decision to Plead Guilty. The Defendant acknowledges that:

- 15 (1) He has read this Plea Agreement and understands its terms and conditions;
- 16 (2) He has had adequate time to discuss this case, the evidence, and this Plea
17 Agreement with his attorney;
- 18 (3) He has discussed the terms of this Plea Agreement with his attorney;
- 19 (4) The representations contained in this Plea Agreement are true and correct,
20 including the facts set forth in Section IV; and
- 21 (5) He was not under the influence of any alcohol, drug, or medicine that would
22 impair his ability to understand the Agreement when he considered signing this
23 Plea Agreement and when he signed it.

1 The Defendant understands that he alone decides whether to plead guilty or go to trial, and
2 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him,
3 his possible defenses, and the benefits and possible detriments of proceeding to trial. The Defendant
4 also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened
5 him to enter into this Plea Agreement.

6 B. Waiver of Appeal and Post-Conviction Proceedings. The Defendant knowingly and
7 expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
8 Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which
9 the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) the right to
10 appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

11 The Defendant also knowingly and expressly waives all collateral challenges, including any
12 claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court
13 adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of
14 counsel.

15 The Defendant reserves only the right to appeal any portion of the sentence that is an upward
16 departure or an upward variance from the Sentencing Guidelines range determined by the Court.

17 The Defendant acknowledges that the United States is not obligated or required to preserve
18 any evidence obtained in the investigation of this case.

19 C. Removal / Deportation Consequences. The Defendant understands and acknowledges
20 that if he is not a United States citizen, then it is highly probable that he will be permanently removed
21 (deported) from the United States as a consequence of pleading guilty under the terms of this Plea
22 Agreement. The Defendant has also been advised if his conviction is for an offense described in 8
23 U.S.C. § 1101(a)(43), he will be deported and removed from the United States and will not be allowed
24 to return to the United States at any time in the future. The Defendant desires to plead guilty regardless

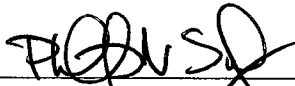
of any immigration consequences that may result from his guilty plea, even if the consequence is automatic removal from the United States with no possibility of returning. The Defendant acknowledges that he has specifically discussed these removal / deportation consequences with his attorney.

XI. ADDITIONAL ACKNOWLEDGMENTS

This Plea Agreement resulted from an arms-length negotiation in which both parties bargained for and received valuable benefits in exchange for valuable concessions. It constitutes the entire agreement negotiated and agreed to by the parties. No promises, agreements or conditions other than those set forth in this agreement have been made or implied by the Defendant, the Defendant's attorney, or the United States, and no additional promises, agreements or conditions shall have any force or effect unless set forth in writing and signed by all parties or confirmed on the record before the Court.

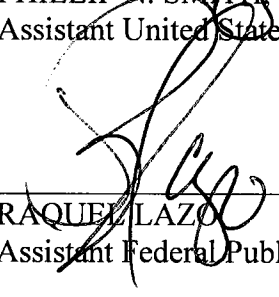
DAYLE ELIESON,
United States Attorney

DATE 2-5-18



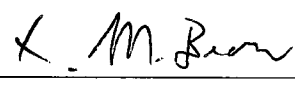
PHILLIP N. SMITH, JR.
Assistant United States Attorney

DATE 1/24/2018



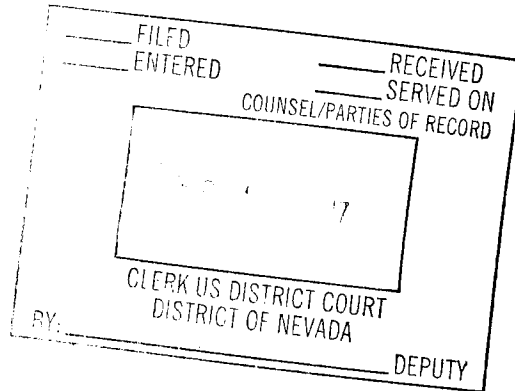
RAQUEL LAZO
Assistant Federal Public Defender

DATE 1/24/2018



MICHAEL TERRELL BEALE
Defendant

1 DANIEL G. BOGDEN
 2 United States Attorney
 3 PHILLIP N. SMITH, JR.
 4 Nevada State Bar Number 10233
 5 Assistant United States Attorney
 6 501 Las Vegas Blvd. South, Suite 1100
 7 Las Vegas, Nevada 89101
 8 PHONE: (702) 388-6503
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 10 phillip.smith@usdoj.gov



11 Attorney for the Plaintiff

12
 13 **UNITED STATES DISTRICT COURT**
 14 **DISTRICT OF NEVADA**

15 -oOo-

16 UNITED STATES OF AMERICA,)
 17)
 18 PLAINTIFF,)
 19)
 20 vs.)
 21)
 22 MICHAEL TERRELL BEALE,)
 23)
 24 DEFENDANT.)

25 **CRIMINAL INDICTMENT**

26 2:17-cr- 50-JAD-CWH

27 **VIOLATION:**

28 18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon
 in Possession of a Firearm.

THE GRAND JURY CHARGES THAT:

On or about May 11, 2016, in the State and Federal District of Nevada,

MICHAEL TERRELL BEALE,

defendant herein, having been convicted of crimes punishable by imprisonment for a term
 exceeding one year, in the State of Nevada, to wit: Conspiracy to Violate the Controlled
 Substances Act, in the Eighth Judicial District Court, Clark County, Nevada, on or about April
 6, 2007, in Case No. C230723; Possession of a Controlled Substance with Intent to Sell, in the
 Eighth Judicial District Court, Clark County, Nevada, on or about September 9, 2010, in Case

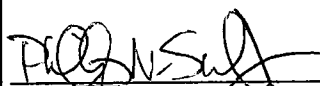
1 No. C263219; and Battery Constituting Domestic Violence, in the Eighth Judicial District Court,
2 Clark County, Nevada, on or about September 21, 2010, in Case No. C262715, did knowingly
3 possess a firearm, to wit: a Colt .38 Special revolver bearing serial number F37536, said
4 possession being in and affecting interstate commerce and said firearm having been shipped
5 and transported in interstate commerce, all in violation of Title 18, United States Code, Sections
6 922(g)(1) and 924(a)(2).
7

8 **DATED:** this 14th day of February, 2017.

9 **A TRUE BILL:**

10 /S/
11 FOREPERSON OF THE GRAND JURY
12

13 DANIEL G. BOGDEN
14 United States Attorney
15

16 
17 PHILLIP N. SMITH, JR.
18 Assistant United States Attorney
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON MICHAEL BOYKINS,

Defendant-Appellant.

No. 21-15398

D.C. Nos. 3:20-cv-00278-LRH
3:18-cr-00029-LRH-CLB-1

District of Nevada,
Reno

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 12, 2021 (Docket Entry No. 2) is lifted.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

2021 WL 50924

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,

v.

John Michael BOYKINS, Petitioner/Defendant.

Case No. 3:18-cr-00029-LRH-CLB-1

|

Signed 01/06/2021

Attorneys and Law Firms

Jason Michael Boykins, pro se.

ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

*1 Before the Court is petitioner Jason Michael Boykins' ("Boykins") motion, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 42). Boykins filed his motion considering the recent ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The government opposes (ECF No. 46), arguing that Boykins' claims are procedurally barred because he did not raise them on direct appeal. In his reply (ECF No. 47), Boykins maintains that the constitutional errors are structural.

For the reasons contained within this Order, the Court denies his motion and denies him a certificate of appealability.

I. BACKGROUND

Boykins has an extensive criminal history which, among other things, includes Unlawful Possession of a Firearm by a Previously Convicted Felon, and subsequent violations of his supervised release stemming from that conviction.

The current motion relates to Boykins' conduct on August 3, 2017, where a detective with the Sparks Police Department located a vehicle suspected to be involved with a shooting from a week earlier. After stopping the vehicle, the detective found that the driver, Boykins, had a suspended driver's license. Following Boykins' arrest and upon conducting an inventory search of the vehicle he was driving, detectives

found two weapons: a loaded .45 caliber, Taurus Millennium pistol, and a loaded .357 caliber, Taurus revolver.

In October 2018, Boykins pleaded guilty to Unlawful Possession of a Firearm by a Previously Convicted Felon. ECF No. 21. This Court sentenced Boykins to 38 months' imprisonment followed by three years of supervised release. Now, Boykins seeks to vacate his sentence pursuant to 28 U.S.C. § 2255.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion may be brought on the following grounds: (1) "the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "the court was without jurisdiction to impose such sentence;" (3) "the sentence was in excess of the maximum authorized by law;" or (4) the sentence "is otherwise subject to collateral attack." *Id.*; see *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010). When a petitioner seeks relief pursuant to a right newly recognized by a decision of the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C. § 2255(f). That one-year limitation period begins to run from "the date on which the right asserted was initially recognized by the Supreme Court." *Id.* § 2255(f)(3).

On June 21, 2019, the Supreme Court decided *Rehaif*, overturning established Ninth Circuit precedent. 139 S. Ct. 2191. In the past, the government was only required to prove that a defendant knowingly possessed a firearm under 18 U.S.C. §§ 922(g) and 924(a)(2). *Id.* at 2200. Now, under *Rehaif*, the government "must prove both that the defendant knew he possessed a firearm and that he knew that he belonged to the relevant category of persons barred from possessing a firearm." *Id.*

III. DISCUSSION

*2 Boykins argues that by leaving out the new *Rehaif* element from the original indictment, this Court lacked jurisdiction. ECF No. 42, at 14. He further alleges the omission in the indictment violated both his Fifth Amendment guarantee that a grand jury find probable cause to support all the necessary elements of a crime, and his Sixth Amendment right to effective assistance of counsel and to be informed of the nature and cause of the accusation. *Id.* at 16–21.

A. Unconditional Guilty Plea

The government contends that by pleading guilty unconditionally, Boykins waived his right to make any non-jurisdictional challenges to the indictment; specifically, his Fifth and Sixth Amendment challenges. *See Tollet v. Henderson*, 411 U.S. 258, 267 (1973). ECF No. 46, at 12.

As part of his plea, Boykins waived “... all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” ECF No. 22, at 11. Consequently waiving “all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013). Considering the plea’s cut-and-dry language, the Court finds Boykins’ claims are barred by his guilty plea even in view of the exceptions to *Tollett v. Henderson*, 411 U.S. 258 (1973).¹ Nevertheless, the Court still finds it necessary to address the jurisdictional and procedural default arguments below.

B. Jurisdiction

This Court “has jurisdiction of all crimes cognizable under the authority of the United States....” *Lamar v. United States*, 240 U.S. 60, 65 (1916). Any “objection that the indictment does not charge a crime against the United States goes only to the merits of the case,” and does not deprive the court of jurisdiction. *Id.*; *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) (reiterating *Lamar*). Quite importantly, the Ninth Circuit and decisions within the District of Nevada have relied on the principle announced in *Cotton* in cases considering the aftermath of *Rehaif*. *See, e.g., United States v. Espinoza*, 816 F. App’x 82, 84 (9th Cir. 2020) (“[T]he indictment’s omission of the knowledge of status requirement did not deprive the district court of jurisdiction.”); *see also United States v. Miller*, Case No. 3:15-cr-00047-HDM-WGC (D. Nev. Dec. 8, 2020); *United States v. Baustamante*, Case No. 2:16-cr-00268-APG (D. Nev. Dec. 7, 2020).

Therefore, pursuant to Ninth Circuit precedent and decisions in this District, the Court had and continues to have jurisdiction over Boykins’ case despite *Rehaif*.

C. Procedural Default

*3 The government also argues that Boykins’ claims are procedurally defaulted. ECF No. 46, at 6. While a defendant certainly can question the underlying legality of his sentence or conviction, one who does not on direct appeal is procedurally defaulted from doing so unless they can demonstrate: (1) cause and prejudice; or (2) actual innocence. *See Bousley v. U.S.*, 523 U.S. 614, 622 (1998) (citations omitted). “ ‘Cause’ is a legitimate excuse for the default; ‘prejudice’ is actual harm resulting from the alleged constitutional violation.” *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

Boykins did not challenge the validity of the indictment and/or plea on direct appeal, but instead, argues his claims have not procedurally defaulted because he can demonstrate cause and prejudice, or, in the alternative, the omission in his indictment is a structural error and therefore only requires a showing of cause. Each argument is addressed in turn.

1. Cause

Boykins can likely demonstrate cause. *Rehaif* overturned long standing precedent in the Ninth Circuit, and the decision’s constitutional consequences were not “reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984).

2. Prejudice

Still, Boykins cannot demonstrate prejudice. The Ninth Circuit has found in numerous scenarios, that even if a defendant had been aware that the Government would need to prove the knowledge-of-status element, there is no reasonable probability that the outcome would have been different. *See United States v. Espinoza*, 816 F. App’x 82, 84 (9th Cir. 2020) (holding that “the failure of the indictment and plea colloquy to include the element of knowledge of felon status does not require us to vacate [the] conviction ...”); *United States v. Schmidt*, 792 F. App’x 521, 522 (9th Cir. 2020) (“Although [defendant] did not argue below that the government was required to prove [defendant] knew he was a felon, under any standard of review there was overwhelming evidence that [defendant] knew he was a felon when he possessed the firearms at issue in this case.”); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 989 (9th Cir. 2020) (finding in the trial context that, “even if the district court had instructed the jury on the knowledge-of-status element, there is no reasonable probability that the jury would have reached a different

verdict ...”). In other words, the Ninth Circuit has repeatedly found no actual harm resulted from alleged constitutional violations stemming from the decision in *Rehaif* in cases involving comparable facts to Boykins.

Here, Boykins admitted to being a convicted felon at the time he possessed the guns. ECF No. 22, at 3. In addition, he had served more than a year in prison upon each one of five prior felony convictions spanning over twenty years. The Court is not persuaded that the inclusion of the *Rehaif* element would have changed Boykins’ decision to plead guilty or that his plea was involuntary.

Accordingly, there is no reasonable probability, but for the *Rehaif* error, that the outcome of the proceeding would have been different. Therefore, because Boykins has not demonstrated both cause and prejudice, he procedurally defaulted on his claims challenging the legality of his conviction.

D. Structural Error

Alternatively, Boykins argues that the constitutional errors are structural, therefore only requiring a showing of cause. “[C]ertain errors, termed structural errors, might affect substantial rights regardless of their actual impact on an appellant’s trial.” *United States v. Marcus*, 560 U.S. 258, 263 (2010) (citations omitted). Structural errors go to the very heart of the trial and are not “simply an error in the trial process itself.” *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

*4 While the Ninth Circuit has not decided whether the knowledge-of-status element in *Rehaif* presents issues of structural error, numerous other circuits have concluded it does not. See *United States v. Nasir*, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020). The Court agrees with these circuit courts and concludes that *Rehaif* likely does not involve the limited class of errors the Supreme Court has deemed structural.

E. Certificate of Appealability is Denied

To proceed with an appeal of this Order, Boykins must receive a certificate of appealability from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9TH CIR. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006). For the Court to grant a certificate of appealability, the petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). And the petitioner bears the burden of demonstrating that the issues are debatable among reasonable jurists; that a court could resolve the issues differently; or that the issues are “adequate to deserve encouragement to proceed further.” *Slack*, 529 U.S. at 483-84 (citation omitted).

As discussed above, Boykins has failed to raise a meritorious challenge to his conviction and sentence pursuant to the Ninth Circuit’s decisions following *Rehaif*. As such, the Court finds that he has failed to demonstrate that reasonable jurists would find the Court’s assessment of his claims debatable or wrong. See *Allen*, 435 F.3d at 950–51. Therefore, the Court denies Boykins a certificate of appealability.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Boykins’ motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 42) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final Judgment denying Boykins’ § 2255 motion. See *Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th Cir. 2018).

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 50924

Footnotes

- 1 *Tollett* limited federal habeas challenges to pre-plea constitutional violations. 411 U.S. at 267. Exceptions to this general rule include a claim which the state cannot “constitutionally prosecute.” *Class v. U.S.*, 138 S. Ct. 789, 805 (2018) (quoting *Menna v. New York*, 423 U.S. 61, 63 (1975) (per curiam)). While Boykins argues such an exception exists in the present instance (ECF No. 42, at 21), the Court agrees with other well-reasoned decisions in the District of Nevada which hold it does not. See *United States v. Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1 (D. Nev. Nov. 30, 2020) (finding that the exceptions to *Tollett* do not apply under *Rehaif* as the claims “could have been remedied by a new indictment.”).

End of Document

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AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

FILED ENTERED	RECEIVED SERVED ON COUNSEL/PARTIES OF RECORD
JAN 30 2019	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

JASON MICHAEL BOYKINS

Case Number: 3:18-cr-0029-LRH-CBC

USM Number: 41119-048

Christopher Frey, AFPD
Defendant's Attorney**THE DEFENDANT:**☒ pleaded guilty to count(s) Count 1 and the Forfeiture Allegation contained in the Indictment filed 3/28/18☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18, U.S.C., §§ 922(g)(1) and 924(a)(2)	Felon in Possession of Firearms	8/3/17	1

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.

January 29, 2019

Date of Imposition of Judgment



Signature of Judge

Larry R. Hicks, United States District Judge

Name and Title of Judge

1/30/19

Date

DEFENDANT: Jason Michael Boykins
CASE NUMBER: 3:18-cr-29-LRH-CBC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **THIRTY-EIGHT (38) MONTHS**

☒ The court makes the following recommendations to the Bureau of Prisons:
FCI MENDOTA, CA

☒ 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
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jason Michael Boykins
CASE NUMBER: 3:18-cr-29-LRH-CBC

SUPERVISED RELEASE

Upon release from imprisonment, you will 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, not to exceed 104 tests annually.
 - ☐ 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 the location where you reside, work, or 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 other conditions on the attached page.

DEFENDANT: Jason Michael Boykins
CASE NUMBER: 3:18-cr-29-LRH-CBC

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 nunchukus 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 User 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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's signature _____

Date _____

DEFENDANT: Jason Michael Boykins
CASE NUMBER: 3:18-cr-29-LRH-CBC

SPECIAL CONDITIONS OF SUPERVISION

1. **Substance Abuse Treatment** - You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay the costs of the program, based upon your ability to pay.
2. **No Gang Affiliation** - You must not communicate, or otherwise interact, with any known member of any street gang, without first obtaining the permission of the probation officer.
3. **No Alcohol** - You must not use or possess alcohol.
4. **Cognitive Behavioral Treatment** - You must participate in a cognitive behavioral treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). Such programs may include group sessions led by a counselor or participation in a program administered by the probation office. You may be required to contribute to the costs of the program, based upon your ability to pay.
5. **Search and Seizure** - You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release.

DEFENDANT: Jason Michael Boykins
CASE NUMBER: 3:18-cr-29-LRH-CBC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100	N/A	WAIVED	\$N/A

- ☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Clerk of Court Attention: Finance Case No.: 333 Las Vegas Blvd. South, Room 1334 Las Vegas, Nevada 89101			

TOTALS \$ _____ \$ _____

- ☐ 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 Sheet 6 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:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: Jason Michael Boykins
CASE NUMBER: 3:18-cr-29-LRH-CBC

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 payment of **\$100** due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with _____ ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with _____ ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):

- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
SEE ATTACHED

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

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON MICHAEL BOYKINS,

Defendant.

3:18-CR-029-LRH-CBC

Final Order of Forfeiture

The United States District Court for the District of Nevada entered a Preliminary Order of Forfeiture pursuant to Fed. R. Crim. P. 32.2(b)(1) and (2); 18 U.S.C. § 924(d)(1) with 28 U.S.C. § 2461(c) based upon the plea of guilty by Jason Michael Boykins to the criminal offense, forfeiting the property set forth in the Plea Agreement and the Forfeiture Allegation of the Indictment and shown by the United States to have the requisite nexus to the offense to which Jason Michael Boykins pled guilty. Indictment, ECF No. 1; Change of Plea, ECF No. 21; Plea Agreement, ECF No. 22; Preliminary Order of Forfeiture, ECF No. 24.

This Court finds that the United States of America may amend this order at any time to add subsequently located property or substitute property to the forfeiture order pursuant to Fed. R. Crim. P. 32.2(b)(2)(C) and 32.2(e).

This Court finds the United States of America published the notice of forfeiture in accordance with the law via the official government internet forfeiture site, www.forfeiture.gov, consecutively from November 14, 2018, through December 13, 2018, notifying all potential third parties of their right to petition the Court. Notice of Filing Proof of Publication, ECF No. 25.

1 This Court finds no petition was filed herein by or on behalf of any person or entity
2 and the time for filing such petitions and claims has expired.

3 This Court finds no petitions are pending with regard to the property named herein
4 and the time for presenting such petitions has expired.

5 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that
6 all possessory rights, ownership rights, and all rights, titles, and interests in the property
7 hereinafter described are condemned, forfeited, and vested in the United States of America
8 pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); Fed. R. Crim. P. 32.2(c)(2); 18 U.S.C. §
9 924(d)(1) with 28 U.S.C. § 2461(c); and 21 U.S.C. § 853(n)(7) and shall be disposed of
10 according to law:

- 11 1. a Taurus Model PT145, .45 caliber pistol bearing serial number NVF20151;
 - 12 2. a Taurus, .357 caliber revolver, bearing serial number BT652129; and
 - 13 3. any and all ammunition
- 14 (all of which constitutes property).

15 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any and all
16 forfeited funds, including but not limited to, currency, currency equivalents, certificates of
17 deposit, as well as any income derived as a result of the United States of America's
18 management of any property forfeited herein, and the proceeds from the sale of any
19 forfeited property shall be disposed of according to law.

20 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send
21 copies of this Order to all counsel of record.

22 DATED this 25th day of January, 2019.

23
24
25 
26 LARRY R. HICKS
27 UNITED STATES DISTRICT JUDGE
28

1 DAYLE ELIESON
 United States Attorney
 2 MEGAN RACHOW
 Nevada Bar No. 8231
 3 Assistant United States Attorney
 400 South Virginia Street, Suite 900
 4 Reno, Nevada 89501
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 Attorneys for United States of America

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
OCT 30 2018	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: <u>DBN</u>	DEPUTY

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 JASON MICHAEL BOYKINS,

12 Defendant.

Case No. 3:18-cr-00029-LRH-CBC

**PLEA AGREEMENT UNDER
 FED. R. CRIM. P. 11 (c)(1)(A) and (B)**

14 Plaintiff United States of America, by and through DAYLE ELIESON, United States
 15 Attorney for the District of Nevada, and MEGAN RACHOW, Assistant United States Attorney,
 16 the defendant JASON MICHAEL BOYKINS, and the defendant's attorney, CHRIS FREY,
 17 Assistant Federal Public Defender, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A
 18 and B).

19 **I. SCOPE OF AGREEMENT**

20 The parties to this Plea Agreement are the United States of America and JASON
 21 MICHAEL BOYKINS, the defendant. This Plea Agreement binds the defendant and the United
 22 States Attorney's Office for the District of Nevada. It does not bind any other prosecuting,
 23 administrative, or regulatory authority, the United States Probation Office, or the Court.

1 The Plea Agreement sets forth the parties' agreement regarding criminal charge
 2 referenced in the Plea Agreement and applicable sentences, fines, restitution and forfeiture. It
 3 does not control or prohibit the United States or any agency or third party from seeking any other
 4 civil or administrative remedies directly or indirectly against the defendant.

5 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

6 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to
 7 the following charge as set forth in the indictment returned by the grand jury on March 26, 2018:

8 Count 1: Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and
 9 924(a)(2).

10 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised and
 11 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
 12 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically,
 13 the defendant is giving up:

14 1. The right to proceed to trial by jury on all charges, or to a trial by a judge
 15 if the defendant and the United States both agree;

16 2. The right to confront the witnesses against the defendant at such a trial, and
 17 to cross-examine them;

18 3. The right to remain silent at such a trial, with assurance that his silence
 19 could not be used against him in any way;

20 4. The right to testify in his own defense at such a trial if he so chooses;

21 5. The right to compel witnesses to appear at such a trial and testify in the
 22 defendant's behalf; and

23 6. The right to have the assistance of an attorney at all stages of such
 24 proceedings.

1 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
2 plea after he has entered it in court.

3 D. Additional Charges. The United States agrees not to bring any additional charges
4 against the defendant arising out of the investigation in the District of Nevada which culminated
5 in this Plea Agreement and based on conduct known to the United States.

6 **III. ELEMENTS OF THE OFFENSE**

7 Count 1: The elements of Felon in Possession of a Firearm under 18 U.S.C. §§ 922(g)(1)
8 and 924(a)(2) are:

9 First: The defendant knowingly possessed a firearm;

10 Second: The firearm had been shipped from one state to another; and

11 Third: At the time the defendant possessed the firearm, the defendant had been
12 convicted of a crime punishable by imprisonment for a term exceeding one
13 year.

14 See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65A (Approved 6/2016).

15 **IV. FACTS SUPPORTING GUILTY PLEA**

16 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
17 the crime charged.

18 B. The defendant acknowledges that if he elected to go to trial instead of pleading
19 guilty, the United States could prove his guilt beyond a reasonable doubt. The defendant further
20 acknowledges that his admissions and declarations of fact set forth below satisfy every element
21 of the charged offense.

22 C. The defendant waives any potential future claim that the facts he admitted in this
23 Plea Agreement were insufficient to satisfy the elements of the charged offense.

1 D. The defendant admits and declares under penalty of perjury that the facts set forth
2 below are true and correct:

3 On August 3, 2017, a detective with Spark Police Department (SPD) was conducting
4 follow up investigation related to a shooting that had occurred on July 27, 2017 on Capurro Way
5 in Sparks. The suspect vehicle involved in the shooting was identified as a maroon colored
6 Chevrolet SUV with Nevada license plate 99E867. Detectives located the vehicle in the area of
7 1600 block of Wedekind Road. When the detectives ran the vehicle's registration, it returned as
8 suspended. Officers initiated a traffic stop in the parking lot of Meadowood Mall, Reno,
9 Nevada. The driver was identified as Jason Boykins and the passenger as Eric Walters. A DMV
10 check of Boykins showed that his driver's license was indefinitely suspended. As such, Boykins
11 was placed under arrest for driving on a suspended license and suspended registration.

12 The decision was made to impound the vehicle and a tow truck was called. During the
13 inventory search, a detective located a black backpack on the passenger floorboard. When the
14 detective moved the backpack, he noticed that a zipper was open and he could see the butt of a
15 semiautomatic handgun. The backpack was searched and detectives located a loaded .45 caliber
16 Taurus Millennium pistol and a loaded .357 caliber Taurus revolver. Also in the backpack was a
17 wallet that appeared to belong to Boykins as it had his driver's license, credit cards and pictures
18 with him and his family.

19 Boykins was given his Miranda warnings and agreed to speak with detectives. Boykins
20 admitted to owning the Taurus Millennium pistol found in the backpack. Boykins stated that he
21 had the pistol for personal protection. Boykins denied ownership of the Taurus .357 revolver but
22 admitted to knowing about the revolver and admitted to handling the revolver. He claimed he
23 didn't know how it ended up in his backpack.

24 The firearms were identified as follows: a Taurus, Model PT145, .45 caliber pistol
bearing serial number NVF20151 and a Taurus, .357 caliber revolver, bearing serial number
BT652129. An ATF investigation determined that the above listed firearms were modern
firearms as defined by federal law and the firearms had been manufactured outside the state of
Nevada. As such, the firearms must have traveled in interstate commerce.

1
2 A review of court records determined that the defendant had been previously convicted of
3 Trafficking in a Controlled Substance on or about April 25, 2007 in the Second Judicial District
4 Court of the State of Nevada in and for the County of Washoe

5 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

6 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
7 defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does
8 not plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea
9 Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting
10 any evidence, argument or representation offered by or on the defendant's behalf. The defendant
11 expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use
12 of the facts set forth in Section IV of this Plea Agreement.

13 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

14 A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that
15 the Court must consider the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing
16 Guidelines") in determining the defendant's sentence, but that the Sentencing Guidelines are
17 advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to
18 the maximum term of imprisonment permitted by statute.

19 B. Offense Level Calculations. The parties stipulate to the following calculation of
20 the defendant's offense level under the Sentencing Guidelines, acknowledge that these
21 stipulations do not bind the Court, and agree that they will not seek to apply any other specific offense
22 characteristics, enhancements or reductions, except as otherwise set forth in this plea agreement:

23 1. Count 1: Felon in Possession of a Firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2)

24 Base Offense Level U.S.S.G. § 2K2.1(a)(6):

14*

1 Reductions:

2 [Acceptance of Responsibility U.S.S.G. § 3E1.1]: -2

3 Adjusted Offense Level: 12

4 *Defendant agrees, and will not dispute, that his base offense level will be determined by the
5 Court, and will be based on the type and number of defendant's prior felony convictions (whether
6 they qualify as a controlled substance offense or crime of violence) and/or the type of firearm
7 possessed. The defendant acknowledges that the statutory maximum sentence limits the Court's
8 discretion in determining the defendant's sentence notwithstanding any applicable Sentencing
9 Guidelines provisions.

10 C. Reduction of Offense Level for Acceptance of Responsibility. Under U.S.S.G.
11 § 3E1.1(a), the United States will recommend that the defendant receive a two-level downward
12 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing
13 a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts
14 establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully
15 admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false
16 or misleading information to the United States, the Court, Pretrial Services, or the Probation
17 Office; (e) denies involvement in the offense or provides conflicting statements regarding his
18 involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts
19 to withdraw his guilty plea; or (g) commits or attempts to commit any crime.

20 Under USSG § 3E1.1(b), if the Court determines that the Defendant's total offense level,
21 before operation of § 3E1.1(a), is 16 or higher, and if the United States recommends a two-level
22 downward adjustment pursuant to the preceding paragraph, the United States will move for an
23 additional one-level downward adjustment for acceptance of responsibility before sentencing
24

1 because the Defendant communicated his decision to plead guilty in a timely manner that enabled
2 the United States to avoid preparing for trial and to efficiently allocate its resources.

3 D. Criminal History Category. The defendant acknowledges that the Court may base
4 his sentence in part on the defendant's criminal record or criminal history. The Court will
5 determine the defendant's Criminal History Category under the Sentencing Guidelines.

6 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
7 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
8 applicable Sentencing Guidelines range and whether to depart from that range.

9 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
10 calculations are based on information now known to the parties. The parties may provide
11 additional information to the United States Probation Office and the Court regarding the nature,
12 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
13 circumstances. Good faith efforts to provide truthful information or to correct factual
14 misstatements shall not be grounds for the defendant to withdraw his guilty plea.

15 The defendant acknowledges that the United States Probation Office may calculate the
16 Sentencing Guidelines differently and may rely on additional information it obtains through its
17 investigation. The defendant also acknowledges that the Court may rely on this and other
18 additional information as it calculates the Sentencing Guidelines range and makes other
19 sentencing determinations, and the Court's reliance on such information shall not be grounds for
20 the defendant to withdraw his guilty plea.

21 VII. APPLICATION OF SENTENCING STATUTES

22 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
23 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a prison sentence of 10 years, a fine of \$250,000,
24 or both.

1 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
2 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
3 sentence and any statutory minimum sentence limit the Court's discretion in determining the
4 defendant's sentence.

5 C. Parole Abolished. The defendant acknowledges that his prison sentence cannot be
6 shortened by early release on parole because parole has been abolished.

7 D. Supervised Release. In addition to imprisonment and a fine, the defendant will be
8 subject to a term of supervised release not to exceed 3 years. 18 U.S.C. § 3583(b)(2). Supervised
9 release is a period of time after release from prison during which the defendant will be subject to
10 various restrictions and requirements. If the defendant violates any condition of supervised
11 release, the Court may order the defendant's return to prison for all or part of the term of
12 supervised release, which could result in the defendant serving a total term of imprisonment
13 greater than the statutory maximum prison sentence of 10 years.

14 E. Special Assessment. The defendant will pay a \$100.00 special assessment per
15 count at the time of sentencing.

16 **VIII. POSITIONS REGARDING SENTENCE**

17 The parties will jointly recommend a sentence in the midrange of the applicable
18 Sentencing Guideline range as contemplated by this plea agreement. The defendant
19 acknowledges that the Court does not have to follow either parties' recommendation.
20 Notwithstanding its agreement to recommend a midrange guideline sentence, the United States
21 reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction
22 litigation.

IX. RESTITUTION

The parties do not believe that restitution is applicable in this case, but the determination whether restitution is appropriate pursuant to 18 U.S.C. § 3663 rests solely with the Court.

X. FORFEITURE

The defendant knowingly and voluntarily:

A. Agrees to the abandonment, the civil administrative forfeiture, the civil judicial forfeiture, or the criminal forfeiture of a Taurus, Model PT145, .45 caliber pistol bearing serial number NVF20151, a Taurus, .357 caliber revolver, bearing serial number BT652129, and any and all ammunition ("property");

B. Abandons or forfeits the property to the United States;

C. Relinquishes all right, title, and interest in the property;

D. Waives his right to any abandonment proceedings, any civil administrative forfeiture proceedings, any civil judicial forfeiture proceedings, or any criminal forfeiture proceedings of the property ("proceedings");

E. Waives service of process of any and all documents filed in this action or any proceedings concerning the property arising from the facts and circumstances of this case;

F. Waives any further notice to him, his agents, or his attorney regarding the abandonment or the forfeiture and disposition of the property;

G. Agrees not to file any claim, answer, petition, or other documents in any proceedings concerning the property;

H. Waives the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7 and 32.2, the constitutional requirements, and the constitutional due process requirements of any proceedings concerning the property;

I. Waives his right to a jury trial on the forfeiture of the property;

1 J. Waives all constitutional, legal, and equitable defenses to the forfeiture or
 2 abandonment of the property in any proceedings, including but not limited to (1) constitutional
 3 or statutory double jeopardy defenses; and (2) defenses under the Excessive Fines or Cruel and
 4 Unusual Punishments Clauses of the Eighth Amendment to the United States Constitution;

5 K. Agrees to the entry of an Order of Forfeiture of the property to the United States;

6 L. Agrees that forfeiture is immediately due and payable and subject to immediate
 7 collection by the United States;

8 M. Agrees and understands the abandonment, the civil administrative forfeiture, the
 9 civil judicial forfeiture, or the criminal forfeiture of the property shall not be treated as satisfaction
 10 of any assessment, fine, restitution, cost of imprisonment, or any other penalty the Court may
 11 impose upon the defendant in addition to the abandonment or the forfeiture; and

12 N. The defendant acknowledges that the amount of the forfeiture may differ from,
 13 and may be significantly greater than, the amount of restitution.

14 **X. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

15 Before or after sentencing, upon request by the Court, the United States, or the Probation
 16 Office, the defendant will provide accurate and complete financial information, submit sworn
 17 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
 18 defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
 19 release funds and property under his control in order to pay any fine, forfeiture, or restitution
 20 ordered by the Court.

21 **XI. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

22 A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

23 (1) He has read this Plea Agreement and understands its terms and conditions;
 24

1 (2) He has had adequate time to discuss this case, the evidence, and this Plea
2 Agreement with his attorney;

3 (3) He has discussed the terms of this Plea Agreement with his attorney;

4 (4) The representations contained in this Plea Agreement are true and correct,
5 including the facts set forth in Section IV; and

6 (5) He was not under the influence of any alcohol, drug, or medicine that
7 would impair his ability to understand the Agreement when he considered signing this Plea
8 Agreement and when he signed it.

9 The defendant understands that he alone decides whether to plead guilty or go to trial, and
10 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against
11 him, his possible defenses, and the benefits and possible detriments of proceeding to trial. The
12 defendant also acknowledges that he decided to plead guilty voluntarily and that no one coerced
13 or threatened him to enter into this Plea Agreement.

14 B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly
15 and expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
16 Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in
17 which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c)
18 with only the exceptions explicitly noted below in the third paragraph of this subsection, the right
19 to appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

20 The defendant also knowingly and expressly waives all collateral challenges, including
21 any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
22 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
23 assistance of counsel.

1 The defendant reserves the right to appeal any portion of his sentence that is above the
2 guideline range as determined by the Court.

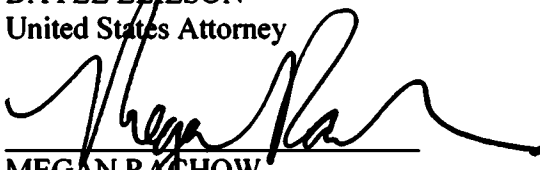
3 The defendant acknowledges that the United States is not obligated or required to preserve
4 any evidence obtained in the investigation of this case.

5 **XIII. ADDITIONAL ACKNOWLEDGMENTS**

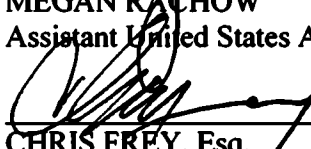
6 This Plea Agreement resulted from an arms-length negotiation in which both parties
7 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
8 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
9 conditions other than those set forth in this agreement have been made or implied by the
10 defendant, the defendant's attorney, or the United States, and no additional promises, agreements
11 or conditions shall have any force or effect unless set forth in writing and signed by all parties or
12 confirmed on the record before the Court.

13
14
15 DATE 10/30/18

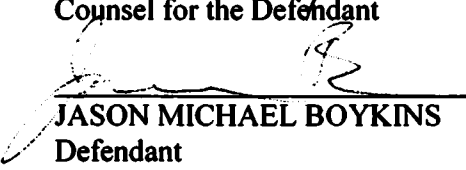
DAYLE ELIASON
United States Attorney

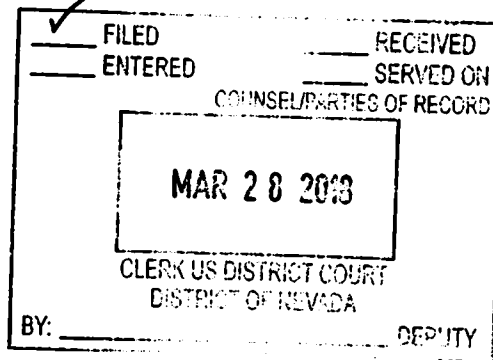

MEGAN RACHOW
Assistant United States Attorney

16
17 DATE 10/30/18


CHRIS FREY, Esq.
Counsel for the Defendant

18
19 DATE 10-30-18


JASON MICHAEL BOYKINS
Defendant



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United States Attorney
MEGAN RACHOW
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Representing the United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON MICHAEL BOYKINS,

Defendant.

INDICTMENT FOR VIOLATION OF:

Title 18, United States Code, Sections
922(g)(1) and 924(a)(2)—Felon in
Possession of Firearms (Count One)

3:18-cr-00029-LRH-VPC

THE GRAND JURY CHARGES THAT:

Count One

(Felon in Possession of Firearms)

On or about August 3, 2017, in the State and District of Nevada, JASON MICHAEL BOYKINS, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, to wit: Trafficking in a Controlled Substance on or about April 25, 2007; did knowingly possess a Taurus, Model PT145, .45 caliber pistol bearing serial number NVF20151, and a Taurus, .357 caliber revolver, bearing serial number BT652129; said

possession being in and affecting commerce; all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATION

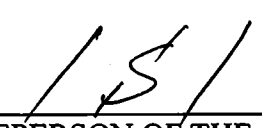
1. The allegations of Count One of this Criminal Indictment are hereby realleged and incorporated herein by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c).

2. Upon conviction of the felony offense charged in Count One of this Criminal Indictment, JASON MICHAEL BOYKINS, defendant herein, shall forfeit to the United States of America, any firearm or ammunition involved in or used in any knowing violation of Title 18, United States Code, Section 922(g)(1):

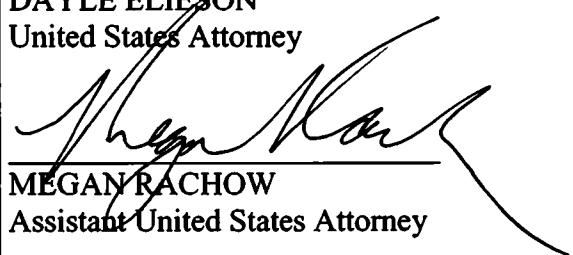
- a. a Taurus, Model PT145, .45 caliber pistol bearing serial number NVF20151;
- b. a Taurus, .357 caliber revolver, bearing serial number BT652129; and
- c. any and all ammunition ("property").

All pursuant to Title 18, United States Code, Section 922(g)(1); Title 18, United States Code, Section 924(d)(1); and Title 28, United States Code, Section 2461(c).

A TRUE BILL:


FOREPERSON OF THE GRAND JURY

DAYLE ELIESON
United States Attorney


MEGAN RACHOW
Assistant United States Attorney

2022 WL 1089908

Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Dean Anthony CARTER, Defendant-Appellant.

No. 21-15630

|

FILED 03/30/2022

D.C. Nos. 2:20-cv-01059-HDM, 2:17-cr-00153-HDM-GWF,
District of Nevada, Las Vegas

Attorneys and Law Firms

Elizabeth Olson White, Esquire, Assistant U.S., USRE -
Office of the US Attorney, Reno, NV, for Plaintiff-Appellee.

Amy B. Cleary, Assistant Federal Public Defender, Federal
Public Defender's Office, Las Vegas, NV, for Defendant-
Appellant.

Before: CALLAHAN and MILLER, Circuit Judges.

ORDER

***1** The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 1089908

End of Document

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2021 WL 432166

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Dean Anthony CARTER, Defendant.

Case No. 2:17-cr-00153-HDM-
GWF, Case No. 2:20-cv-01059-HDM

I

Signed 02/08/2021

Attorneys and Law Firms

Dean Anthony Carter, pro se.

ORDER

HOWARD D. McKIBBEN, UNITED STATES DISTRICT
JUDGE

***1** Defendant Dean Anthony Carter has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 141). The government has opposed (ECF No. 143), and Carter has replied (ECF No. 144).

On May 10, 2017, Carter was charged by way of indictment with one count of felon in possession of a firearm and one count of felon in possession of ammunition in violation of 18 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Carter entered a plea of guilty to Count 2, which charged felon in possession of ammunition. (ECF Nos. 126 & 129). The court thereafter sentenced Carter to 63 months in prison. (ECF No. 27 & 28).

Section 922(g) prohibits the possession of ammunition by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Carter had several prior felonies, including three for which he received a cumulative 14-year sentence and a prior conviction for felon in possession of a firearm. When Carter was charged and entered his plea in this case, the government was not required to prove that he knew he was a felon. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). But shortly after Carter was sentenced, the U.S. Supreme Court concluded that a defendant may be

convicted under § 922(g) only if the government proves that the defendant “knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). On the basis of *Rehaif* and the government's failure to charge his knowledge of status, Carter now moves to vacate his conviction.

Pursuant to 28 U.S.C. § 2255, a federal inmate may move to vacate, set aside, or correct his sentence if: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *Id.* § 2255(a).

Carter argues that the omission of the *Rehaif* element from the indictment violated his Fifth Amendment rights guaranteeing that a grand jury find probable cause to support all the necessary elements of the crime and to not be tried on a fatally defective indictment and his Sixth Amendment rights to notice of the charges. He also alleges that the defective indictment deprived the court of jurisdiction. The government asserts that Carter has waived his right to bring these claims, that his claims are procedurally defaulted, and that the government is not required to prove the defendant knew his possession of firearms was unlawful.

As part of his plea, Carter “knowingly and expressly waive[d] all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” (ECF No. 126 at 9). Such “[a]n unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Espinoza*, 816 Fed. App'x 82, 85 (9th Cir. June 1, 2020) (unpublished disposition) (unconditional plea waiver precludes all Fifth and Sixth Amendment claims except to the extent they contest the court's jurisdiction or the voluntariness of the plea). Thus, except to the extent Carter attacks the jurisdiction of the court,¹ his claims are waived.²

***2** Carter's jurisdictional argument is without merit. The omission of an element from the indictment does not affect the court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *United States v. Ratigan*, 351 F.3d

957, 962–63 (9th Cir. 2003); *see also* *United States v. Jackson*, 2020 WL 7624842, at *1 (9th Cir. Dec. 22, 2020) (unpublished disposition) (rejecting the defendant's argument that omission of the *Rehaif* element deprived the district court of jurisdiction); *United States v. Burleson*, 2020 WL 4218317, at *1 (July 23, 2020) (unpublished disposition) (same); *Espinoza*, 2020 WL 2844542, at *1 (same); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 88–92 (2d Cir. 2019); *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). *Cf.* *United States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission of *Rehaif* element from indictment for plain error).

Moreover, Carter's Fifth and Sixth Amendment claims are procedurally defaulted, even assuming, as Carter argues, that they could be considered jurisdictional in nature.

“If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate” either “cause excusing his procedural default, and actual prejudice resulting from the claim of error,” *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is actually innocent of the offense, *Bousley v. United States*, 523 U.S. 614, 622 (1998). “[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.” *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice “requires the petitioner to establish ‘not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’ ” *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation omitted).

Carter could have raised his claims on direct appeal but did not do so. They are therefore procedurally defaulted. It is unnecessary to resolve whether Carter can demonstrate cause for the default, because even if he could, he cannot demonstrate prejudice.³

Carter committed the instant offense after receiving a fourteen-year sentence for assault, assault with attempt to rape and attempted murder and additionally after having been previously convicted of felon in possession of a firearm. (PSR ¶¶ 35 & 37). Further, Carter acknowledged in his plea agreement that he had been previously convicted of a felony. (ECF No. 126 at 4). Finally, and most importantly, Carter

acknowledged during his plea colloquy both that he had a prior felony conviction – specifically, a felon in possession of a firearm -- *and* that he was aware at the time of his offense that he was not allowed to possess a firearm. In light of Carter's admissions that he knew he was a convicted felon and that he was prohibited from possessing firearms, combined with his criminal history, the court is not persuaded that the outcome of the proceedings would have been any different had the grand jury been presented with, and the indictment had alleged, the *Rehaif* element.

***3** Carter argues that he suffered prejudice because he was convicted by a court lacking jurisdiction. For the reasons previously discussed, this argument is without merit because the errors Carter complains of did not deprive the court of jurisdiction.

Carter alternatively argues that he is not required to demonstrate prejudice to obtain relief because the omission is structural error.

“[C]ertain errors, termed structural errors, might affect substantial rights regardless of their actual impact on an appellant's trial.” *United States v. Marcus*, 560 U.S. 258, 263 (2010) (internal punctuation and citations omitted). Thus, structural error “warrant[s] habeas relief without a showing of specific prejudice.” *United States v. Withers*, 638 F.3d 1055, 1063–64 (9th Cir. 2011). “But structural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error.” *Marcus*, 560 U.S. at 263 (internal punctuation and citations omitted). Cases in which the Supreme Court has found structural error include total deprivation of counsel, lack of an impartial trial judge, violation of the right to a public trial and an erroneous reasonable-doubt instruction. *See id.* (discussing cases). In contrast, errors that have been found to be non-structural include where the court instructed on an invalid alternative theory of guilt, gave an instruction omitting an element of the offense, or erroneously instructed the jury on an element. *Id.* at 264 (discussing cases).

The Ninth Circuit has not yet addressed in a published opinion whether omission of the *Rehaif* element from the indictment is structural error. But it has held that the error is not structural in at least one unpublished decision. *See United States v. Jackson*, 2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the First, Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded that *Rehaif* errors are not structural.

United States v. Patrone, — F.3d —, 2021 WL 128473, at *3 (1st Cir. Jan. 14, 2021); *United States v. Nasir*, 982 F.3d 144, 171 n.30 (3d Cir. Dec. 1, 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); *see also United States v. Hill*, 2020 WL 7258551, at *2 n.3 (3d Cir. Dec. 10, 2020) (unpublished disposition); *United States v. Watson*, 820 Fed. App'x 397, 400 (6th Cir. 2020) (unpublished disposition). *But see United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). The court agrees with the well-reasoned opinions of these courts and concludes that a *Rehaif* error does not fall within the limited class of errors the Supreme Court has found to be structural.⁴

*4 Finally, Carter argues that *Rehaif* requires the government to prove not only that he knew that he was a convicted felon but also that he knew he was barred from possessing firearms. Notwithstanding the fact that Carter admitted to the court that he knew he was barred from possessing a firearm, Carter's legal argument is also without merit. *United States v. Singh*, 979 F.3d 697, 727 (9th Cir.

2020) (“[The defendant] contends that *Rehaif* requires the Government to prove he knew not only his status, but also that he knew his status prohibited him from owning a firearm. But this interpretation is not supported by *Rehaif*”).

Accordingly, because the claims raised in Carter's § 2255 motion are waived, procedurally defaulted and/or without merit, IT IS THEREFORE ORDERED that the motion to vacate, set aside or correct sentence (ECF No. 141) is hereby DENIED.

IT IS FURTHER ORDERED that Carter is DENIED a certificate of appealability, as jurists of reason would not find the court's denial of the motion to be debatable or wrong.

The Clerk of Court shall enter final judgment accordingly.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 432166

Footnotes

- 1 Carter does not attack the voluntariness of his plea.
- 2 The court agrees with the well-reasoned opinions of several courts that none of the exceptions under *Tollett* to the collateral challenge waiver applies in this case. *See, e.g., United States v. Kelbch*, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).
- 3 Carter does not argue actual innocence.
- 4 While there is some case law holding that defects in the indictment are structural error, those cases apply only where the claim is timely raised. *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) (“We hold that, if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.... Untimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard.”). Carter argues that he raised his argument at the earliest possible opportunity and so the timeliness limitation does not apply. The court does not agree. As previously discussed, Carter could have challenged the indictment on direct appeal but failed to do so. The claim is not therefore timely raised.

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

DEAN ANTHONY CARTER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-cr-00153-HDM-GWF

USM Number: 54054-048

Thomas Ericsson, CJA
 Defendant's Attorney
THE DEFENDANT:☒ pleaded guilty to Count Two of Indictment filed 5/10/2017☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18, U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of Ammunition	4/25/2017	Two

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 One of 5/10/2017 Indictment is 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.

June 11, 2019

Date of Imposition of Judgment


 Signature of Judge

HOWARD D. McKIBBEN, Senior U S. District Judge
 Name and Title of Judge

June 13, 2019
 Date

DEFENDANT: DEAN ANTHONY CARTER
CASE NUMBER: 2:17-cr-00153-HDM-GWF

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **Sixty-three (63) months**.

☒ The court makes the following recommendations to the Bureau of Prisons:
Recommendation for placement of defendant at FCI Terminal Island or a facility that will offer the defendant proper medical treatment.

☒ 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
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEAN ANTHONY CARTER
CASE NUMBER: 2:17-cr-00153-HDM-GWF

SUPERVISED RELEASE

Upon release from imprisonment, you will 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, not to exceed 104 tests annually.
 - ☐ 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. c 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, or 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 other conditions on the attached page.

DEFENDANT: DEAN ANTHONY CARTER
CASE NUMBER: 2:17-cr-00153-HDM-GWF

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 nunchukus 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 User 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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's signature _____

Date _____

DEFENDANT: DEAN ANTHONY CARTER
CASE NUMBER: 2:17-cr-00153-HDM-GWF

SPECIAL CONDITIONS OF SUPERVISION

1. Substance Abuse Treatment - You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to contribute to the costs of the program based on your ability to pay.
2. No Alcohol - You must not use or possess alcohol.
3. Drug Testing - You must submit to substance abuse testing to determine if you have used a prohibited substance. *Testing shall not exceed 104 tests per year.* You may be required to contribute to the costs of the testing based upon your ability to pay. You must not attempt to obstruct or tamper with the testing methods.
4. Mental Health Treatment - You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to contribute to the costs of the program, based upon your ability to pay.
5. Search and Seizure - You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
6. Sex Offender Treatment - You must participate in a sex offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to contribute to the costs of the program based on your ability to pay.
7. Polygraph Testing - You must submit to periodic polygraph testing at the discretion of the probation officer as a means to ensure that you are in compliance with the requirements of your supervision or treatment program.

DEFENDANT: DEAN ANTHONY CARTER

CASE NUMBER: 2:17-cr-00153-HDM-GWF

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	N/A	None	N/A

Due and payable immediately.

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

Clerk, U.S. District Court
Attention: Finance
Case No.: 2:17-cr-00153-HDM-GWF
333 Las Vegas Blvd., South
Las Vegas, Nevada 89101

TOTALS \$ _____ \$ _____

☐ 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 Sheet 6 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:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: DEAN ANTHONY CARTER
CASE NUMBER: 2:17-cr-00153-HDM-GWF

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 payment of \$100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with _____ ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with _____ ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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
- 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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
APR - 1 2019	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY:	DEPUTY

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Counsel for the United States

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEAN ANTHONY CARTER,

Defendant.

2:17-cr-00153-HDM-GWF

PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11 (c)(1)(A) and (B)

The United States of America, by and through NICHOLAS A. TRUTANICH, United States Attorney, Brandon C. Jarock, Assistant United States Attorney, the defendant DEAN ANTHONY CARTER, and his attorney, Thomas A. Ericsson, Esq., submit this Plea Agreement under Federal Rules of Criminal Procedure 11(c)(1)(A) and (B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and DEAN ANTHONY CARTER (the defendant). This Plea Agreement binds the defendant and the United States Attorneys' Offices for the District of Nevada. It does not bind any other

1 prosecuting, administrative, or regulatory authority, the United States Probation Office, or the
2 Court.

3 The Plea Agreement sets forth the parties' agreement regarding the criminal charge
4 referenced in the Plea Agreement and the applicable sentence, fine, and restitution. It does not
5 control or prohibit the United States or any agency or third party from seeking any other civil or
6 administrative remedies directly or indirectly against the defendant.

7 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

8 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to
9 the following charge, as set forth in the Criminal Indictment:

10 Count Two: Felon in Possession of Ammunition, in violation of 18 U.S.C. §§
11 922(g)(1) and 924(a)(2).

12 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised
13 and understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain
14 rights guaranteed to all defendants by the laws and the Constitution of the United States.
15 Specifically, the defendant is giving up:

16 1. The right to proceed to trial by jury on all charges, or to a trial by a judge if the
17 defendant and the United States both agree;

18 2. The right to confront the witnesses against the defendant at such a trial, and to
19 cross-examine them;

20 3. The right to remain silent at such a trial, with assurance that his silence could not
21 be used against him in any way;

22 4. The right to testify in his own defense at such a trial if he so chooses;

23 5. The right to compel witnesses to appear at such a trial and testify in the
24 defendant's behalf; and

1 6. The right to have the assistance of an attorney at all stages of such proceeding.

2 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
3 plea after he has entered it in court.

4 D. Additional Charges. The United States agrees not to bring any additional charges
5 against the defendant arising out of the investigation in the District of Nevada that culminated
6 in this Plea Agreement and based on conduct known to the United States except that the
7 United States reserves the right to prosecute the defendant for any crime of violence as defined
8 by 18 U.S.C. § 16. The government will move to dismiss the remaining count in the Criminal
9 Indictment at the time of sentencing.

10 **III. ELEMENTS OF THE OFFENSES**

11 A. The elements of Felon in Possession of Ammunition under 18 U.S.C. § 922(g)(1)
12 and 924(a)(2) are:

- 13 1. The defendant knowingly possessed ammunition;
- 14 2. The ammunition had been shipped or transported from one state to another; and
- 15 3. At the time the defendant possessed the ammunition, the defendant had been
- 16 previously convicted of a crime punishable by a term of imprisonment exceeding one year.

17 See 9th Cir. Crim. Jury Instr. 8.65 (2010).

18 **IV. FACTS SUPPORTING GUILTY PLEA**

19 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
20 the crimes charged.

21 B. The defendant acknowledges that if he elected to go to trial instead of pleading
22 guilty, the United States could prove his guilt beyond a reasonable doubt. The defendant further
23 acknowledges that his admissions and declarations of fact set forth below satisfy every element
24 of the charged offense.

1 C. The defendant waives any potential future claim that the facts he admitted in this
2 Plea Agreement were insufficient to satisfy the elements of the charged offenses.

3 D. The defendant admits and declares under penalty of perjury that the facts set
4 forth below are true and correct:

5 On April 25, 2017, the defendant was located inside an apartment located at 221
6 Mission Newport Lane, Las Vegas, NV, while Las Vegas Metropolitan Police officers were
7 executing a state search warrant. The defendant was taken into custody and was found to have
8 one 9mm round of Luger Blazer ammunition in his pocket.

9 At the time the defendant was in possession of the ammunition, he had been previously
10 convicted of felonies in the State of California, to wit: Attempted Murder, Assault with a
11 Deadly Weapon, Assault with Intent to Commit Rape, in or about 1994; Felon in Possession of
12 a Firearm, in or about 2004; and Violation of Court Order – Domestic Violence Prior, in or
13 about 2014; crimes punishable by a term of imprisonment exceeding one year. The defendant
14 further acknowledges that the ammunition had been shipped or transported across state lines
15 thus affecting interstate commerce.

16 All of the foregoing occurred in the State and Federal District of Nevada.

17 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

18 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
19 defendant under Federal Rule of Evidence 801(d)(2)(A) at sentencing for any purpose. If the
20 defendant does not plead guilty or withdraws his guilty plea, the facts set forth in Section IV of
21 this Plea Agreement shall be admissible at any proceeding, including a trial, for impeaching or
22 rebutting any evidence, argument or representation offered by or on the defendant's behalf. The
23 defendant expressly waives all rights under Federal Rule of Criminal Procedure 11(f) and
24

1 Federal Rule of Evidence 410 regarding the use of the facts set forth in Section IV of this Plea
2 Agreement.

3 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

4 A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges
5 that the Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing
6 Guidelines") in determining the defendant's sentence, but that the Sentencing Guidelines are
7 advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to
8 the maximum term of imprisonment permitted by statute.

9 B. Offense Level Calculations. The parties stipulate to the following calculation of
10 the defendant's offense level under the Sentencing Guidelines, acknowledge that these
11 stipulations do not bind the Court, and agree that they will not seek to apply any other specific
12 offense characteristics, enhancements or reductions:

13 *Two:*
Count One: Felon in Possession of Ammunition
Base Offense Level (USSG § 2K2.1(a)(4)(A)) 20
USSG § 3E1.1 (Acceptance of Resp. – If Applicable) -3
15 Total Adjusted Offense Level 17

16 The defendant acknowledges that the statutory maximum sentence and any statutory
17 minimum sentence limit the Court's discretion in determining the defendant's sentence
18 notwithstanding any applicable Sentencing Guidelines provisions.

19 C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG §
20 3E1.1(a), the United States will recommend that the defendant receive a two-level downward
21 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts
22 establishing a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully
23 admit facts establishing the amount of restitution owed when he enters his guilty plea; (c) fails
24

1 to truthfully admit facts establishing the forfeiture allegations when he enters his guilty plea; (d)
2 provides false or misleading information to the United States, the Court, Pretrial Services, or
3 the Probation Office; (e) denies involvement in the offense or provides conflicting statements
4 regarding his involvement or falsely denies or frivolously contests conduct relevant to the
5 offense; (f) attempts to withdraw his guilty plea; (g) commits or attempts to commit any crime;
6 (h) fails to appear in court; or (i) violates the conditions of pretrial release.

7 Under USSG § 3E1.1(b), if the Court determines that the Defendant's total offense level,
8 before operation of § 3E1.1(a), is 16 or higher, and if the United States recommends a two-level
9 downward adjustment pursuant to the preceding paragraph, the United States will move for an
10 additional one-level downward adjustment for acceptance of responsibility before sentencing
11 because the Defendant communicated his decision to plead guilty in a timely manner that
12 enabled the United States to avoid preparing for trial and to efficiently allocate its resources.

13 D. Criminal History Category. The defendant acknowledges that the Court may
14 base his sentence in part on the defendant's criminal record or criminal history. The Court will
15 determine the defendant's Criminal History Category under the Sentencing Guidelines.

16 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
17 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
18 applicable Sentencing Guidelines range and whether to depart from that range.

19 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
20 calculations are based on information now known to the parties. The parties may provide
21 additional information to the United States Probation Office and the Court regarding the
22 nature, scope, and extent of the defendant's criminal conduct and any aggravating or mitigating
23 facts or circumstances. Good faith efforts to provide truthful information or to correct factual
24 misstatements shall not be grounds for the defendant to withdraw his guilty plea.

1 The defendant acknowledges that the United States Probation Office may calculate the
2 Sentencing Guidelines differently and may rely on additional information it obtains through its
3 investigation. The defendant also acknowledges that the Court may rely on this and other
4 additional information as it calculates the Sentencing Guidelines range and makes other
5 sentencing determinations, and the Court's reliance on such information shall not be grounds
6 for the defendant to withdraw his guilty plea.

7 VII. APPLICATION OF SENTENCING STATUTES

8 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
9 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a 10-year prison sentence, a fine of not more
10 \$250,000, or both.

11 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
12 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory minimum
13 and statutory maximum sentence limits the Court's discretion in determining the defendant's
14 sentence.

15 C. Parole Abolished. The defendant acknowledges that his prison sentence cannot be
16 shortened by early release on parole because parole has been abolished.

17 D. Supervised Release. In addition to imprisonment and a fine, the defendant will be
18 subject to a term of supervised release not to exceed three years. 18 U.S.C. §§ 3559(a)(3) and
19 3583(b)(2). Supervised release is a period of time after release from prison during which the
20 defendant will be subject to various restrictions and requirements. If the defendant violates any
21 condition of supervised release, the Court may order the defendant's return to prison for all or
22 part of the term of supervised release, which could result in the defendant serving a total term of
23 imprisonment greater than the statutory maximum prison sentence.

1 E. Special Assessment. The defendant will pay a \$100.00 special assessment per
2 count of conviction at the time of sentencing.

3 **VIII. POSITIONS REGARDING SENTENCE**

4 The parties will recommend a sentence within the Sentencing Guidelines range
5 determined by the Court unless the defendant commits any act that could result in a loss of the
6 downward adjustment for acceptance of responsibility. The defendant acknowledges that the
7 Court does not have to follow that recommendation. Notwithstanding its agreement to
8 recommend a sentence within the Sentencing Guidelines range, the United States reserves its
9 right to defend any lawfully imposed sentence on appeal or in any post-conviction litigation.

10 The defendant may not request a downward adjustment pursuant to 18 U.S.C. § 3553 or
11 USSG § 4A1.3(b)(1) from any sentence that the Court may impose.

12 **IX. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

13 Before or after sentencing, upon request by the Court, the United States, or the
14 Probation Office, the defendant will provide accurate and complete financial information,
15 submit sworn statements, and/or give depositions under oath concerning his assets and his
16 ability to pay. The defendant will surrender assets he obtained directly or indirectly as a result
17 of his crimes, and will release funds and property under his control in order to pay any fine,
18 forfeiture, or restitution ordered by the Court.

19 **X. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

20 A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

- 21 1. He has read this Plea Agreement and understands its terms and conditions;
- 22 2. He has had adequate time to discuss this case, the evidence, and this Plea
23 Agreement with his attorney;
- 24 3. He has discussed the terms of this Plea Agreement with his attorney;

1 4. The representations contained in this Plea Agreement are true and correct,
2 including the facts set forth in Section IV; and

3 5. He was not under the influence of any alcohol, drug, or medicine that would
4 impair his ability to understand the Agreement when he considered signing this Plea Agreement
5 and when he signed it.

6 The defendant understands that he alone decides whether to plead guilty or go to trial,
7 and acknowledges that he has decided to enter his guilty plea knowing of the charges brought
8 against his, his possible defenses, and the benefits and possible detriments of proceeding to trial.
9 The defendant also acknowledges that he decided to plead guilty voluntarily and that no one
10 coerced or threatened him to enter into this Plea Agreement.

11 B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly
12 and expressly waives: (a) the right to appeal any sentence imposed within or below the
13 applicable Sentencing Guideline range as determined by the Court; (b) the right to appeal the
14 manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. §
15 3742; and (c) the right to appeal any other aspect of the conviction or sentence and any order of
16 restitution or forfeiture.

17 The defendant also knowingly and expressly waives all collateral challenges, including
18 any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
19 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
20 assistance of counsel.

21 The defendant reserves only the right to appeal any portion of the sentence that is an
22 upward departure from the Sentencing Guidelines range determined by the Court.

23 The defendant acknowledges that the United States is not obligated or required to
24 preserve any evidence obtained in the investigation of this case.

1 C. Removal/Deportation Consequences. The defendant understands and
2 acknowledges that if he is not a United States citizen, then it is highly probable that he will be
3 permanently removed (deported) from the United States as a consequence of pleading guilty
4 under the terms of this Plea Agreement. The defendant has also been advised if his conviction is
5 for an offense described in 8 U.S.C. § 1101(a)(43), he will be deported and removed from the
6 United States and will not be allowed to return to the United States at any time in the future.
7 The defendant desires to plead guilty regardless of any immigration consequences that may
8 result from his guilty plea, even if the consequence is automatic removal from the United States
9 with no possibility of returning. The defendant acknowledges that he has specifically discussed
10 these removal/deportation consequences with his attorney.

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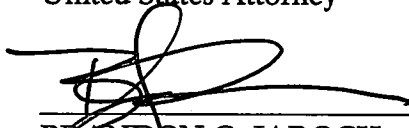
24 ///

1 **XI. ADDITIONAL ACKNOWLEDGMENTS**

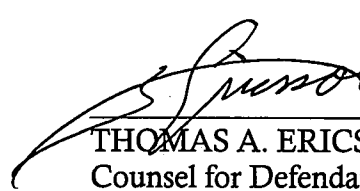
2 This Plea Agreement resulted from an arms-length negotiation in which both parties
 3 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
 4 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
 5 conditions other than those set forth in this agreement have been made or implied by the
 6 defendant, the defendant's attorney, or the United States, and no additional promises,
 7 agreements or conditions shall have any force or effect unless set forth in writing and signed by
 8 all parties or confirmed on the record before the Court.

10 NICHOLAS A. TRUTANICH
 United States Attorney

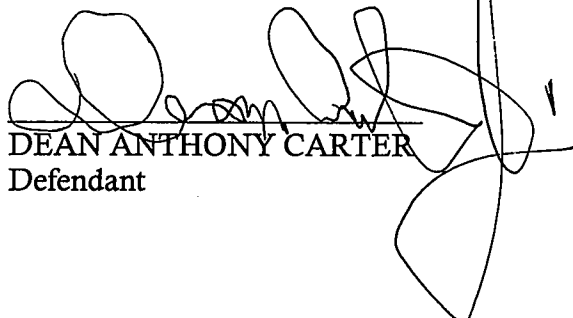
12 DATE 4/1/19

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 13 BRANDON C. JAROCH
 Assistant United States Attorney

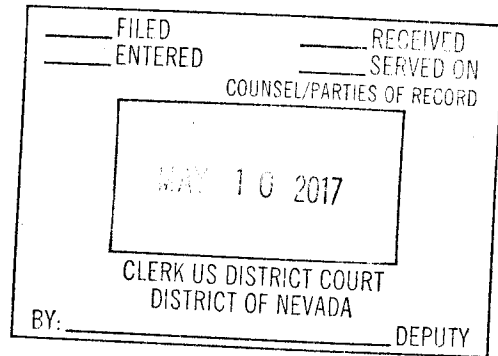
14 DATE 3/27/19

15 
 16 THOMAS A. ERICSSON, Esq.
 Counsel for Defendant CARTER

17 DATE 3-27-19

18 
 19 DEAN ANTHONY CARTER
 Defendant

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Acting United States Attorney
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phillip.smith@usdoj.gov



Attorney for the Plaintiff

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,)
)
 PLAINTIFF,)
)
 vs.)
)
 DEAN ANTHONY CARTER,)
)
 DEFENDANT.)

CRIMINAL INDICTMENT

2:17-CR- 153

VIOLATIONS:

18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon
in Possession of a Firearm; and

18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon
in Possession of Ammunition.

THE GRAND JURY CHARGES THAT:

COUNT ONE

Felon in Possession of a Firearm

On or about April 25, 2017, in the State and Federal District of Nevada,

DEAN ANTHONY CARTER,

defendant herein, having been convicted of crimes punishable by imprisonment for a term
exceeding one year, in the State of California, to wit: Attempted Murder (Count 1), Assault with
a Deadly Weapon (Count 2), Assault with Intent to Commit Sodomy (Count 3), and Burglary

(Count 4), in or about 1994; Felon in Possession of a Firearm, in or about 2004; and Inflicting Corporal Injury on Spouse or Cohabitant, in or about 2014; and in the State of New York, to wit: Second Degree Assault, in or about 2002, did knowingly possess a firearm, to wit: a Glock 9-millimeter handgun bearing serial number DRL617, said possession being in and affecting interstate commerce and said firearm having been shipped and transported in interstate commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

COUNT TWO

Felon in Possession of Ammunition

On or about April 25, 2017, in the State and Federal District of Nevada,

DEAN ANTHONY CARTER,

defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of California, to wit: Attempt Murder (Count 1), Assault with a Deadly Weapon (Count 2), Assault with Intent to Commit Sodomy (Count 3), and Burglary (Count 4), in or about 1994; Felon in Possession of a Firearm, in or about 2004; and Inflicting Corporal Injury on Spouse or Cohabitant, in or about 2014; and in the State of New York, to wit: Second Degree Assault, in or about 2002, did knowingly possess ammunition, to wit: one round of 9-millimeter ammunition, said possession being in and affecting interstate commerce and.

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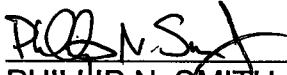
1 said ammunition having been shipped and transported in interstate commerce, all in violation
2 of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

3 **DATED:** this 10th day of May, 2017.

4 **A TRUE BILL:**

5
6
7 */S/*
8 FOREPERSON OF THE GRAND JURY

9 STEVEN W. MYHRE
10 Acting United States Attorney

11
12 
13 PHILLIP N. SMITH, JR.
14 Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSE JAMES FEEHAN-JONES,

Defendant-Appellant.

No. 21-15172

D.C. Nos. 3:20-cv-00377-MMD

3:15-cr-00011-MMD-VPC-1

District of Nevada,

Reno

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 11, 2021 (Docket Entry No. 3) is lifted.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

2020 WL 7055898

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,

v.

Julio FEEHAN-JONES, Petitioner/Defendant.

Case No. 3:15-cr-00011-MMD-

VPC-1, 3:20-cv-00377-MMD¹

|

Signed 12/02/2020

Attorneys and Law Firms

Amy B. Cleary, Benjamin F. Nemec, Office of the Federal Public Defender, Las Vegas, NV, for Petitioner/Defendant.

ORDER

MIRANDA M. DU, CHIEF UNITED STATES DISTRICT JUDGE

I. SUMMARY

*1 Feehan-Jones plead guilty to one count of Felon in Possession of a Firearm, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) (ECF No. 26) and on June 20, 2016, the Court sentenced him to 46 months imprisonment.² (ECF Nos. 32, 33). Before the Court is Feehan-Jones' amended motion to vacate, set aside, or correct his conviction and sentence under 28 U.S.C. § 2255(a). (ECF No. 38 (the "Motion")).³ Feehan-Jones filed his Motion in response to the Supreme Court's ruling in *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019), arguing that the Supreme Court's reinterpretation of 18 U.S.C. §§ 922(g) and 924(a)(2) in *Rehaif* renders his indictment defective for failure to include a requisite mens rea element. But because Feehan-Jones' claims are procedurally barred, because he waived the right to raise constitutional claims like this one when he plead guilty unconditionally, and as further explained below, the Court will deny the Motion.

II. BACKGROUND

On January 28, 2015, a grand jury indicted Petitioner Jesse Feehan-Jones on one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)

(2). (ECF No. 1.) As to Count One, Felon in Possession of a Firearm, the indictment alleges the following:

On or about January 11, 2015, in the State and Federal District of Nevada, Jesse Feehan-Jones, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year ... did knowingly possess a Beretta 9mm semi-automatic pistol ... said possession being in and affecting interstate commerce in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a) (2).

(*Id.*) Feehan-Jones pled guilty in open court without a plea agreement. (ECF No. 27.) On June 20, 2016, the Court sentenced Feehan-Jones to 46 months imprisonment, 12 months running concurrently with Nevada state case CR 15-0375 and 34 months running consecutively, with three years of supervised release. (ECF Nos. 32, 33.) Judgment was entered on June 21, 2016. (ECF No. 33.) Feehan-Jones did not appeal his sentence. Feehan-Jones is currently incarcerated at Warm Spring Correctional Center until January 27, 2022, after which he will serve the remaining 32 months of in federal custody. (ECF No. 38 at 6.) On June 20, 2020, he filed the Motion. (ECF Nos. 35, 38.)

III. LEGAL STANDARD

As noted, Feehan-Jones requests his sentence be vacated, set aside, or corrected under 28 U.S.C. § 2255(a) following the Supreme Court's decision in *Rehaif*, 139 S. Ct. 2191. (*Id.*) Under § 2255, a federal prisoner may "move the court which imposed the sentence to vacate, set aside or correct the sentence" if the sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a). On June 21, 2019, the Supreme Court decided *Rehaif*, overruling longstanding Ninth Circuit precedent regarding the required mens rea under 922(g) and 924(a)(2).⁴ See 139 S. Ct. at 2200. Prior to the decision, the government was only required to prove the defendant knowingly possessed a firearm. See *id.* But under *Rehaif*, the government "must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons

barred from possessing a firearm.” *Id.* Thus, the decision added a new mens rea element to 922(g) and 924(a)(2).

IV. DISCUSSION

*2 Feehan-Jones argues that his indictment failed to state a federal crime by omitting a necessary element of § 922(g)(1) required under *Rehaif*, depriving the court of subject matter jurisdiction and rendering his conviction unconstitutional. (ECF No. 38.) As to the constitutionality of the conviction, Feehan-Jones claims that the indictment lacked a cognizable claim, violating his Fifth Amendment right requiring that the grand jury find probable cause to support all necessary elements of the crime, and his Sixth Amendment right guaranteeing notice of the nature and cause of the accusations against him. (*Id.*) Further, Feehan-Jones argues that the government was required to demonstrate not only that he knew of his prohibited status, but also that he knew his status prohibited him from possessing a firearm. (*Id.*) Ultimately, Feehan-Jones maintains these errors are structural, requiring the Court vacate his conviction and release him. (*Id.*)

The government responds that Feehan-Jones' claims are waived by his unconditional guilty plea, and procedurally barred because they were not raised on direct appeal. (ECF No. 39.)

As further explained below, the Court addresses each issue Feehan-Jones raises and finds as follows. First, Feehan-Jones' petition is timely. Second, *Rehaif* applies retroactively. Third, the government is not required to demonstrate Feehan-Jones knew he was barred from possessing a firearm. Fourth, the Court had subject matter jurisdiction at the time it imposed his sentence. Fifth, Feehan-Jones' claims are procedurally barred because while he can demonstrate cause, he has failed to demonstrate prejudice and there is no structural error. Finally, Feehan-Jones waived his right to bring a challenge by pleading guilty. In short, the Motion is ultimately denied because Feehan-Jones waived his right by pleading guilty and the Motion is procedurally barred.

A. The Petition is Timely

Under 28 U.S.C. § 2255, a “1-year period of limitation” applies and runs from the latest of four time triggers.⁵ See 28 U.S.C. § 2255. Feehan-Jones claims that his Motion is timely because it was filed within one year of *Rehaif* being decided. (ECF No. 38 at 11.) Under this standard, the Motion is timely. *Rehaif* was decided June 21, 2019, and thus Feehan-Jones had until June 20, 2020 to file for relief. His initial motion

was filed June 20, 2020 (ECF No. 35), with the amended motion filed June 22, 2020 (ECF No. 38). Thus, it was filed within one year of the Court's decision in *Rehaif*. Moreover, the government does not contest timeliness.

B. Retroactivity

Feehan-Jones next argues that the new rule established in *Rehaif* applies retroactively to his case. (ECF No. 38 at 11-12.)

As the government does not dispute retroactivity,⁶ the Court assumes without deciding that *Rehaif* applies retroactively to Feehan-Jones' § 2255 claims. See *U.S. v. Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1 (D. Nev. Nov. 30, 2020).

C. Required Proof

*3 Feehan-Jones further argues that the plain language of *Rehaif* requires the government not only demonstrate he knew of his prohibited status—as previously convicted of a crime punishable by more than one year—but knew that this status barred him from possessing a firearm. (ECF No. 38 at 8-10.) The Court finds that the government was only required to prove that Feehan-Jones knew of his prohibited status, not that Feehan-Jones knew his status barred him from possessing a firearm. See *Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1.

D. Subject Matter Jurisdiction

Next, Feehan-Jones argues that because the indictment did not describe each element of the offense he was charged with, it failed to make out a federal offense, depriving the Court of jurisdiction under 18 U.S.C. § 3231—a defect constituting structural error. See *U.S. v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir. 2003). To the extent the indictment was defective for failing to allege the mens rea element under *Rehaif*, it did not deprive this Court of subject matter jurisdiction. See *Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1.

E. Procedural Default

The government also argues that Feehan-Jones' claims are procedurally defaulted. (ECF No. 39 at 6.) While a defendant is permitted to attack the legality of his sentence or conviction, a defendant who fails to raise the claim on direct appeal is procedurally defaulted unless the defendant can demonstrate: (1) cause and prejudice; or (2) actual innocence. See *Bousley* 523 U.S. at 622 (citations omitted); *U.S. v. Frady*, 456 U.S. 152, 167-168 (1982).

Feehan-Jones does not contest that he did not raise the claim in the Motion during his direct appeal, but Feehan-Jones responds he can overcome his procedural default because the errors in his indictment are structural, requiring only a showing of cause to set it aside. (ECF No. 38 at 13-14, 17-24.) Alternatively, Feehan-Jones argues that he can overcome procedural default because he has sufficiently demonstrated cause and prejudice. (ECF No. 42 at 9-17.) The Court finds that Feehan-Jones demonstrates cause but not prejudice or structural error.

1. Cause

A defendant has cause to overcome procedural default when the “constitutional claim is so novel that its legal basis is not reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984). A claim is not reasonably available if it “overturn[s] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.” *Id.* at 17 (quotation omitted).

The Court finds Feehan-Jones has cause because *Rehaif* overturned longstanding practice approved by a near unanimous body of lower courts, making his claim based on *Rehaif* “novel.” *See Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1.

2. Prejudice

The actual prejudice prong of the procedural default analysis requires a defendant show “not merely that the errors created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire proceedings with error of constitutional dimensions.” *Murray v. Carrier*, 477 US at 478, 488 (1986). For defective indictments, the question is “whether an error or omission in an indictment worked to the prejudice of the accused.” *U.S. v. James*, 980 F.2d 1314, 1316 (9th Cir. 1992). More specifically, the question is whether the defendant had “been given adequate knowledge of the missing element[] in order to satisfy the due process requirement.” *Id.* at 1318.

Feehan-Jones argues that without adequate knowledge of the missing element, due process was not satisfied because he was not given notice and not able to put on a thorough defense. (ECF No 42 at 23.) The government relies on the Ninth Circuit's decision in *U.S. v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019), to argue in response that, given his criminal history, no reasonable possibility exists that Feehan-Jones did

not know he had been convicted of a crime for which he could be sentenced to more than a year imprisonment. (ECF No. 39 at 18-20.)

*4 In *Benamor*, the defendant filed a petition for rehearing following *Rehaif*, arguing that the evidence was insufficient because the government failed to prove he knew he was a felon. *See* 937 F.3d at 1188. The Ninth Circuit pointed to the defendant's stipulation that he had been convicted of a crime punishable by more than one year to relieve the government's burden. *See id.* But the Ninth Circuit also acknowledged that “the stipulation does not end the discussion as to Defendant's *knowledge* of his status.” *Id.* Rather, the court pointed to defendant's seven prior felony convictions, several of which were sentences for more than one year imprisonment imposed, as well as the nine years he actually spent in prison, and conclusively indicated that there was no error in not instructing the jury to find knowledge of prohibited status. *Id.* And although, as Feehan-Jones points out, the plain error standard does not apply here,⁷ *Benamor* is instructive. There, the Ninth Circuit relied on the stipulation but focused primarily on prior convictions and sentences and the nine years in prison. Many courts determining prejudice have similarly relied predominantly on a defendant's criminal history to find it is implausible that the defendant did not know they had been convicted of a crime punishable by imprisonment for a term exceeding one year.⁸

Here, the Court similarly finds it implausible that Feehan-Jones was unaware of his prohibited person status, as formerly convicted of a crime punishable by imprisonment for a term exceeding one year, given his criminal history. By the time Feehan-Jones allegedly possessed the firearm, he had been convicted of several criminal offenses, sentenced to several terms of imprisonment exceeding one year, and served more than a year in prison. (ECF No. 39 at 2-3.)⁹

*5 Most notably, in 2001, he was convicted of a felony and sentenced to 12 to 32 months imprisonment suspended, with 24 months of probation. (*Id.*) Probation was later revoked, and the suspended sentence imposed. (*Id.*) In 2012, he was charged with another felony and again sentenced to 12 to 36 months imprisonment, suspended, with the original sentence later imposed. (*Id.*) Finally, and most convincingly, in 2002 he was convicted of a felony and sentenced to 12 to 36 months imprisonment. (*Id.*) Thus, as other courts have concluded,¹⁰ Feehan-Jones is unable to demonstrate prejudice given his criminal record and sentencing history.

The Court finds that Feehan-Jones did not suffer prejudice. Accordingly, Feehan-Jones cannot overcome procedural default.

3. Structural Error

Alternatively, Feehan-Jones argues that the constitutional errors are structural, requiring only a showing of cause and not prejudice. Structural errors are those that “affect the framework within which the trial proceeds” and is not “simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Feehan-Jones relies on *U.S. v. Inzunza* to argue that a “defective indictment is a structural flaw not subject to harmless error review.” 638 F.3d 1006, 1016-17 (9th Cir. 2011).

The Ninth Circuit has yet to decide if the issue presented by *Rehaif* is structural. Circuit courts are split, with only the Fourth Circuit finding structural error.¹¹ But, the Court finds no structural error fatally infected Feehan-Jones' indictment for two reasons.

First, the Supreme Court has found that structural error is applied “only in a very limited class of cases.” *Johnson v. U.S.*, 520 U.S. 461, 468 (1997).¹² The error here does not rise to the level of errors the Supreme Court has recognized as structural. The government relies on the case of *Neder v. U.S.*, 527 U.S. 1, 8 (1999) as a comparison. (ECF No. 39 at 12-13.) In *Neder* the Court found that lack of a specific jury finding or admission of a particular offense element is not structural error in the context of trial. *Id.* Although the facts differ because Feehan-Jones' claim is about a defective indictment not a defective jury instruction, the Court is inclined to find that the error here is more similar in kind to that in *Neder*, as compared to the cases cited above where structural error was found.¹³ Next, in *Rehaif* itself, the Supreme Court remanded the case for harmless error review rather than dismissing the conviction. *See*, 139 S. Ct. at 2200. This suggests *Rehaif* errors are not structural.

*6 Given the above, the Court finds *Rehaif* error is not structural.

F. Claims Waived by Unconditional Guilty Plea

Finally, the government argues that by pleading guilty unconditionally, Feehan-Jones waived his right to make any non-jurisdictional challenges to the indictment under the rule announced in *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). (ECF No. 39 at 15.) The Court finds Feehan-Jones' claims are barred by his guilty plea. *See Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1. Therefore, the claims are both procedurally barred, as discussed above, and also barred by his guilty plea.

V. CERTIFICATE OF APPEALABILITY

Before Feehan-Jones can appeal the Court's decision to deny his Motion, he must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22; 9th Cir. R. 22-1; *U.S. v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). To receive such a certificate, a petitioner must make “ ‘a substantial showing of the denial of a constitutional right’ as to each issue the petitioner seeks to appeal.” *Washington*, 653 F.3d at 1059 (quoting 28 U.S.C. § 2253(c)(2), (3)). “The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court determines that reasonable jurists would not find its reasoning debatable or wrong. Thus, the Court will deny a certificate of appealability.

VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that Feehan-Jones' motion to vacate, set aside, or correct his conviction and sentence (ECF Nos. 35, 38) is denied.

It is further ordered that a certificate of appealability is denied.

The Clerk is directed to enter judgment in accordance with this order and close this case.

All Citations

Slip Copy, 2020 WL 7055898

Footnotes

- 1 Case No. 3:15-cr-00011-MMD-VPC-1 is the underlying criminal matter. Case No. 3:20-cv-00377-MMD is the civil matter opened when the Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. 2255 was filed on June 20, 2020.
- 2 The 46-month sentence was to run concurrently for 12 months with Nevada state case CR 15-0375 and 34 months running consecutively. (ECF Nos. 32, 33.)
- 3 Feehan-Jones filed his initial motion on June 20, 2020 (ECF No. 35), and later amended that motion (ECF No. 38). The Court addresses the amended motion. (ECF No. 38.) The government opposes the Motion. (ECF No. 39.) Feehan-Jones filed a reply. (ECF No. 42.)
- 4 See *U.S. v. Enslin*, 327 F.3d 788,798 (9th Cir. 2003) (holding the government did not need to prove defendant knew of their prohibited status under 922(g).)
- 5 The four time triggers are: “(1) The date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2255.
- 6 The government only cursorily addresses retroactivity and at no point refutes Feehan-Jones’ argument that *Rehaif* applies retroactively. (ECF No. 39 at 6 (“Just as Feehan-Jones argues with respect to the retroactivity analysis, see ECF No. 38, at 11-12, the government believes that *Bailey v. United States*, 516 U.S. 137 (1995) provides an ‘excellent parallel’ for the procedural default analysis.”).)
- 7 “The government does not cite to any case applying the plain error standard to habeas petitions. In fact, ‘use of the ‘plain error’ standard to review [a] § 2255 motion [is] contrary to long-established law.’ ” (ECF No. 42 at 19 (citing *Frady*, 456 U.S. at 167).)
- 8 See e.g., *U.S. v. Reynolds*, Case No. 2:16-cr-00296-JAD-PAL-3, 2020 WL 5235316, at *4 (D. Nev., Sept. 2, 2020) (finding that 13 total years in prison on five felony convictions “renders it implausible that Reynolds did not know at the time of this offense that he had been convicted of a crime punishable by imprisonment for a term exceeding one year and forecloses his actual-prejudice arguments.”); *U.S. v. Lowe*, Case No. 2:14-cr-00004-JAD-VCF, 2020 WL 2200852, at *2 (D. Nev. May 6, 2020) (finding that evidence of serving five years in prison “proves beyond a reasonable doubt that Lowe well knew at the time of the offense that he had been convicted of ‘a crime punishable by imprisonment for a term exceeding one year.’ ”); *Whitley v. U.S.*, Case No. 04 Cr. 1381 (NRB), 2020 WL 1940897, at *2 (S.D.N.Y. Apr. 22, 2020) (finding that “any argument that Whitley was prejudiced therefrom is belied by the sheer implausibility that, after having been convicted of multiple prior felony convictions for which sentences exceeding a year had been imposed, and having in fact served more than a year in prison in connection therewith, Whitley nevertheless lacked the requisite awareness of his restricted status.”); *MacArthur v. U.S.*, Case No. 1:12-cr-00084-JAW, 2020 WL 1670369, at *10 (D. Me. Apr. 3, 2020) (“The record, including the presentence investigation report, shows that Petitioner had numerous prior felony convictions over many years before the § 922(g) conviction at issue ... [thus] the Government would have been able to prove beyond a reasonable doubt that Petitioner knew of his prohibited status at the time he possessed the firearm.”); *Floyd v. U.S.*, Case No. 19 C 6578, 2020 WL 374695, at *3 (N.D. Ill. Jan. 23, 2020) (“His plea agreement stated that he had previously been convicted of a crime (heroin manufacturing/delivery) for which he was sentenced to four years in prison, and he admitted

at his plea hearing that he 'had been convicted of at least one crime punishable by imprisonment for a term exceeding one year. It is inconceivable that Floyd would have declined to plead guilty ...' ") (citations omitted).

- 9 These prior offenses are summarized in Feehan-Jones' presentence investigation report.
- 10 As discussed above in footnote 8, other courts have predominantly relied on the amount of time in custody to find no prejudice exists. See, e.g., *Lowe*, 2020 WL 2200852, at *2 n.15 (collecting cases).
- 11 See *U.S. v. Hicks*, 958 F.3d 399 (5th Cir. 2020) (finding no structural error); *U.S. v. Watson*, 820 Fed. Appx. 397 (6th Cir. 2020) (finding no structural error); *U.S. v. Maez*, 960 F.3d 949, 957-58 (7th Cir. 2020) (finding no structural error); *U.S. v. Coleman*, 961 F.3d 1024 (8th Cir. 2020) (finding no structural error); *U.S. v. Trujillo*, 960 F.3d 1196, 1205-06 (10th Cir. 2020) (finding no structural error); *U.S. v. Gary*, 954 F.3d 194, 207–08 (4th Cir. 2020) (finding structural error).
- 12 The Supreme Court has recognized structural error in the following circumstances: *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding a total deprivation of the right to counsel structural error); *Turney v. Ohio*, 273 U.S. 510 (1927) (finding lack of an impartial trial judge structural error); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (finding unlawful exclusion of grand jurors of defendant's race structural error); *McKaskle v. Wiggins*, 465 U.S. 39 (1984) (finding the the denial of the right to self-representation at trial structural error); *Waller v. Georgia*, 467 U.S. 39 (1984) (finding the denial of the right to a public trial structural error); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (finding an erroneous reasonable-doubt instruction to a jury structural error).
- 13 See footnote 12.

End of Document

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

JESSE JAMES FEEHAN-JONES

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15-CR-11-MMD-VPC

USM Number: 49974-048

Biray Dogan, AFD
Defendant's Attorney**THE DEFENDANT:**☒ pleaded guilty to count(s) 1 of the indictment☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

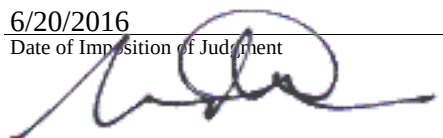
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	1/11/2015	1

The defendant is sentenced as provided in pages 2 through 6 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.

6/20/2016

Date of Imposition of Judgment


Signature of JudgeMIRANDA M. DU, U.S. DISTRICT JUDGE

Name and Title of Judge

6/20/2016

Date

DEFENDANT: JESSE JAMES FEEHAN-JONES
CASE NUMBER: 3:15-cr-11-MMD-VPC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
46 months, of which 12 months is to be served concurrent with the sentence imposed in State of Nevada case number CR 15-0375 and 34 months is to be served consecutive to the sentence imposed in State of Nevada case number CR 15-0375,

☒ The court makes the following recommendations to the Bureau of Prisons:
that the Defendant be designated to serve his sentence at FCI Sheridan, OR and that he be allowed to participate in the Residential Drug Abuse Program at the facility at which he serves his sentence.

☒ 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: JESSE JAMES FEEHAN-JONES
CASE NUMBER: 3:15-CR-11-MMD-VPC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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, not to exceed 104 tests annually.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JESSE JAMES FEEHAN-JONES
CASE NUMBER: 3:15-CR-11-MMD-VPC

SPECIAL CONDITIONS OF SUPERVISION

1. You shall participate in and successfully complete a substance abuse treatment and/or cognitive based life skills program, which will include drug/alcohol testing and/or outpatient counseling, as approved and directed by the probation office. You shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in substance abuse treatment. Further, you shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon your ability to pay.
2. You shall participate in and successfully complete a mental health treatment program, which may include testing, evaluation, and/or outpatient counseling, as approved and directed by the probation office. You shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in mental health treatment. Further, you shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon your ability to pay.
3. You shall complete 100 hours of community service, as approved and directed by the probation officer.
4. To ensure compliance with all conditions of release, the defendant shall submit to the search of his person, and any property, residence, business or automobile under his control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant at a reasonable time and in a reasonable manner. Provided, however, the defendant shall be required to submit to any search only if the probation officer has reasonable suspicion to believe the defendant has violated a condition or conditions of release.
5. You shall not possess, have under your control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state, or local law.
6. You shall report, in person, to the probation office in the district to which you are released within 72 hours of discharge from custody.

ACKNOWLEDGEMENT

Upon finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant

Date

U.S. Probation/Designated Witness

Date

DEFENDANT: JESSE JAMES FEEHAN-JONES
CASE NUMBER: 3:15-CR-11-MMD-VPC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS	\$ _____	\$ _____
---------------	----------	----------

☐ 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 Sheet 6 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:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* 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: JESSE JAMES FEEHAN-JONES
CASE NUMBER: 3:15-CR-11-MMD-VPC

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 payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States: the item(s) listed in the preliminary order of forfeiture (attached.)

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) 3:15-CR-011-MMD-(VPC)
)
 JESSE JAMES FEEHAN-JONES,)
)
 Defendant.)

This Court finds that defendant JESSE JAMES FEEHAN-JONES pled guilty to Count One of a One-Count Indictment charging him with Felon in Possession of a Firearm in violation of Title 18, United States Code, Section 922(g)(1). Indictment, ECF No. 1; Change of Plea, ECF No. 26.

The following assets are subject to forfeiture pursuant to Title 18, United States Code, Section 924(d)(1) with Title 28, United States Code, Section 2461(c):

- / / /

1 5. any and all ammunition
2 (all of which constitutes property).

3 This Court finds the United States of America is now entitled to, and should, reduce the
4 aforementioned property to the possession of the United States of America.

5 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the
6 United States of America should seize the aforementioned property.

7 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED all right, title, and interest of
8 JESSE JAMES FEEHAN-JONES in the aforementioned property is forfeited and is vested in the
9 United States of America and shall be safely held by the United States of America until further order
10 of the Court.

11 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the United States of America
12 shall publish for at least thirty (30) consecutive days on the official internet government forfeiture
13 website, www.forfeiture.gov, notice of this Order, which shall describe the forfeited property, state the
14 time under the applicable statute when a petition contesting the forfeiture must be filed, and state the
15 name and contact information for the government attorney to be served with the petition, pursuant to
16 Fed. R. Crim. P. 32.2(b)(6) and Title 21, United States Code, Section 853(n)(2).

17 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any individual or entity
18 who claims an interest in the aforementioned property must file a petition for a hearing to adjudicate
19 the validity of the petitioner's alleged interest in the property, which petition shall be signed by the
20 petitioner under penalty of perjury pursuant to Title 21, United States Code, Section 853(n)(3) and
21 Title 28, United States Code, Section 1746, and shall set forth the nature and extent of the petitioner's
22 right, title, or interest in the forfeited property and any additional facts supporting the petitioner's
23 petition and the relief sought.

24 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED a petition, if any, must be filed
25 with the Clerk of the Court, Bruce R. Thompson U.S. Courthouse and Federal Building, 400 South
26 Virginia Street, 3rd Floor, Reno, NV 89501, no later than thirty (30) days after the notice is sent or, if

1 direct notice was not sent, no later than sixty (60) days after the first day of the publication on the
2 official internet government forfeiture site, www.forfeiture.gov.

3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED a copy of the petition, if any,
4 shall be served upon the Asset Forfeiture Attorney of the United States Attorney's Office at the
5 following address at the time of filing:

6 Greg Addington
7 Assistant United States Attorney
8 100 West Liberty Street, Suite 600
9 Reno, NV 89501

10 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the notice described herein
11 need not be published in the event a Declaration of Forfeiture is issued by the appropriate agency
12 following publication of notice of seizure and intent to administratively forfeit the above-described
13 property.

14 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send copies of
15 this Order to all counsel of record.

16 DATED this 26th day of February, 2016.

17 

18 UNITED STATES DISTRICT JUDGE
19
20
21
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23
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25
26

DANIEL G. BOGDEN
United States Attorney
MEGAN RACHOW
Assistant United States Attorney
100 West Liberty Street, Suite 600
Reno, Nevada 89501
(775) 784-5438

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSE JAMES FEEHAN-JONES,

Defendant.

Case No. 3:15-cr-00011-MMD-VPC

MEMORANDUM IN SUPPORT OF
DEFENDANT'S PLEA

There is no plea agreement in this case. Government counsel was informed by defense counsel that the defendant intends to change his plea of not guilty to guilty without the benefit of a plea agreement. This Memorandum is to aid the court in advising the defendant of the consequences of a guilty plea under Federal Rule of Criminal Procedure 11(a)(2)(c).

The defendant is charged by Indictment with a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), Felon in Possession of a Firearm, and with a Forfeiture Allegation pursuant to 28 U.S.C. § 2461(c).

I.
PENALTY

Statutory

The maximum penalty for violating Title 18, United States Code, Section 922(g)(1), is not more than ten (10) years imprisonment, a fine of not more than \$250,000, or both.

1 Advisory Sentencing Guidelines

2 1. The sentence imposed will be under 18 U.S.C. § 3551 et. seq. and the Sentencing
3 Guidelines. The length and terms of that sentence depend upon the nature and extent of previous
4 criminal convictions which determine the offense level and criminal history category. The Court
5 determines the offense level and criminal history category and then must impose a reasonable sentence.

6 2. A federal prison sentence can no longer be shortened by early release on parole, because
7 parole has been abolished. However, under U.S.S.G. § 5D1.1, a term of Supervised Release following
8 any period of imprisonment is required when the term of imprisonment is more than a year. Under 18
9 U.S.C. § 3559(a)(3), this is a Class C felony and, therefore, pursuant to U.S.S.G. § 5D1.2(a)(2), a term
10 of Supervised Release of at least 1 year but not more than 3 years must be ordered.

11 3. Under the provisions of U.S.S.G. § 5E1.2, a fine must be imposed, depending upon the
12 Court's finding of the appropriate Offense Level within a range to be determined by the Guidelines.
13 However, U.S.S.G. § 5E1.2(e) allows the District Court to waive the fine, impose a lesser fine or an
14 alternative sanction, such as community service, if the defendant establishes he does not have the
15 ability to pay a fine and is not likely to become able to pay any fine.

16 4. Title 18, U.S.C. § 3663 and U.S.S.G. § 5E1.1 permit restitution as deemed appropriate
17 by the Court. A mandatory special assessment under 18 U.S.C. § 3013 and U.S.S.G. § 5E1.3 of
18 \$100.00 must be imposed for this offense.

19 5. Title 18, U.S.C. § 924(d)(1) subjects the firearm or ammunition involved in or used in
20 any knowing violation of 18 U.S.C. § 922(g) to seizure and forfeiture if the intent is demonstrated by
21 clear and convincing evidence.

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II.
ELEMENTS OF THE OFFENSE

The essential elements for the crime of Felon in Possession of a Firearm, in violation of Title 18, United States Code, Sections 922(g) and 924(a)(2), are the following:

- (1) the Defendant knowingly possessed a firearm;
- (2) the firearm had been shipped or transported from one state to another; and,
- (3) at the time the Defendant possessed the firearm, the Defendant had been previously convicted of a crime punishable by a term of imprisonment exceeding one year.

See Ninth Cir. Manuel of Model Jury Instr., Criminal 8.65 (2010).

III.
FACTS TO SUPPORT A PLEA OF GUILTY

Defendant admits the following facts to support his guilty plea:

On January 11, 2015, Sparks Police Dispatch received a call from the resident at 2042 K Street, Sparks, Nevada, that two unidentified males were in their backyard. Spark police officers responded and located two individuals in the backyard. One individual was confronted in the northwest portion of the backyard where he was hiding behind an object on the patio. As one officer ordered him to place his hands in the air, the other officer went to handcuff the individual. As the officer was placing the individual in handcuffs, a concealed black pistol fell out of the individual's waistband onto the patio. The individual was identified as Jesse James Feehan-Jones. A routine wants and warrants check showed that Feehan-Jones was on parole and had a no bail warrant for being in violation of his parole.

Once the other subject was also apprehended, the handgun was recovered by police. The gun was identified as a Beretta Model 92FS Centurion 9mm pistol bearing serial number E85080Z. The firearm was loaded. An ATF nexus determined that the Beretta had not been manufactured in Nevada and therefore, must have traveled in interstate commerce.

1 Officers had noted during their search for the individuals that a Dodge Durango with California
2 plates was parked behind an abandoned house. The Durango was unoccupied but officers could see a
3 rifle in plain view in the back. When Feehan-Jones had been searched incident to arrest, a small amount
4 of methamphetamine and keys to a Durango were located. The Durango was inventoried prior to being
5 towed. Inside the Durango, three rifles were recovered: a Savage .17 Winchester Super Magnum rifle
6 bearing serial number J156410, a Carl Gustafs 6.5 x 55 Swedish Mauser, and a Ruger .243 with a scope.
7 A check of the serial number on the Swedish Mauser showed that it had been reported stolen out of
8 Carson City. Sparks dispatch was able to obtain a faxed copy of the original report from the burglary.
9 The other two rifles matched descriptions on the list of stolen firearms but the serial numbers were not
10 included. In addition, the Beretta recovered from Feehan-Jones was also reported stolen from the
11 residence in Carson City.

12 Feehan-Jones was given his Miranda rights and agreed to speak with officers. Feehan-Jones
13 stated that he had not driven the Durango even though he had the keys in his possession. Feehan-Jones
14 stated a male named "Chris" was involved and that he only had the keys because he had gone back to
15 the Durango to get the methamphetamine. Feehan-Jones said that he had purchased the pistol from
16 Chris for \$200.00.

17 A review of court records revealed that Feehan-Jones had been convicted of Possession of a
18 Stolen Motor Vehicle, on or about January 10, 2013, in the Second Judicial District Court of the State of
19 Nevada in and for the County of Washoe.

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1 All of the foregoing occurred in the State and Federal District of Nevada.

2 DATED this 4th day of February, 2016.

3 Respectfully submitted,

4 DANIEL G. BOGDEN
United States Attorney

5
6 /s/ Megan Rachow
MEGAN RACHOW
7 Assistant United States Attorney
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CERTIFICATE OF SERVICE

It is hereby certified that pursuant to LCR 47-11 service of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANT'S PLEA was made through the Court's electronic filing and notice system (CM/ECF) or, as appropriate, by sending a copy of the same by first class mail, addressed to the following addresses:

Biray Dogan
Assistant Federal Public Defender
201 West Liberty Street, Suite 102
Reno, Nevada 89501
Biray_Dogan@fd.org

DATED this 4th day of February, 2016.

/s/ Megan Rachow
MEGAN RACHOW

DANIEL G. BOGDEN
United States Attorney
MEGAN RACHOW
Assistant United States Attorney
100 West Liberty Street, Suite 600
Reno, Nevada 89501
(775) 784-5438

Attorneys for Plaintiff

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
JAN 28 2015	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSE JAMES FEEHAN-JONES,

Defendant.

INDICTMENT FOR VIOLATION OF:

Title 18, United States Code, Sections
922(g)(1) and 924(a)(2) – Felon in Possession
of a Firearm (Count One)

3:15-cr-00011-MMD-VPC

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Felon in Possession of a Firearm)

On or about January 11, 2015, in the State and District of Nevada, JESSE JAMES FEEHAN-JONES, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year in the Second Judicial District Court of the State of Nevada in and for the county of Washoe, to wit: Possession of a Stolen Motor Vehicle, on or about January 10, 2013; did knowingly possess a Beretta 9mm semi-automatic pistol, Model 92FS, bearing serial number E85080Z, said possession being in and affecting commerce; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATION

1. The allegation of Count One of this Criminal Indictment is hereby realleged and incorporated herein by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c).

2. Upon conviction of the felony offense charged in Count One of this Criminal Indictment, JESSE JAMES FEEHAN-JONES, defendant herein, shall forfeit to the United States of America, any firearm or ammunition involved in or used in any knowing violation of Title 18, United States Code, Section 922(g)(1):

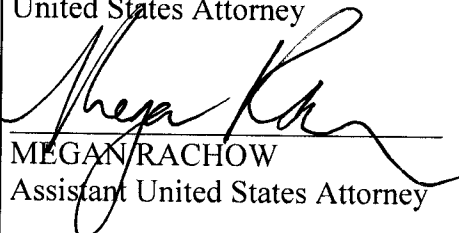
- a. a Beretta 9mm semi-automatic pistol, Model 92FS, bearing serial number E85080Z;
- b. a Savage rifle, .17 WSM caliber, Model B. Mag, bearing serial number J156410 ;
- c. a Carl Gustafs rifle, 6.5 x 55mm caliber, Mauser type, bearing serial number 69259;
- d. a Ruger rifle, .243 caliber, Model No. 1, bearing serial number 130-40724; and
- e. any and all ammunition ("property").

All pursuant to Title 18, United States Code, Section 922(g)(1); Title 18, United States Code, Section 924(d)(1); and Title 28, United States Code, Section 2461(c).

A TRUE BILL:

/S/
FOREPERSON OF THE GRAND JURY

DANIEL G. BOGDEN
United States Attorney


MEGAN RACHOW
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY CHARLES GRAY,

Defendant-Appellant.

No. 21-15873

D.C. Nos. 3:20-cv-00359-HDM
3:17-cr-00054-HDM-VPC-1

District of Nevada,
Reno

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

2021 WL 1033211

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Anthony Charles GRAY, Defendant.

Case No. 3:17-cr-00054-HDM-
VPC, Case No. 3:20-cv-00359-HDM

I

Signed 03/17/2021

Attorneys and Law FirmsAmy B. Cleary, Benjamin F. Nemec, Office of the Federal
Public Defender, Las Vegas, NV, for Defendant.**ORDER**HOWARD D. McKIBBEN, UNITED STATES DISTRICT
JUDGE

***1** Before the court is defendant Anthony Gray's motion to vacate pursuant to 28 U.S.C. § 2255 (ECF No. 68). The government has responded (ECF No. 70), and Gray has replied (ECF No. 71).

On July 12, 2017, Gray was charged by way of indictment with one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Gray entered a plea of guilty to the charge. (ECF Nos. 41 & 43). The court thereafter sentenced Gray to 63 months in prison. (ECF Nos. 49 & 50).

Section 922(g) prohibits the possession of a firearm by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Gray had prior felony convictions for discharging a firearm from a vehicle and for possession of a firearm with an obliterated serial number for which he was sentenced to concurrent terms of 26 to 120 months and 12 to 24 months, respectively. When Gray was charged and entered his plea in this case, the government was not required to prove that he knew he was a felon. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). But after Gray was sentenced, the U.S. Supreme Court concluded that a defendant may be

convicted under § 922(g) only if the government proves that the defendant “knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). On the basis of *Rehaif* and the government's failure to charge his knowledge of status, Gray now moves to vacate his conviction.

Pursuant to 28 U.S.C. § 2255, a federal inmate may move to vacate, set aside, or correct his sentence if: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *Id.* § 2255(a).

Gray argues that the omission of the *Rehaif* element from the indictment violated his Fifth Amendment rights guaranteeing that a grand jury find probable cause to support all the necessary elements of the crime and to not be tried on a fatally defective indictment and his Sixth Amendment rights to notice of the charges. He also alleges that the defective indictment deprived the court of jurisdiction. The government asserts that Gray has waived his right to bring these claims, that his claims are procedurally defaulted, and that the government is not required to prove the defendant knew his possession of firearms was unlawful.

Gray entered a conditional guilty plea that allowed him to appeal the denial of his motion to suppress and any sentence above the Guidelines range. However, he “knowingly and expressly waive[d]” all other direct appeal rights as well as “all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” (ECF No. 41 at 10-11).

***2** “An unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Espinoza*, 816 Fed. App'x 82, 85 (9th Cir. June 1, 2020) (unpublished disposition) (unconditional plea waiver precludes all Fifth and Sixth Amendment claims except to the extent they contest the court's jurisdiction or the voluntariness of the plea). Thus, except to the extent Gray attacks the jurisdiction of the court,¹ his claims are waived.²

Gray's jurisdictional argument is without merit. The omission of an element from the indictment does not affect the court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *United States v. Ratigan*, 351 F.3d 957, 962–63 (9th Cir. 2003); *see also United States v. Jackson*, 2020 WL 7624842, at *1 (9th Cir. Dec. 22, 2020) (unpublished disposition) (rejecting the defendant's argument that omission of the *Rehaif* element deprived the district court of jurisdiction); *United States v. Burleson*, 2020 WL 4218317, at *1 (July 23, 2020) (unpublished disposition) (same); *Espinoza*, 2020 WL 2844542, at *1 (same); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 88–92 (2d Cir. 2019); *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). *Cf. United States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission of *Rehaif* element from indictment for plain error).

Moreover, to the extent they are not otherwise waived, Gray's claims are procedurally defaulted.

“If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate” either “cause excusing his procedural default, and actual prejudice resulting from the claim of error,” *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is actually innocent of the offense, *Bousley v. United States*, 523 U.S. 614, 622 (1998). “[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.” *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice “requires the petitioner to establish ‘not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’ ” *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation omitted).

Gray could have raised his claims on direct appeal but did not do so. They are therefore procedurally defaulted. It is unnecessary to resolve whether Gray can demonstrate cause for the default, because even if he could, he cannot demonstrate prejudice.³

Gray committed the instant offense after receiving a two-to-ten-year sentence for discharging a firearm from a vehicle and a one-to two-year sentence for possession of a firearm

with an obliterated serial number. (PSR ¶ 37). Further, Gray acknowledged in his plea agreement that he had been previously convicted of a felony. (ECF No. 41 at 3–4). Finally, and most importantly, Gray acknowledged during his plea colloquy both that he had a prior felony conviction -- specifically, for discharging a weapon from a vehicle -- and that he was aware at the time of his offense that he was not allowed to possess a firearm. (ECF No. 60 (Tr. 21)). In light of Gray's admissions that he knew he was a convicted felon and that he was prohibited from possessing firearms, combined with his criminal history, the court is not persuaded that the outcome of the proceedings would have been any different had the grand jury been presented with, and the indictment had alleged, the *Rehaif* element. He thus suffered no prejudice from the omission of the *Rehaif* element.

***3** Gray argues that he suffered prejudice because he was convicted by a court lacking jurisdiction. For the reasons previously discussed, this argument is without merit because the errors Gray complains of did not deprive the court of jurisdiction.

Gray alternatively argues that he is not required to demonstrate prejudice to obtain relief because the omission is structural error.

“[C]ertain errors, termed structural errors, might affect substantial rights regardless of their actual impact on an appellant's trial.” *United States v. Marcus*, 560 U.S. 258, 263 (2010) (internal punctuation and citations omitted). Thus, structural error “warrant[s] habeas relief without a showing of specific prejudice.” *United States v. Withers*, 638 F.3d 1055, 1063–64 (9th Cir. 2011). “But structural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error.” *Marcus*, 560 U.S. at 263 (internal punctuation and citations omitted). Cases in which the Supreme Court has found structural error include total deprivation of counsel, lack of an impartial trial judge, violation of the right to a public trial and an erroneous reasonable-doubt instruction. *See id.* (discussing cases). In contrast, errors that have been found to be non-structural include where the court instructed on an invalid alternative theory of guilt, gave an instruction omitting an element of the offense, or erroneously instructed the jury on an element. *Id.* at 264 (discussing cases).

The Ninth Circuit has not yet addressed in a published opinion whether omission of the *Rehaif* element from the indictment

is structural error. But it has held that the error is not structural in at least one unpublished decision. *See United States v. Jackson*, 2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the First, Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded that *Rehaif* errors are not structural. *United States v. Patrone*, 985 F.3d 81, 86 (1st Cir. 2021); *United States v. Nasir*, 982 F.3d 144, 171 n.30 (3d Cir. Dec. 1, 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); *see also United States v. Hill*, 2020 WL 7258551, at *2 n.3 (3d Cir. Dec. 10, 2020) (unpublished disposition); *United States v. Watson*, 820 Fed. App'x 397, 400 (6th Cir. 2020) (unpublished disposition). *But see United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). This court agrees with the well-reasoned opinions of these courts and concludes that a *Rehaif* error does not fall within the limited class of errors the Supreme Court has found to be structural.⁴

*4 Finally, Gray argues that *Rehaif* requires the government to prove not only that he knew that he was a convicted felon but also that he knew he was barred from possessing firearms. Notwithstanding the fact that Gray admitted to the court that

he knew he was barred from possessing a firearm, Gray's legal argument is also without merit. *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020) (“[The defendant] contends that *Rehaif* requires the Government to prove he knew not only his status, but also that he knew his status prohibited him from owning a firearm. But this interpretation is not supported by *Rehaif*”).

Accordingly, because the claims raised in Gray's § 2255 motion are waived, procedurally defaulted and/or without merit, IT IS THEREFORE ORDERED that the motion to vacate, set aside or correct sentence (ECF No. 68) is hereby DENIED.

IT IS FURTHER ORDERED that Gray is DENIED a certificate of appealability, as jurists of reason would not find the court's denial of the motion to be debatable or wrong.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 1033211

Footnotes

- 1 Gray does not attack the voluntariness of his plea.
- 2 The court agrees with the well-reasoned opinions of several courts that none of the exceptions under *Tollett* to the collateral challenge waiver applies in this case. *See, e.g., United States v. Kelbch*, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).
- 3 Gray does not argue actual innocence.
- 4 While there is some case law holding that defects in the indictment are structural error, those cases apply only where the claim is timely raised. *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) (“We hold that, if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.... Untimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard.”).

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA)

v.)

ANTHONY CHARLES GRAY)

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:17-cr-00054-HDM-VPC

USM Number: 54197-048

Kate Berry, AFPD

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to Count One of Single Count Indictment filed 7/12/17☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18, U.S.C. §§ 922(g)(1) and 924(a)(2) Forfeiture	Felon in Possession of a Firearm	6/29/2017	One

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.

May 16, 2018

Date of Imposition of Judgment


Signature of JudgeHOWARD D. McKIBBEN, Senior U.S. District Judge
Name and Title of Judge5/17/18
Date

²
 DEFENDANT: ANTHONY CHARLES GRAY
 CASE NUMBER: 3:17-cr-00054-HDM-VPC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **Sixty-three (63) months**.

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

Recommendation for placement of defendant at FCI Herlong or at a facility as close as possible to Reno, Nevada.

X 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 _____
 a _____, with a certified copy of this judgment.

 UNITED STATES MARSHAL

 DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANTHONY CHARLES GRAY
CASE NUMBER: 3:17-cr-00054-HDM-VPC

SUPERVISED RELEASE

Upon release from imprisonment, you will 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, not to exceed 104 tests annually.
 - ☐ 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 the location where you reside, work, or 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 other conditions on the attached page.

DEFENDANT: ANTHONY CHARLES GRAY
CASE NUMBER: 3:17-cr-00054-HDM-VPN

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 nunchukus 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 User 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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's signature _____

Date _____

DEFENDANT: ANTHONY CHARLES GRAY
CASE NUMBER: 3:17-cr-00054-HDM-VPC

SPECIAL CONDITIONS OF SUPERVISION

1. Search and Seizure - You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release, based upon reasonable suspicion of evidence of a crime or contraband or a violation of supervision.
2. Substance Abuse Treatment - You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program, as directed by the probation office based upon your ability to pay.
3. No Alcohol - You must not use or possess alcohol.
4. Mental Health Treatment - You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program based upon your ability to pay.
5. Community Service - You must complete 100 hours of community service within 12 months. The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.
6. No Gang Affiliation - You must not communicate, or otherwise interact, with any known member of any gang, including the Cut Throat Mob (CTM) gang, without first obtaining the permission of the probation officer.

DEFENDANT: ANTHONY CHARLES GRAY
CASE NUMBER: 3:17-cr-00054-HDM-VPC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	N/A	None	N/A
	Due and payable immediately.			

- ☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Clerk, U.S. District Court Attn: Financial Officer Case No. 3:17-cr-00054-HDM-VPC 333 Las Vegas Boulevard, South Las Vegas, NV 89101			

TOTALS \$ _____ \$ _____

- ☐ 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 Sheet 6 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:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: ANTHONY CHARLES GRAY
CASE NUMBER: 3:17-cr-00054-HDM-VPC

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 payment of \$100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____
_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or
60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____
_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60
days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days)
after release from imprisonment. The court will set the payment plan based on an assessment of the
defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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
- 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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
See attached.

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

UNITED STATES OF AMERICA,) 3:17-CR-054-HDM-(VPC)
)
 Plaintiff,)
)
 v.) Preliminary Order of Forfeiture
)
 ANTHONY CHARLES GRAY,)
)
 Defendant.)

This Court finds defendant ANTHONY CHARLES GRAY agreed to the forfeiture of the property set forth in the Plea Agreement and the Forfeiture Allegation of the Indictment.

Indictment, ECF No. 1; Plea Agreement, ECF No. 41; Change of Plea, ECF No. 43

The following property is subject to forfeiture pursuant to Title 18, United States Code, Section 924(d)(1) with Title 28, United States Code, Section 2461(c):

App. F-12

- 1 1. a Smith & Wesson, 9mm, semi-automatic pistol bearing serial number
- 2 FYJ2400; and
- 3 2. any and all ammunition
- 4 (all of which constitutes property).

5 This Court finds the United States of America is now entitled to, and should, reduce the
6 aforementioned property to the possession of the United States of America.

7 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that
8 the United States of America should seize the aforementioned property.

9 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED all right, title, and interest
10 of ANTHONY CHARLES GRAY in the aforementioned property is forfeited and is vested in
11 the United States of America and shall be safely held by the United States of America until
12 further order of the Court.

13 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the United States of
14 America shall publish for at least thirty (30) consecutive days on the official internet government
15 forfeiture website, www.forfeiture.gov, notice of this Order, which shall describe the forfeited
16 property, state the time under the applicable statute when a petition contesting the forfeiture must
17 be filed, and state the name and contact information for the government attorney to be served
18 with the petition, pursuant to Fed. R. Crim. P. 32.2(b)(6) and Title 21, United States Code,
19 Section 853(n)(2).

20 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any individual or
21 entity who claims an interest in the aforementioned property must file a petition for a hearing to
22 adjudicate the validity of the petitioner's alleged interest in the property, which petition shall be
23 signed by the petitioner under penalty of perjury pursuant to Title 21, United States Code,
24 Section 853(n)(3) and Title 28, United States Code, Section 1746, and shall set forth the nature
25 and extent of the petitioner's right, title, or interest in the forfeited property and any additional
26 facts supporting the petitioner's petition and the relief sought.

1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED a petition, if any, must be
2 filed with the Clerk of the Court, Bruce R. Thompson U.S. Courthouse and Federal Building,
3 400 South Virginia Street, 3rd Floor, Reno, NV 89501, no later than thirty (30) days after the
4 notice is sent or, if direct notice was not sent, no later than sixty (60) days after the first day of
5 the publication on the official internet government forfeiture site, www.forfeiture.gov.

6 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED a copy of the petition, if
7 any, shall be served upon the Asset Forfeiture Attorney of the United States Attorney's Office at
8 the following address at the time of filing:

9 Greg Addington
10 Assistant United States Attorney
11 100 West Liberty Street, Suite 600
Reno, NV 89501

12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the notice described
13 herein need not be published in the event a Declaration of Forfeiture is issued by the appropriate
14 agency following publication of notice of seizure and intent to administratively forfeit the above-
15 described property.

16 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send copies
17 of this Order to all counsel of record.

18 DATED this 22nd day of February, 2018.

19
20
21 
22 UNITED STATES DISTRICT JUDGE

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF NEVADA
 3 BEFORE THE HONORABLE HOWARD D. McKIBBEN, SENIOR DISTRICT JUDGE
 4 ---o0o---

5 UNITED STATES OF AMERICA, : No. 3:17-cr-054-HDM(VPC)
 6 :
 7 Plaintiff, :
 8 : February 15, 2018
 9 -vs- :
 10 :
 11 ANTHONY CHARLES GRAY, : United States District Court
 12 : 400 S. Virginia Street
 13 Defendant. : Reno, Nevada 89501
 14 :
 15 :
 16 :
 17 :
 18 :
 19 :
 20 :
 21 :
 22 :
 23 :
 24 :
 25 :

11 **TRANSCRIPT OF CHANGE OF PLEA**

12 A P P E A R A N C E S:

13 FOR THE GOVERNMENT: Megan Rachow
 14 Assistant United States Attorney
 15 Reno, Nevada

16 FOR THE DEFENDANT: Kate Berry
 17 Assistant Federal Public Defender
 18 Reno, Nevada

19 Proceedings recorded by mechanical stenography produced by
 20 computer-aided transcript
 21

22 Reported by: KATHRYN M. FRENCH, RPR, CCR
 23 NEVADA LICENSE NO. 392
 24 CALIFORNIA LICENSE NO. 8536
 25

09:52:00 1 Reno, Nevada, Thursday, February 15, 2018, 12:55 p.m.

09:52:01 2 ---OoO---

10:03:26 3

10:03:26 4 THE CLERK: This is the date and time set for
10:03:32 5 change of plea in case number 3:17-cr-054-HDM(VPC), United
10:03:39 6 States of America versus Anthony Charles Gray.

10:03:41 7 Defendant is present in custody with counsel,
10:03:45 8 Kate Berry.

10:03:46 9 Appearing on behalf of the government is
10:03:48 10 Megan Rachow.

10:03:50 11 THE COURT: Okay. Thank you.

10:03:52 12 Good afternoon, counsel. How are you?

10:03:55 13 MS. BERRY: Good afternoon, Your Honor.

10:03:58 14 THE COURT: We have a Plea Agreement. It's
10:04:00 15 been signed by the defense and by the government and by the
10:04:08 16 defendant.

10:04:10 17 So, I'll have you sworn. You may remain seated.
10:04:16 18 Just raise your right hand and be sworn, please.

10:04:18 19 (Defendant sworn.)

10:04:28 20 THE COURT: All right. Thank you.

10:04:29 21 I'm going to ask you a number of questions,
10:04:34 22 Mr. Gray. At any point, you should understand that you have
10:06:10 23 the right to ask me to clarify something if you don't
10:06:15 24 understand it, and at anytime you may ask me to have a chance
10:06:21 25 to talk with your counsel about this matter before you respond

10:06:26 1 to anything.

10:06:27 2 Do you understand that?

10:06:28 3 DEFENDANT GRAY: Yes, sir.

10:06:29 4 THE COURT: Okay. I have before -- well, let me
10:06:54 5 ask you just a couple preliminary questions.

10:06:58 6 What is your age?

10:06:59 7 DEFENDANT GRAY: 28 -- I mean, 27.

10:07:03 8 THE COURT: 27?

10:07:05 9 DEFENDANT GRAY: Yes, sir.

10:07:11 10 THE COURT: And your level of education?

10:07:14 11 DEFENDANT GRAY: 11th grade.

10:07:15 12 THE COURT: You read, write and understand the
10:07:17 13 English language?

10:07:19 14 DEFENDANT GRAY: Yes, sir.

10:07:20 15 THE COURT: And so I take it you did understand
10:07:23 16 what was in the Plea Agreement before you signed it, right?

10:07:26 17 DEFENDANT GRAY: Yes, sir.

10:07:27 18 THE COURT: Are you on any medication today?

10:07:30 19 DEFENDANT GRAY: No, sir.

10:07:47 20 THE COURT: Have you ever been hospitalized for
10:07:49 21 any disorder that would affect your memory or your ability to
10:08:01 22 comprehend something?

10:08:03 23 DEFENDANT GRAY: No, sir.

10:08:04 24 THE COURT: Okay. And are you satisfied -- I
10:08:07 25 think Ms. Gorman also has been involved in this case, but are

10:08:12 1 you satisfied with Ms. Berry --

10:08:18 2 DEFENDANT GRAY: Yes, sir.

10:08:19 3 THE COURT: -- and Ms. Gorman representing you?

10:08:36 4 DEFENDANT GRAY: Yes, sir.

10:08:38 5 THE COURT: Have they in any way compelled you
10:08:41 6 or forced you to come in here today to change your plea?

10:08:44 7 DEFENDANT GRAY: No, sir.

10:08:53 8 THE COURT: Have though promised you anything?

10:08:56 9 DEFENDANT GRAY: No, sir.

10:08:57 10 THE COURT: Okay. So you're here on your own
10:09:00 11 free will, with the understanding that you can consult with
10:09:03 12 your attorney, but you're making the final decision to go
10:09:06 13 ahead today, is that right?

10:09:14 14 DEFENDANT GRAY: Yes, sir.

10:09:15 15 THE COURT: Okay. And has either Ms. Berry or
10:09:22 16 Ms. Gorman promised you anything that's not in the agreement
10:09:31 17 itself?

10:09:32 18 DEFENDANT GRAY: No, sir.

10:09:33 19 THE COURT: Okay. And they haven't told you you
10:09:36 20 have to go ahead and enter a plea today, have they?

10:09:44 21 DEFENDANT GRAY: No, sir.

10:09:45 22 THE COURT: So I'll go over the Plea Agreement
10:09:48 23 with you now. And again, if you need anything clarified,
10:09:53 24 please let me know.

10:09:54 25 Have you received the Indictment in this case?

10:09:57 1 DEFENDANT GRAY: Yes, sir.

10:09:59 2 THE COURT: And do you wish to have it read or
10:10:01 3 do you waive the reading of it?

10:10:02 4 DEFENDANT GRAY: Uh --

10:10:05 5 THE COURT: Do you need to have it read again?

10:10:08 6 MS. BERRY: We'll waive the reading, Your Honor.

10:10:10 7 THE COURT: Okay. All right. Thank you.

10:10:13 8 You're charged with being a felon in possession of
10:10:16 9 a firearm, and that's a violation of Title 18 U.S. Code,
10:10:21 10 Section 922(g) (1) and 924(a) (2).

10:10:24 11 Do you understand that?

10:10:25 12 DEFENDANT GRAY: Yes, sir.

10:10:26 13 THE COURT: All right. You have the right to
10:10:55 14 continue to plead not guilty and have a speedy and public jury
10:11:00 15 trial.

10:11:00 16 Do you understand that?

10:11:04 17 DEFENDANT GRAY: Yes, sir.

10:11:04 18 THE COURT: At that trial you would be
10:11:17 19 represented by your counsel, either both of your attorneys or
10:11:25 20 one of the two.

10:11:26 21 Do you understand that?

10:11:28 22 DEFENDANT GRAY: Yes, sir.

10:11:29 23 THE COURT: And they would, in representing
10:11:32 24 you, have the right to cross-examine the witnesses called
10:11:36 25 against you.

10:11:37 1 Do you understand that?

10:11:49 2 DEFENDANT GRAY: Yes, sir.

10:11:57 3 THE COURT: You would hear what those witnesses
10:12:00 4 would say and you would have an opportunity to impeach them by
10:12:09 5 virtue of asking them questions.

10:12:11 6 Do you understand that?

10:12:13 7 DEFENDANT GRAY: Yes, sir.

10:12:17 8 THE COURT: You also, in addition to being able
10:12:19 9 to confront the witnesses and hear what they had to say and
10:12:23 10 observe their demeanor, you also have what we call the
10:12:27 11 privilege against self-incrimination. During the trial, you
10:12:31 12 could remain silent. That would not be held against you
10:12:35 13 because the presumption of innocence applies and you're not
10:12:39 14 required to give any testimony during the trial, and I would
10:12:43 15 advise the jury that that could not be held against you.

10:12:46 16 Do you understand that?

10:12:47 17 DEFENDANT GRAY: Yes, I do, Your Honor.

10:12:49 18 THE COURT: You could waive that privilege and
10:12:52 19 go ahead and testify on your own behalf and be subject to
10:12:56 20 cross-examination. You could have the Clerk of Court issue
10:13:23 21 subpoenas to compel witnesses to appear on your behalf. You
10:13:28 22 would waive those important rights if you were to enter a plea
10:13:33 23 here today.

10:13:33 24 Do you understand that?

10:13:35 25 DEFENDANT GRAY: Yes, sir.

10:13:36 1 THE COURT: Okay. Now, also, you have certain
10:13:44 2 potential defenses, perhaps, in this case, statement taken
10:13:52 3 from you in violation of your Constitutional rights, evidence
10:13:55 4 seized in violation of your Constitutional rights. And
10:14:00 5 through motions to suppress, you could bring those to the
10:14:03 6 attention of the Court. And, in fact, you have already
10:14:12 7 brought one before the Court.

10:14:15 8 Do you understand that?

10:14:17 9 DEFENDANT GRAY: Yes, sir.

01:00:42 10 THE COURT: And that's recited in the Plea
01:00:42 11 Agreement as a basis, possible basis for appeal, and you
01:00:42 12 reserve that right. But other than that, you would waive any
01:00:42 13 rights in the future to bring any other motions to suppress or
01:00:46 14 motions that would indicate that some Constitutional right was
01:00:51 15 violated. You would waive those rights.

01:00:53 16 Do you understand that?

01:00:54 17 DEFENDANT GRAY: Yes, sir.

01:01:03 18 THE COURT: Okay. If I take your plea today,
01:01:03 19 it's unlikely that I'll let you withdraw it later on.

01:01:03 20 Do you understand that?

01:01:05 21 DEFENDANT GRAY: Yes, sir.

01:01:05 22 THE COURT: Okay. The government's agreed not
01:01:05 23 to file any additional charges against you arising out of
01:01:10 24 the conduct that's the subject of the action here.

01:01:11 25 Do you understand that?

01:01:12 1 DEFENDANT GRAY: Yes, sir.

01:01:12 2 THE COURT: Okay. If we went to trial, the
01:01:14 3 government would have it prove certain things beyond a
01:01:16 4 reasonable doubt before you could be convicted:

01:01:17 5 First, that you knowingly possessed a firearm;

01:01:20 6 Second, it had been shipped from one state to
01:01:23 7 another; and

01:01:25 8 Third, at the time you possessed the firearm, you
01:01:27 9 had been convicted of a crime punishable by imprisonment for
01:01:31 10 a term exceeding one year.

01:01:32 11 Do you understand all of those things?

01:01:34 12 DEFENDANT GRAY: Yes, sir.

01:01:34 13 THE COURT: All right. Now, the facts to
01:01:36 14 support your plea are contained on pages 3 and 4 of the
01:01:39 15 Plea Agreement. Are those facts true to the best of your
01:01:41 16 knowledge?

01:01:42 17 DEFENDANT GRAY: Yes, sir.

01:01:42 18 THE COURT: Okay. If for some reason you
01:01:47 19 were allowed to withdraw your plea and went to trial, the
01:01:50 20 government could impeach you, if you were to take the stand
01:01:52 21 and testify, using these facts against you.

01:01:55 22 Do you understand that?

01:01:56 23 DEFENDANT GRAY: Yes, sir.

01:01:56 24 THE COURT: Okay.

01:01:57 25 Again, it's unlikely that I'm going to allow you to

01:02:01 1 withdraw your plea if you enter it today, but, if that were
01:02:04 2 the case, then that would be the one of the consequences, do
01:02:07 3 you understand, of entering your plea?

01:02:08 4 DEFENDANT GRAY: Yes, sir.

01:02:08 5 THE COURT: All right.

01:02:10 6 Now, the sentencing guidelines are something that
01:02:14 7 the Court always considers and I'll consider it in your
01:02:17 8 case --

01:02:17 9 DEFENDANT GRAY: Yes, sir.

01:02:18 10 THE COURT: -- at the time of sentencing.

01:02:19 11 Do you understand that?

01:02:20 12 DEFENDANT GRAY: Yes. Yes, sir.

01:02:20 13 THE COURT: I'm not bound by them, but I give
01:02:23 14 serious consideration to them.

01:02:24 15 Do you understand that?

01:02:25 16 DEFENDANT GRAY: Yes, sir.

01:02:25 17 THE COURT: The parties believe that the base
01:02:27 18 offense level for this offense is 20, that will have to be
01:02:31 19 established at the time that I sentence you, and I'll review
01:02:34 20 the Presentence Report from the Department of Probation. But,
01:02:38 21 in any event, at least at this point, the parties believe that
01:02:41 22 the base offense level is 20, and that if you receive the full
01:02:45 23 three-level reduction for acceptance of responsibility, the
01:02:49 24 adjusted offense level would be 17.

01:02:51 25 Do you understand that?

01:02:51 1 DEFENDANT GRAY: Yes, sir.

01:02:52 2 THE COURT: Now, your base offense level will
01:02:54 3 be determined by the type or number of your prior felony
01:02:58 4 convictions. That is, whether they qualify as a controlled
01:03:01 5 substance offense or a crime of violence, and/or the type of
01:03:04 6 firearm possessed.

01:03:07 7 You acknowledge that the statutory maximum sentence
01:03:10 8 limits the Court's discretion. And in this case, the
01:03:13 9 statutory maximum sentence -- I guess I'll come to that
01:03:19 10 in a second, but I'll just tell you right now it's up to
01:03:21 11 10 years imprisonment, and a fine of \$250,000 or both.

01:03:27 12 Do you understand that?

01:03:27 13 DEFENDANT GRAY: Yes, sir.

01:03:28 14 THE COURT: Now it's likely you will receive the
01:03:31 15 full three-level reduction for acceptance of responsibility,
01:03:34 16 unless the government argues that you shouldn't receive the
01:03:37 17 one level -- you get the two levels. If they argue, for some
01:03:42 18 reason, you shouldn't get the one level, then I would have to
01:03:45 19 make that final determination.

01:03:46 20 Do you understand that?

01:03:47 21 DEFENDANT GRAY: Yes, sir.

01:03:47 22 THE COURT: Okay. Criminal history will be
01:03:50 23 based upon what prior offenses you have. And we know you have
01:03:53 24 one, because it was a qualifying offense for the offense
01:03:56 25 you're pleading guilty to today.

01:03:58 1 Do you understand that?

01:03:58 2 DEFENDANT GRAY: Yes, sir.

01:03:59 3 THE COURT: Okay. But if you have more than
01:04:02 4 one criminal offense, then you will fall farther over on the
01:04:05 5 criminal history category.

01:04:07 6 Do you understand that?

01:04:08 7 DEFENDANT GRAY: Yes, sir.

01:04:08 8 THE COURT: The Court may consider any
01:04:10 9 relevant conduct surrounding the charge here in deciding
01:04:14 10 the appropriate sentence.

01:04:15 11 Do you understand that?

01:04:16 12 DEFENDANT GRAY: Yes, sir.

01:04:16 13 THE COURT: Now as I indicated before, the
01:04:21 14 maximum sentence and penalty for this offense is 10 years
01:04:25 15 imprisonment, and a fine of \$250,000 or both.

01:04:29 16 You understand that?

01:04:31 17 DEFENDANT GRAY: Yes, sir.

01:04:32 18 THE COURT: And then I'll consider the factors
01:04:33 19 under Section 3553 of Title 18 of the United States Code, such
01:04:39 20 things as the severity of the conduct; protecting the public;
01:04:48 21 questions involving possible rehabilitation; questions
01:04:52 22 involving disparity in sentences; and the potential for
01:04:58 23 recidivism; and not only protecting the public, but the
01:05:03 24 seriousness of the offense. All of those things are factors
01:05:06 25 that I consider. And, possible education and training that

01:05:09 1 you can receive as a result of a period of incarceration. All
01:05:13 2 of those are factors the Court puts into the equation after I
01:05:17 3 consider the Sentencing Guidelines and deciding whether there
01:05:20 4 should be any departures from the Guidelines, and/or variances
01:05:23 5 under 3553.

01:05:24 6 Do you understand that?

01:05:25 7 DEFENDANT GRAY: Yes, sir.

01:05:25 8 THE COURT: Okay.

01:05:27 9 Now, parole has been abolished; so, whatever term of
01:05:31 10 imprisonment, if there's a term of imprisonment by the Court,
01:05:34 11 you would serve that full-time without the possibility of
01:05:37 12 parole.

01:05:37 13 Do you understand that?

01:05:38 14 DEFENDANT GRAY: Yes, sir.

01:05:38 15 THE COURT: I will impose a period of supervised
01:05:42 16 release upon your release from custody. It would not exceed
01:05:45 17 three years.

01:05:46 18 Do you understand that?

01:05:47 19 DEFENDANT GRAY: Yes, sir.

01:05:48 20 THE COURT: If you violate conditions of
01:05:50 21 supervised release, then you could be sentenced for the
01:05:52 22 violation up to the maximum under the statute.

01:05:55 23 Do you understand that?

01:05:56 24 DEFENDANT GRAY: Yes, sir.

01:05:56 25 THE COURT: The \$100 penalty assessment will be

01:05:59 1 imposed at the time of sentencing.

01:06:01 2 Do you understand that?

01:06:01 3 DEFENDANT GRAY: Yes, sir.

01:06:02 4 THE COURT: Now, before I get to the position
01:06:08 5 of the parties regarding sentencing, I always like to at
01:06:12 6 least give you some general idea, under the guidelines, of
01:06:19 7 the sentence. My recollection was the parties have indicated
01:06:23 8 that absent some other findings by the Court, we're looking
01:06:28 9 at a 20, less 3, which would be 17. So if you fell in a 17
01:06:35 10 offense level, and let's say you were at the highest level of
01:06:39 11 the criminal history category -- and I have no way of knowing
01:06:42 12 that, but, if you were, then the sentence would be 51 to 63
01:06:47 13 months.

01:06:47 14 Do you understand that?

01:06:47 15 DEFENDANT GRAY: Yes, sir.

01:06:48 16 THE COURT: Under the Guidelines. And I would
01:06:50 17 have to depart either down or up, or do something with a
01:06:53 18 variance under 3553 to change that.

01:06:56 19 Do you understand that?

01:06:56 20 DEFENDANT GRAY: Yes, sir.

01:06:57 21 THE COURT: And it might even be higher than
01:06:59 22 that if you're not at a 17. If I make some findings
01:07:02 23 respecting the nature of your conduct and prior offenses and
01:07:08 24 everything else, you might fall in a higher category than 20.
01:07:12 25 And if that's the case, then that could go up based upon the

01:07:15 1 offense level.

01:07:16 2 Do you understand that?

01:07:17 3 DEFENDANT GRAY: Yes, sir.

01:07:17 4 THE COURT: So, there's no assurance that that
01:07:20 5 even would be the guideline. It might be higher. But, at
01:07:23 6 least that gives you some idea, under the Plea Agreement, as
01:07:26 7 to a possible range of sentences.

01:07:30 8 Do you understand that?

01:07:30 9 DEFENDANT GRAY: Yes, sir.

01:07:31 10 THE COURT: Okay. I'll, of course, have all of
01:07:35 11 the relevant sentencing information at the time I impose
01:07:39 12 judgment and sentence because we'll have a Presentence Report,
01:07:42 13 and the Department will provide me with that information,
01:07:44 14 including prior offenses.

01:07:46 15 Do you understand that?

01:07:47 16 DEFENDANT GRAY: Yes, sir.

01:07:47 17 THE COURT: Parole has been abolished. Whatever
01:07:50 18 sentence the Court imposes, you'll have to serve that
01:07:53 19 full-time without the possibility of parole.

01:07:55 20 Do you clearly understand that?

01:07:56 21 DEFENDANT GRAY: Yes, sir.

01:07:57 22 THE COURT: And I've told you about the
01:07:58 23 supervised release, three years, and then the \$100 assessment.

01:08:03 24 The parties are going to each make recommendations
01:08:07 25 that the sentence be imposed within the applicable guideline

01:08:16 1 range as determined by the Court.

01:08:18 2 Do you understand that?

01:08:18 3 DEFENDANT GRAY: Yes, sir.

01:08:22 4 THE COURT: There's no restitution involved
01:08:24 5 here. You agree to forfeit any interest that you may have
01:08:27 6 in a Smith & Wesson, 9 millimeter, semi-automatic pistol
01:08:33 7 that's described in the Indictment and also in the Plea
01:08:35 8 Agreement.

01:08:36 9 Do you understand that?

01:08:36 10 DEFENDANT GRAY: Yes, sir.

01:08:37 11 THE COURT: You agree to abandon, forfeit the
01:08:39 12 property, relinquish any right, title or interest you have;
01:08:42 13 You waive your right to abandonment proceedings;
01:08:43 14 You waive service of process, notices;
01:08:46 15 You agree not to file any claims; and
01:08:48 16 Waive the statute of limitations;
01:08:50 17 Right to a jury trial;
01:08:50 18 You waive any Constitutional, legal and equitable
01:08:53 19 defenses;

01:08:54 20 You agree to the entry of the forfeiture by the
01:08:56 21 Court; and

01:08:57 22 Abandon any rights that you have to that firearm.

01:09:01 23 Do you understand all of that.

01:09:02 24 DEFENDANT GRAY: Yes, sir.

01:09:02 25 THE COURT: And you'll provide financial

01:09:04 1 information to the Department.

01:09:05 2 Do you understand that?

01:09:06 3 DEFENDANT GRAY: Yes, sir.

01:09:09 4 THE COURT: Now, also, you're waiving your
01:09:11 5 appellate rights in this case and reserving only certain
01:09:15 6 rights. But except for the rights I'll articulate in a
01:09:18 7 second, you knowingly and expressly waive your right to appeal
01:09:21 8 any sentence imposed within or below the applicable sentencing
01:09:27 9 guideline range as determined by the Court;

01:09:28 10 Your right to appeal the manner in which the Court
01:09:30 11 determines that sentence under 18 USC 3742; and

01:09:35 12 The right to appeal any other aspect of the
01:09:37 13 conviction or sentence, and any order of restitution or
01:09:40 14 forfeiture.

01:09:40 15 Do you understand that?

01:09:41 16 DEFENDANT GRAY: Yes, sir.

01:09:41 17 THE COURT: And you knowingly and expressly
01:09:44 18 waive all collateral challenges, including challenges under
01:09:47 19 28 USC, Section 2255.

01:09:50 20 Do you understand that?

01:09:51 21 DEFENDANT GRAY: Yes, sir.

01:09:52 22 THE COURT: And, the manner in which the Court
01:09:55 23 adjudicated guilt and imposed sentence, except an issue of
01:09:59 24 ineffective assistance of counsel.

01:10:01 25 Do you understand that?

01:10:01 1 DEFENDANT GRAY: Yes, sir.

01:10:02 2 THE COURT: And the only other qualification is
01:10:04 3 you reserve the right to appeal any portion of your sentence
01:10:07 4 that's above the guideline range as determined by the Court.

01:10:09 5 Do you understand that?

01:10:10 6 DEFENDANT GRAY: Yes, sir.

01:10:11 7 THE COURT: And you also reserve the right to
01:10:12 8 appeal the Court's order denying your Motion to Suppress. You
01:10:16 9 recall you had a suppression hearing. I denied the Motion to
01:10:19 10 Suppress. Whether you'll take an appeal on that is up to you,
01:10:22 11 but you have that right.

01:10:23 12 Do you understand that?

01:10:24 13 DEFENDANT GRAY: Yes, sir.

01:10:24 14 THE COURT: And that will not affect your Plea
01:10:24 15 Agreement.

01:10:26 16 Do you understand that?

01:10:27 17 DEFENDANT GRAY: Yes, sir.

01:10:27 18 THE COURT: And, the government is not required
01:10:32 19 to preserve any evidence.

01:10:33 20 So that you clearly understand, then, outside
01:10:39 21 ineffective assistance of counsel -- and it appears to me
01:10:41 22 you've been very well represented by your attorneys -- but
01:10:44 23 putting that aside, you would have the right to make an
01:10:47 24 argument on that. You don't waive that.

01:10:51 25 The other issue is the possible appellate right that

01:10:56 1 you have in connection with the Motion to Suppress. But
01:10:57 2 otherwise, you're waiving all your collateral challenges and
01:11:01 3 direct appeal challenges.

01:11:02 4 Do you understand that?

01:11:02 5 DEFENDANT GRAY: Yes, sir.

01:11:03 6 THE COURT: As an example, then, the way I read
01:11:05 7 this Plea Agreement, if, for example, the Court determines
01:11:08 8 that your base offense level is higher than 20 -- and I have
01:11:11 9 no way of knowing what the evidence or facts would be on
01:11:14 10 that -- you can't appeal that.

01:11:17 11 Do you understand that?

01:11:18 12 DEFENDANT GRAY: Yes, sir.

01:11:18 13 THE COURT: And if I find that your prior
01:11:23 14 criminal history is such that you fall in a category, let's
01:11:26 15 say, three instead of two, you can't appeal that either.

01:11:30 16 Do you understand that?

01:11:31 17 DEFENDANT GRAY: Yes, sir.

01:11:34 18 THE COURT: But, you can appeal the two issues
01:11:34 19 that I've talked about.

01:11:37 20 Do you understand that?

01:11:38 21 DEFENDANT GRAY: Yes, sir.

01:11:38 22 THE COURT: Well, actually, three, because if I
01:11:40 23 go above the guideline range, but as long as I stay within the
01:11:43 24 guideline range as I determine it to be appropriate, then you
01:11:45 25 can't appeal it.

01:11:46 1 Do you understand that?

01:11:47 2 DEFENDANT GRAY: Yes, sir.

01:11:48 3 THE COURT: Okay. Thank you.

01:11:49 4 Do you have any questions about nature of the
01:11:51 5 offense or the possible penalty here?

01:11:53 6 DEFENDANT GRAY: No, sir.

01:11:54 7 THE COURT: All right. Do you have any other
01:11:57 8 questions you want to go over with your counsel before I take
01:12:00 9 your plea?

01:12:00 10 DEFENDANT GRAY: No, sir.

01:12:01 11 THE COURT: All right. To the Indictment, then,
01:12:03 12 charging you with a violation of 922(g)(1) of Title 18 of the
01:12:07 13 United States Code; being a felon in possession of a firearm,
01:12:10 14 what is your plea? Are you guilty or not guilty?

01:12:12 15 DEFENDANT GRAY: Guilty.

01:12:13 16 THE COURT: Have you entered that plea freely
01:12:16 17 and voluntarily.

01:12:17 18 DEFENDANT GRAY: Yes, sir.

01:12:17 19 THE COURT: Has anyone threatened you or
01:12:19 20 promised you anything?

01:12:20 21 DEFENDANT GRAY: No, sir.

01:12:20 22 THE COURT: Has Ms. Berry promised you anything?

01:12:23 23 DEFENDANT GRAY: No, sir.

01:12:23 24 THE COURT: Do you understand, now, you've
01:12:26 25 waived the right to a speedy and public jury trial?

01:12:29 1 DEFENDANT GRAY: Yes, sir.

01:12:29 2 THE COURT: You waived the right to have
01:12:31 3 Ms. Berry and/or Ms. Gorman, or both of them, represent you
01:12:34 4 at that trial.

01:12:35 5 Do you understand that?

01:12:35 6 DEFENDANT GRAY: Yes, sir.

01:12:35 7 THE COURT: You're waiving the right to confront
01:12:37 8 the witnesses called against you and to cross-examine them
01:12:40 9 through your attorneys.

01:12:40 10 Do you understand that?

01:12:41 11 DEFENDANT GRAY: Yes, sir.

01:12:41 12 THE COURT: And you're waiving the right to what
01:12:43 13 we call the privilege against self-incrimination as a result
01:12:46 14 of this plea, and the presumption of innocence.

01:12:49 15 Do you understand that?

01:12:50 16 DEFENDANT GRAY: Yes, sir.

01:12:50 17 THE COURT: You're also waiving the right to
01:12:52 18 give testimony on your own behalf at trial and to subpoena
01:12:55 19 witnesses to appear on your behalf.

01:12:56 20 Do you understand that?

01:12:57 21 DEFENDANT GRAY: Yes, sir.

01:12:57 22 THE COURT: And you're waiving all defenses you
01:13:00 23 have in this case, save and except the possible appellate
01:13:03 24 issue involving the Motion to Suppress that's been decided by
01:13:05 25 the Court.

01:13:06 1 Do you understand all of that?

01:13:07 2 DEFENDANT GRAY: Yes, sir.

01:13:07 3 THE COURT: Now, can you just tell me in your
01:13:09 4 own words what you did that causes you to plead guilty here
01:13:11 5 today?

01:13:12 6 DEFENDANT GRAY: On June 29th, I possessed a
01:13:14 7 firearm, previously being convicted as an ex-felon.

01:13:17 8 THE COURT: And what was the prior felony that
01:13:19 9 you were convicted of?

01:13:21 10 DEFENDANT GRAY: Discharging a firearm from a
01:13:23 11 motor vehicle.

01:13:23 12 THE COURT: Okay. And how long ago was that?

01:13:25 13 DEFENDANT GRAY: In 2012.

01:13:27 14 THE COURT: Okay. And you acknowledge you were
01:13:30 15 convicted of that felony, is that correct?

01:13:32 16 DEFENDANT GRAY: Yes, sir.

01:13:32 17 THE COURT: And you knew it was illegal, did you
01:13:36 18 not, to possess a firearm after that conviction of the felony,
01:13:39 19 is that correct?

01:13:40 20 DEFENDANT GRAY: Yes, sir.

01:13:40 21 THE COURT: All right. I'll accept your plea
01:13:43 22 as having been made freely and voluntarily, with a full
01:13:45 23 understanding of your rights.

01:13:46 24 The matter is referred to the Department for a
01:13:49 25 Presentence Report. And I'll continue for imposition of

01:13:51 1 sentence and judgment until -- what dates?

01:13:53 2 THE CLERK: Until Wednesday, May 16th, 2018, at
01:13:57 3 10:30.

01:13:58 4 THE COURT: Is that all right, counsel, both of
01:13:58 5 you?

01:13:58 6 MS. BERRY: Yes, Your Honor.

01:13:59 7 MS. RACHOW: Yes, Your Honor.

01:14:00 8 THE COURT: All right. Thank you very much. I
01:14:01 9 appreciate it. We'll vacate the trial in this case.

01:14:05 10 Is there a preliminary order of forfeiture -- oh,
01:14:08 11 okay.

01:14:08 12 THE CLERK: You didn't talk about the firearm
01:14:10 13 being shipped --

01:14:11 14 THE COURT: Oh, yes.

01:14:12 15 The one other element on this is -- I just took a
01:14:15 16 look at this -- is that you possessed the firearm, and the
01:14:17 17 firearm had been shipped from one state to another; and, you
01:14:21 18 had been convicted of a crime punishable by imprisonment for a
01:14:22 19 term exceeding one year.

01:14:23 20 You understand each one of those elements?

01:14:25 21 DEFENDANT GRAY: Yes, sir.

01:14:25 22 THE COURT: And if any one of those is not
01:14:28 23 established beyond a reasonable doubt, you would be entitled
01:14:30 24 to a not guilty verdict.

01:14:30 25 Do you understand that?

01:14:31 1 DEFENDANT GRAY: Yes, sir.

01:14:32 2 THE COURT: And understanding all of that, you
01:14:34 3 still wish to enter your guilty plea?

01:14:36 4 DEFENDANT GRAY: Yes, sir.

01:14:36 5 THE COURT: All right.

01:14:37 6 I think that's all I have. Anything else then?

01:14:40 7 MS. BERRY: Nothing further, Your Honor.

01:14:42 8 MS. RACHOW: No. Thank you.

01:14:43 9 THE COURT: Thank very much. Appreciate it.

01:14:45 10 We'll vacate the trial.

01:14:48 11 Thank you, counsel, for working this out.

01:14:50 12

13 (Court Adjourned.)

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18 I certify that the foregoing is a correct
19 transcript from the record of proceedings
in the above-entitled matter.

20 \s\ Kathryn M. French

July 7, 2018

21

22 KATHRYN M. FRENCH, RPR, CCR
23 Official Reporter

DATE

23

24

25

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
FEB 15 2018	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY GRAY,

Defendant.

Case No. 3:17-cr-00054-HDM-VPC

**PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11 (c)(1)(A) and (B)**

Plaintiff United States of America, by and through DAYLE ELIESON, United States Attorney for the District of Nevada, and MEGAN RACHOW, Assistant United States Attorney, the defendant ANTHONY GRAY, and the defendant's attorney, KATE BERRY, Assistant Federal Public Defender, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A and B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and ANTHONY GRAY, the defendant. This Plea Agreement binds the defendant and the United States Attorney's Office for the District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

The Plea Agreement sets forth the parties' agreement regarding criminal charge referenced in the Plea Agreement and applicable sentences, fines, restitution and forfeiture. It

1 does not control or prohibit the United States or any agency or third party from seeking any other
2 civil or administrative remedies directly or indirectly against the defendant.

3 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

4 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to
5 the following charge as set forth in the indictment returned by the grand jury on July 12, 2017:

6 Count 1: Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and
7 924(a)(2).

8 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised and
9 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
10 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically,
11 the defendant is giving up:

12 1. The right to proceed to trial by jury on all charges, or to a trial by a judge
13 if the defendant and the United States both agree;

14 2. The right to confront the witnesses against the defendant at such a trial, and
15 to cross-examine them;

16 3. The right to remain silent at such a trial, with assurance that his silence
17 could not be used against him in any way;

18 4. The right to testify in his own defense at such a trial if he so chooses;

19 5. The right to compel witnesses to appear at such a trial and testify in the
20 defendant's behalf; and

21 6. The right to have the assistance of an attorney at all stages of such
22 proceedings.

23 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
24 plea after he has entered it in court.

1 D. Additional Charges. The United States agrees not to bring any additional charges
2 against the defendant arising out of the investigation in the District of Nevada which culminated
3 in this Plea Agreement and based on conduct known to the United States.

4 The United States will move to dismiss any additional charges pending against the
5 defendant in this case at the time of sentencing.

6 **III. ELEMENTS OF THE OFFENSES**

7 Count 1: The elements of Felon in Possession of a Firearm under 18 U.S.C. §§ 922(g)(1)
8 and 924(a)(2) are:

9 First: The defendant knowingly possessed a firearm;

10 Second: The firearm had been shipped from one state to another; and

11 Third: At the time the defendant possessed the firearm, the defendant had been
12 convicted of a crime punishable by imprisonment for a term exceeding one
13 year.

14 *See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65A (Approved 6/2016).*

15 **IV. FACTS SUPPORTING GUILTY PLEA**

16 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
17 the crime charged.

18 B. The defendant acknowledges that if he elected to go to trial instead of pleading
19 guilty, the United States could prove his guilt beyond a reasonable doubt. The defendant further
20 acknowledges that his admissions and declarations of fact set forth below satisfy every element
21 of the charged offense.

22 C. The defendant waives any potential future claim that the facts he admitted in this
23 Plea Agreement were insufficient to satisfy the elements of the charged offense.
24

1 D. The defendant admits and declares under penalty of perjury that the facts set forth
2 below are true and correct:

3 On June 29, 2017, within the State and District of Nevada, the defendant, Anthony Gray,
4 knowingly possessed a loaded Smith & Wesson 9mm semi-automatic pistol bearing serial number
5 FYJ2400. Also with the firearm a loaded high capacity magazine (capable of holding 30 rounds).

6 An ATF investigation determined that the firearm was a Smith & Wesson 9mm semi-
7 automatic pistol bearing serial number FYJ2400, was a modern firearm as defined by federal law,
8 and had been manufactured outside the state of Nevada. As such, the firearm must have traveled
9 in interstate commerce.

10 A review of court records determined that the defendant had been previously convicted
11 on June 21, 2012, of Discharging a Firearm Within or From a Vehicle and Possession of a Firearm
12 with an Obliterated Serial Number in the Second Judicial District Court of the State of Nevada in
13 and for the County of Washoe.

14 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

15 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
16 defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does
17 not plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea
18 Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting
19 any evidence, argument or representation offered by or on the defendant's behalf. The defendant
20 expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use
21 of the facts set forth in Section IV of this Plea Agreement.

22 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

23 A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that
24 the Court must consider the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing

Guidelines”) in determining the defendant’s sentence, but that the Sentencing Guidelines are advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term of imprisonment permitted by statute.

B. Offense Level Calculations. The parties stipulate to the following calculation of the defendant’s offense level under the Sentencing Guidelines, acknowledge that these stipulations do not bind the Court, and agree that they will not seek to apply any other specific offense characteristics, enhancements or reductions, except as otherwise set forth in this plea agreement:

1. Count 1: Felon in Possession of a Firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2)

Base Offense Level U.S.S.G. § 2K2.1(a)(4)(B): 20*

Reductions:

[Acceptance of Responsibility U.S.S.G. § 3E1.1]: -3

Adjusted Offense Level: 17

*Defendant’s base offense level will be determined by the type and number of defendant’s prior felony convictions (whether they qualify as a controlled substance offense or crime of violence) and/or the type of firearm possessed. The defendant acknowledges that the statutory maximum sentence limits the Court’s discretion in determining the defendant’s sentence notwithstanding any applicable Sentencing Guidelines provisions.

C. Reduction of Offense Level for Acceptance of Responsibility. Under U.S.S.G. § 3E1.1(a), the United States will recommend that the defendant receive a two-level downward adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false or misleading information to the United States, the Court, Pretrial Services, or the Probation

1 Office; (e) denies involvement in the offense or provides conflicting statements regarding his
2 involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts
3 to withdraw his guilty plea; or (g) commits or attempts to commit any crime.

4 Under U.S.S.G. § 3E1.1(b), the United States will move for an additional one-level
5 downward adjustment for acceptance of responsibility before sentencing because the defendant
6 communicated his decision to plead guilty in a timely manner that enabled the United States to
7 avoid preparing for trial and to efficiently allocate its resources.

8 D. Criminal History Category. The defendant acknowledges that the Court may base
9 his sentence in part on the defendant's criminal record or criminal history. The Court will
10 determine the defendant's Criminal History Category under the Sentencing Guidelines.

11 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
12 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
13 applicable Sentencing Guidelines range and whether to depart from that range.

14 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
15 calculations are based on information now known to the parties. The parties may provide
16 additional information to the United States Probation Office and the Court regarding the nature,
17 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
18 circumstances. Good faith efforts to provide truthful information or to correct factual
19 misstatements shall not be grounds for the defendant to withdraw his guilty plea.

20 The defendant acknowledges that the United States Probation Office may calculate the
21 Sentencing Guidelines differently and may rely on additional information it obtains through its
22 investigation. The defendant also acknowledges that the Court may rely on this and other
23 additional information as it calculates the Sentencing Guidelines range and makes other
24

1 sentencing determinations, and the Court's reliance on such information shall not be grounds for
2 the defendant to withdraw his guilty plea.

3 **VII. APPLICATION OF SENTENCING STATUTES**

4 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
5 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a prison sentence of 10 years, a fine of \$250,000,
6 or both.

7 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
8 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
9 sentence and any statutory minimum sentence limit the Court's discretion in determining the
10 defendant's sentence.

11 C. Parole Abolished. The defendant acknowledges that his prison sentence cannot be
12 shortened by early release on parole because parole has been abolished.

13 D. Supervised Release. In addition to imprisonment and a fine, the defendant will be
14 subject to a term of supervised release not to exceed 3 years. 18 U.S.C. § 3583(b)(2). Supervised
15 release is a period of time after release from prison during which the defendant will be subject to
16 various restrictions and requirements. If the defendant violates any condition of supervised
17 release, the Court may order the defendant's return to prison for all or part of the term of
18 supervised release, which could result in the defendant serving a total term of imprisonment
19 greater than the statutory maximum prison sentence of 10 years.

20 E. Special Assessment. The defendant will pay a \$100.00 special assessment per
21 count at the time of sentencing.

22 **VIII. POSITIONS REGARDING SENTENCE**

23 The parties will recommend a sentence within the applicable Sentencing Guideline range
24 as determined by the Court. The defendant acknowledges that the Court does not have to follow

1 either parties' recommendation. Notwithstanding its agreement to recommend a guideline
2 sentence, the United States reserves its right to defend any lawfully imposed sentence on appeal
3 or in any post-conviction litigation.

4 **IX. RESTITUTION**

5 The parties do not believe that restitution is applicable in this case, but the determination
6 whether restitution is appropriate pursuant to 18 U.S.C. § 3663 rests solely with the Court.

7 **X. FORFEITURE**

8 The defendant knowingly and voluntarily:

9 A. Agrees to the abandonment, the civil administrative forfeiture, the civil judicial
10 forfeiture, or the criminal forfeiture of a Smith & Wesson, 9mm semi-automatic pistol bearing
11 serial number FYJ2400, and any and all ammunition ("property");

12 B. Abandons or forfeits the property to the United States;

13 C. Relinquishes all right, title, and interest in the property;

14 D. Waives his right to any abandonment proceedings, any civil administrative
15 forfeiture proceedings, any civil judicial forfeiture proceedings, or any criminal forfeiture
16 proceedings of the property ("proceedings");

17 E. Waives service of process of any and all documents filed in this action or any
18 proceedings concerning the property arising from the facts and circumstances of this case;

19 F. Waives any further notice to him, his agents, or his attorney regarding the
20 abandonment or the forfeiture and disposition of the property;

21 G. Agrees not to file any claim, answer, petition, or other documents in any
22 proceedings concerning the property;

1 H. Waives the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7 and
2 32.2, the constitutional requirements, and the constitutional due process requirements of any
3 proceedings concerning the property;

4 I. Waives his right to a jury trial on the forfeiture of the property;

5 J. Waives all constitutional, legal, and equitable defenses to the forfeiture or
6 abandonment of the property in any proceedings, including but not limited to (1) constitutional
7 or statutory double jeopardy defenses; and (2) defenses under the Excessive Fines or Cruel and
8 Unusual Punishments Clauses of the Eighth Amendment to the United States Constitution;

9 K. Agrees to the entry of an Order of Forfeiture of the property to the United States;

10 L. Agrees that forfeiture is immediately due and payable and subject to immediate
11 collection by the United States;

12 M. Agrees and understands the abandonment, the civil administrative forfeiture, the
13 civil judicial forfeiture, or the criminal forfeiture of the property shall not be treated as satisfaction
14 of any assessment, fine, restitution, cost of imprisonment, or any other penalty the Court may
15 impose upon the defendant in addition to the abandonment or the forfeiture; and

16 N. The defendant acknowledges that the amount of the forfeiture may differ from,
17 and may be significantly greater than, the amount of restitution.

18 **XI. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

19 Before or after sentencing, upon request by the Court, the United States, or the Probation
20 Office, the defendant will provide accurate and complete financial information, submit sworn
21 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
22 defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
23 release funds and property under his control in order to pay any fine, forfeiture, or restitution
24 ordered by the Court.

XII. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS

A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

- (1) He has read this Plea Agreement and understands its terms and conditions;
- (2) He has had adequate time to discuss this case, the evidence, and this Plea Agreement with his attorney;
- (3) He has discussed the terms of this Plea Agreement with his attorney;
- (4) The representations contained in this Plea Agreement are true and correct, including the facts set forth in Section IV; and
- (5) He was not under the influence of any alcohol, drug, or medicine that would impair his ability to understand the Agreement when he considered signing this Plea Agreement and when he signed it.

The defendant understands that he alone decides whether to plead guilty or go to trial, and acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him, his possible defenses, and the benefits and possible detriments of proceeding to trial. The defendant also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened him to enter into this Plea Agreement.

B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly and expressly waives: (a) the right to appeal any sentence imposed within or below the applicable Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) with only the exceptions explicitly noted below in the third paragraph of this subsection, the right to appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

The defendant also knowingly and expressly waives all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the

1 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
2 assistance of counsel.

3 The defendant reserves the right to appeal any portion of his sentence that is above the
4 guideline range as determined by the Court. In addition, the defendant reserves the right to appeal
5 the Court's order denying his Motion to Suppress.

6 The defendant acknowledges that the United States is not obligated or required to preserve
7 any evidence obtained in the investigation of this case.

8 XIII. ADDITIONAL ACKNOWLEDGMENTS

9 This Plea Agreement resulted from an arms-length negotiation in which both parties
10 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
11 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
12 conditions other than those set forth in this agreement have been made or implied by the
13 defendant, the defendant's attorney, or the United States, and no additional promises, agreements
14 or conditions shall have any force or effect unless set forth in writing and signed by all parties or
15 confirmed on the record before the Court.

16 DAYLE ELIESON
17 United States Attorney

18 DATE

2/15/18

19 MEGAN KACHOW
Assistant United States Attorney

20 DATE

2/15/18

21 KATE BERRY, Esq.
Counsel for the Defendant

22 DATE

2/15/18

23 ANTHONY CHARLES GRAY
24 Defendant

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
JUL 12 2017	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

STEVEN W. MYHRE
Acting United States Attorney
Nevada Bar No. 9635
MEGAN RACHOW
Nevada Bar No. 8231
Assistant United States Attorney
100 West Liberty Street, Suite 600
Reno, Nevada 89501
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Megan.Rachow@usdoj.gov

Representing the United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY CHARLES GRAY,

Defendant.

INDICTMENT FOR VIOLATION OF:

Title 18, United States Code, Sections
922(g)(1) and 924(a)(2) – Felon in
Possession of a Firearm (Count One)

3:17-cr-00054-HDM-VPC

THE GRAND JURY CHARGES THAT:

Count One

(Felon in Possession of a Firearm)

On or about June 29, 2017, in the State and District of Nevada, ANTHONY CHARLES GRAY, defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, to wit: Discharging a Firearm Within or From a Vehicle and Possession of a Firearm with an Obliterated Serial Number, on or about June 21, 2012; did knowingly possess a Smith & Wesson, 9mm, semi-automatic pistol bearing serial number FYJ2400, said possession

1 being in and affecting commerce; all in violation of Title 18, United States Code, Sections
2 922(g)(1) and 924(a)(2).

3 **FORFEITURE ALLEGATION**

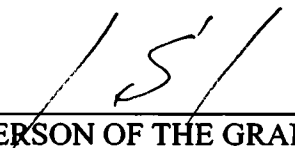
4 1. The allegations of Count One of this Criminal Indictment are hereby realleged and
5 incorporated herein by reference for the purpose of alleging forfeiture pursuant to Title 18, United
6 States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c).

7 2. Upon conviction of the felony offense charged in Count One of this Criminal
8 Indictment, ANTHONY CHARLES GRAY, defendant herein, shall forfeit to the United States
9 of America, any firearm or ammunition involved in or used in any knowing violation of Title 18,
10 United States Code, Section 922(g)(1):

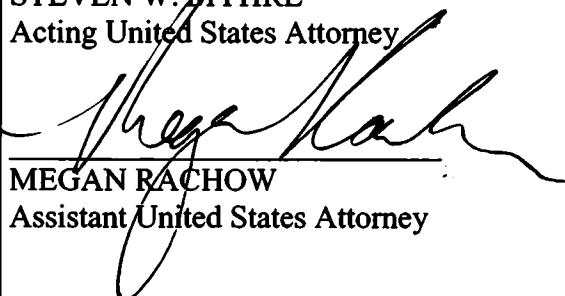
- 11 a. a Smith & Wesson, 9mm, semi-automatic pistol bearing serial number
12 FYJ2400; and
13 b. any and all ammunition ("property").

14 All pursuant to Title 18, United States Code, Section 922(g)(1); Title 18, United States
15 Code, Section 924(d)(1); and Title 28, United States Code, Section 2461(c).

16
17 A TRUE BILL:

18 
19 FOREPERSON OF THE GRAND JURY

20 STEVEN W. MYHRE
21 Acting United States Attorney

22 
23 MEGAN RACHOW
24 Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEVIN RAY KELBCH, AKA Andrew
Johnson,

Defendant-Appellant.

No. 21-15445

D.C. Nos. 3:20-cv-00361-LRH
3:17-cr-00040-LRH-WGC-1

District of Nevada,
Reno

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 15, 2021 (Docket Entry No. 2) is lifted.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.



KeyCite Blue Flag – Appeal Notification

Appeal Filed by USA v. DEVIN KELBCH, 9th Cir., March 12, 2021

2021 WL 96242

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,

v.

Devin Ray KELBCH, Petitioner/Defendant.

Case No. 3:17-cr-00040-LRH-WGC

|

Signed 01/07/2021

Attorneys and Law Firms

Amy B. Cleary, Benjamin F. Nemec, Office of the Federal Public Defender, Las Vegas, NV, for Petitioner/Defendant.

ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

*1 Before the Court is petitioner Devin Ray Kelbch's ("Kelbch") motion, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 36). Kelbch filed his motion considering the recent ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The Government opposed (ECF No. 38), arguing that Kelbch's claims are procedurally barred because he did not raise them on direct appeal. In his reply (ECF No. 39), Kelbch maintains that the constitutional errors are structural. For the reasons contained within this Order, the Court denies his motion and denies him a certificate of appealability.

I. BACKGROUND

On March 26, 2017, Reno police officers responded to a report of an individual passed out in a vehicle in an apartment parking lot. ECF No. 38, at 2. Upon arrival, the officers found Kelbch asleep at the wheel of a vehicle with the keys in the ignition while the vehicle was running. After waking up, Kelbch gave the officers a false identity because he was on parole and did not want to get revoked. Once officers discovered Kelbch's true identity, they also determined that the vehicle was stolen. In the vehicle, the officers found

tools commonly used in burglaries, and, most notably, a modified .410 caliber shotgun.

Kelbch is an ex-felon, and in February 2018, Kelbch pled guilty to Unlawful Possession of a Firearm by a Previously Convicted Felon. ECF No. 33. This Court sentenced Kelbch to 63 months' imprisonment followed by three years of supervised release. Kelbch did not appeal.

Now, Kelbch seeks to vacate his sentence pursuant to 28 U.S.C. § 2255.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion may be brought on the following grounds: (1) "the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "the court was without jurisdiction to impose such sentence;" (3) "the sentence was in excess of the maximum authorized by law;" or (4) the sentence "is otherwise subject to collateral attack." *Id.*; see *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010). When a petitioner seeks relief pursuant to a right newly recognized by a decision of the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C. § 2255(f). That one-year limitation period begins to run from "the date on which the right asserted was initially recognized by the Supreme Court." *Id.* § 2255(f)(3). Kelbch filed his petition on June 16, 2020.

On June 21, 2019, the Supreme Court decided *Rehaif*, overturning established Ninth Circuit precedent. 139 S. Ct. 2191. In the past, the government was only required to prove that a defendant knowingly possessed a firearm under 18 U.S.C. §§ 922(g) and 924(a)(2). *Id.* at 2200. Now, under *Rehaif*, the government "must prove both that the defendant knew he possessed a firearm and that he knew that he belonged to the relevant category of persons barred from possessing a firearm." *Id.*

III. DISCUSSION

*2 Kelbch argues that by leaving out the new *Rehaif* element from the original indictment, this Court lacked jurisdiction. ECF No. 36, at 14. Kelbch further alleges the omission in the indictment violated both his Fifth Amendment guarantee that a grand jury find probable cause to support all the necessary elements of a crime, and his Sixth Amendment right

to effective assistance of counsel and to be informed of the nature and cause of the accusation. *Id.* at 16–19.

A. Unconditional Guilty Plea

The government contends that by pleading guilty unconditionally, Kelbch waived his right to make any non-jurisdictional challenges to the indictment; specifically, his Fifth and Sixth Amendment challenges. *See Tollet v. Henderson*, 411 U.S. 258, 267 (1973). ECF No. 38, at 14.

As part of his plea, Kelbch waived “all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” ECF No. 25, at 12. Consequently, Kelbch waived “all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013). Considering the plea's cut-and-dry language, the Court finds Kelbch's claims are barred by his guilty plea even in view of the exceptions to *Tollett v. Henderson*, 411 U.S. 258 (1973).¹ Nevertheless, the Court still finds it necessary to address the jurisdictional and procedural default arguments below.

B. Jurisdiction

This Court “has jurisdiction of all crimes cognizable under the authority of the United States....” *Lamar v. United States*, 240 U.S. 60, 65 (1916). Any “objection that the indictment does not charge a crime against the United States goes only to the merits of the case,” and does not deprive the court of jurisdiction. *Id.*; *see also United States v. Cotton*, 535 U.S. 625, 630 (2020) (reiterating *Lamar*). Quite importantly, the Ninth Circuit and decisions within the District of Nevada have relied on the principle announced in *Cotton* in cases considering the aftermath of *Rehaif*. *See, e.g., United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (“[T]he indictment's omission of the knowledge of status requirement did not deprive the district court of jurisdiction.”); *see also United States v. Miller*, Case No. 3:15-cr-00047-HDM-WGC (D. Nev. Dec. 8, 2020); *United States v. Baustamante*, Case No. 2:16-cr-00268-APG (D. Nev. Dec. 7, 2020).

Therefore, pursuant to Ninth Circuit precedent and decisions in this District, the Court had and continues to have jurisdiction over Kelbch's case despite *Rehaif*.

C. Procedural Default

*3 The government also argues that Kelbch's claims are procedurally defaulted. ECF No. 38, at 4. While a defendant certainly can question the underlying legality of his sentence or conviction, one who does not on direct appeal is procedurally defaulted from doing so unless they can demonstrate: (1) cause and prejudice; or (2) actual innocence. *See Bousley v. U.S.*, 523 U.S. 614, 622 (1998) (citations omitted). “ ‘Cause’ is a legitimate excuse for the default; ‘prejudice’ is actual harm resulting from the alleged constitutional violation.” *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

Kelbch did not challenge the validity of the indictment and/or plea on direct appeal, but instead, argues his claims have not procedurally defaulted because he can demonstrate cause and prejudice, or, in the alternative, the omission in his indictment is a structural error and therefore only requires a showing of cause. ECF No. 39, at 8–17. Each argument is addressed in turn.

1. Cause

Kelbch can likely demonstrate cause. *Rehaif* overturned long standing precedent in the Ninth Circuit, and the decision's constitutional consequences were not “reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984).

2. Prejudice

Still, Kelbch cannot demonstrate prejudice. The Ninth Circuit has found in numerous scenarios that, even if a defendant had been aware that the Government would need to prove the knowledge-of-status element, there is no reasonable probability that the outcome would have been different. *See United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (holding that “the failure of the indictment and plea colloquy to include the element of knowledge of felon status does not require us to vacate [the] conviction ...”); *United States v. Schmidt*, 792 F. App'x 521, 522 (9th Cir. 2020) (“Although [defendant] did not argue below that the government was required to prove [defendant] knew he was a felon, under any standard of review there was overwhelming evidence that [defendant] knew he was a felon when he possessed the firearms at issue in this case.”); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 989 (9th Cir. 2020) (finding in the trial

context that, “even if the district court had instructed the jury on the knowledge-of-status element, there is no reasonable probability that the jury would have reached a different verdict ...”). In other words, the Ninth Circuit has repeatedly found no actual harm resulted from alleged constitutional violations stemming from the decision in *Rehaif* in cases involving comparable facts to Kelbch's.

Here, Kelbch admitted that he had a prior felony at the time he possessed the weapon. ECF No. 25, at 3. In addition, Kelbch had previously served a term of imprisonment of more than a year in each of at least three prior felony convictions. The Court is not persuaded that the inclusion of the *Rehaif* element would have changed Kelbch's decision to plead guilty or that his plea was involuntary.

Accordingly, there is no reasonable probability, but for the *Rehaif* error, that the outcome of the proceeding would have been different. Therefore, because Kelbch has not demonstrated both cause and prejudice, he procedurally defaulted on his claims questioning the legality of his conviction.

D. Structural Error

Alternatively, Kelbch argues the constitutional errors are structural, therefore only requiring a showing of cause. “[C]ertain errors, termed structural errors, might affect substantial rights regardless of their actual impact on an appellant's trial.” *United States v. Marcus*, 560 U.S. 258, 263 (2010) (citations omitted). Structural errors go to the very heart of the trial and are not “simply an error in the trial process itself.” *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

*4 While the Ninth Circuit has not decided whether the knowledge-of-status element in *Rehaif* presents issues of structural error, numerous other circuits have concluded it does not. See *United States v. Nasir*, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020).

The Court agrees with these circuit courts and concludes that *Rehaif* likely does not involve the limited class of errors the Supreme Court has deemed structural.

E. Certificate of Appealability is Denied

To proceed with an appeal of this Order, Kelbch must receive a certificate of appealability from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9TH CIR. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006). For the Court to grant a certificate of appealability, the petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). And the petitioner bears the burden of demonstrating that the issues are debatable among reasonable jurists; that a court could resolve the issues differently; or that the issues are “adequate to deserve encouragement to proceed further.” *Slack*, 529 U.S. at 483-84 (citation omitted).

As discussed above, Kelbch has failed to raise a meritorious challenge to his conviction and sentence pursuant to the Ninth Circuit's decisions following *Rehaif*. As such, the Court finds that he has failed to demonstrate that reasonable jurists would find the Court's assessment of his claims debatable or wrong. See *Allen*, 435 F.3d at 950–51. Therefore, the Court denies Kelbch a certificate of appealability.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Kelbch's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 36) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final Judgment denying Kelbch's § 2255 motion. See *Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th Cir. 2018).

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 96242

Footnotes

- 1 *Tollett* limited federal habeas challenges to pre-plea constitutional violations. 411 U.S. at 267. Exceptions to this general rule include a claim which the state cannot “constitutionally prosecute.” *Class v. U.S.*, 138 S. Ct. 789, 805 (2018) (quoting *Menna v. New York*, 423 U.S. 61, 63 (1975) (per curiam)). While Kelbch argues such an exception exists in the present instance (ECF No. 36, at 21), the Court agrees with other well-reasoned decisions in the District of Nevada which hold it does not. See *United States v. Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1 (D. Nev. Nov. 30, 2020) (finding that the exceptions to *Tollett* do not apply under *Rehaif* as the claims “could have been remedied by a new indictment.”).

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA)

JUDGMENT IN A CRIMINAL CASE

v.)

DEVIN RAY KELBCH aka)
Andrew Johnson)

Case Number: 3:17-CR-40-LRH-WGC

USM Number: 54251-048

Lauren Gorman, AEPD
Defendant's Attorney

THE DEFENDANT:

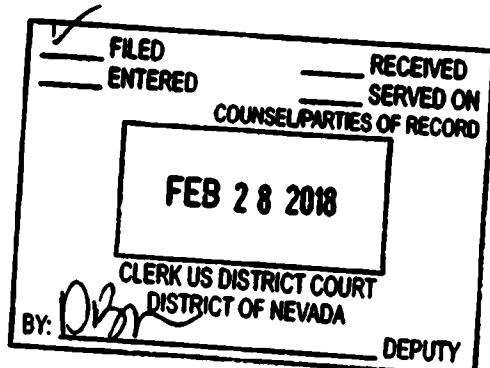
X pleaded guilty to count 1 and the Forfeiture Allegation in the Indictment filed 4/19/17☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	3/26/17	1

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) _____X Count 2 is 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.



2/26/18

Date of Imposition of Judgment

Signature of Judge

Larry R. Hicks, United States District Judge
Name and Title of Judge

Date

2-28-18

DEFENDANT: DEVIN RAY KELBCH aka Andrew Johnson
CASE NUMBER: 3:17-CR-40-LRH-WGC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **SIXTY-THREE (63) MONTHS**

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

1) FCI Sheridan, OR; 2) FCI Lompoc, CA; 3) USP Atwater, CA

The Court further recommends participation in Residential Drug Abuse Program (RDAP).

X 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 _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEVIN RAY KELBCH aka Andrew Johnson
CASE NUMBER: 3:17-CR-40-LRH-WGC

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **THREE 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, not to exceed 104 tests annually.
 - ☐ 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 the location where you reside, work, or 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 other conditions on the attached page.

DEFENDANT: DEVIN RAY KELBCH aka Andrew Johnson
CASE NUMBER: 3:17-CR-40-LRH-WGC

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 nunchukus 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 User 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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's signature _____

Date _____

DEFENDANT: DEVIN RAY KELBCH aka Andrew Johnson
CASE NUMBER: 3:17-CR-40-LRH-WGC

SPECIAL CONDITIONS OF SUPERVISION

1. **Substance Abuse Treatment** - You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to contribute to the costs of the program based on your ability to pay.
2. **No Alcohol** - You must not use or possess alcohol.
3. **No Gang Affiliation** - You must not communicate, or otherwise interact, with any known member of any street gang, without first obtaining the permission of the probation officer.
4. **Community Service** - You must complete 100 hours of community service within 24 months. The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.
5. **Cognitive Behavioral Treatment** - You must participate in a cognitive behavioral treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). Such programs may include group sessions led by a counselor or participation in a program administered by the probation office. You may be required to contribute to the costs of the program based upon your ability to pay.
6. **Search and Seizure** - You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release.

DEFENDANT: DEVIN RAY KELBCH aka Andrew Johnson
CASE NUMBER: 3:17-CR-40-LRH-WGC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$N/A	\$WAIVED	\$N/A

- ☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

Clerk, U.S. District Court
Attn: Financial Office
Case No. 3:17-CR-40-LRH-WGC
333 Las Vegas Boulevard, South
Las Vegas, NV 89101

TOTALS	\$ _____	\$ _____
---------------	----------	----------

- ☐ 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 Sheet 6 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:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: DEVIN RAY KELBCH aka Andrew Johnson
CASE NUMBER: 3:17-CR-40-LRH-WGC

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 payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____
_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60
days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____
_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days)
after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after
release from imprisonment. The court will set the payment plan based on an assessment of the defendant's
ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):

- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
SEE ATTACHED

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

This Court finds the United States of America published the notice of forfeiture in accordance with the law via the official government internet forfeiture site, www.forfeiture.gov, consecutively from December 3, 2017, through January 1, 2018, notifying all potential third parties of their right to petition the Court. Notice of Filing Proof of Publication, ECF No. 28.

1 This Court finds no petition was filed herein by or on behalf of any person or entity and
2 the time for filing such petitions and claims has expired.

3 This Court finds no petitions are pending with regard to the assets named herein and the
4 time for presenting such petitions has expired.

5 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all
6 right, title, and interest in the property hereinafter described is condemned, forfeited, and vested
7 in the United States of America pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); Fed. R.
8 Crim. P. 32.2(c)(2); Title 18, United States Code, Section 924(d)(1) with Title 28, United States
9 Code, Section 2461(c); and Title 21, United States Code, Section 853(n)(7) and shall be disposed
10 of according to law:

- 11 1. a weapon made from a Mossberg 183T 410 shotgun bearing serial number
12 874373; and
- 13 2. any and all ammunition.

14 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any and all forfeited
15 funds, including but not limited to, currency, currency equivalents, certificates of deposit, as well
16 as any income derived as a result of the United States of America's management of any property
17 forfeited herein, and the proceeds from the sale of any forfeited property shall be disposed of
18 according to law.

19 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send copies
20 of this Order to all counsel of record.

21 DATED this 22nd day of February, 2018.

22 
23 LARRY R. HICKS
24 UNITED STATES DISTRICT JUDGE
25
26

STEVEN W. MYRHE
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MEGAN RACHOW
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☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL PARTIES OF RECORD	
NOV 21 2017	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: 	DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEVIN RAY KELBCH,

Defendant.

Case No. 3:17-cr-00040-LRH-WGC

**PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11 (c)(1)(A) and (B)**

Plaintiff United States of America, by and through STEVEN W. MYHRE, Acting United States Attorney for the District of Nevada, and MEGAN RACHOW, Assistant United States Attorney, the defendant DEVIN RAY KELBCH, and the defendant's attorney, LAUREN GORMAN, Assistant Federal Public Defender, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A and B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and DEVIN RAY KELBCH, the defendant. This Plea Agreement binds the defendant and the United States Attorney's Office for the District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

1 The Plea Agreement sets forth the parties' agreement regarding criminal charge
 2 referenced in the Plea Agreement and applicable sentences, fines, restitution and forfeiture. It
 3 does not control or prohibit the United States or any agency or third party from seeking any other
 4 civil or administrative remedies directly or indirectly against the defendant.

5 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

6 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to
 7 the following charge as set forth in the indictment returned by the grand jury on April 19, 2017:

8 Count 1: Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and
 9 924(a)(2).

10 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised and
 11 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
 12 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically,
 13 the defendant is giving up:

14 1. The right to proceed to trial by jury on all charges, or to a trial by a judge
 15 if the defendant and the United States both agree;

16 2. The right to confront the witnesses against the defendant at such a trial, and
 17 to cross-examine them;

18 3. The right to remain silent at such a trial, with assurance that his silence
 19 could not be used against him in any way;

20 4. The right to testify in his own defense at such a trial if he so chooses;

21 5. The right to compel witnesses to appear at such a trial and testify in the
 22 defendant's behalf; and

23 6. The right to have the assistance of an attorney at all stages of such
 24 proceedings.

1 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
2 plea after he has entered it in court.

3 D. Additional Charges. The United States agrees not to bring any additional charges
4 against the defendant arising out of the investigation in the District of Nevada which culminated
5 in this Plea Agreement and based on conduct known to the United States.

6 The United States will move to dismiss any additional charges pending against the
7 defendant in this case at the time of sentencing.

8 **III. ELEMENTS OF THE OFFENSES**

9 Count 1: The elements of Felon in Possession of a Firearm under 18 U.S.C. §§ 922(g)(1)
10 and 924(a)(2) are:

11 First: The defendant knowingly possessed a firearm;

12 Second: The firearm had been shipped from one state to another; and

13 Third: At the time the defendant possessed the firearm, the defendant had been
14 convicted of a crime punishable by imprisonment for a term exceeding one
15 year.

16 See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65A (Approved 6/2016).

17 **IV. FACTS SUPPORTING GUILTY PLEA**

18 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
19 the crime charged.

20 B. The defendant acknowledges that if he elected to go to trial instead of pleading
21 guilty, the United States could prove his guilt beyond a reasonable doubt. The defendant further
22 acknowledges that his admissions and declarations of fact set forth below satisfy every element
23 of the charged offense.
24

1 C. The defendant waives any potential future claim that the facts he admitted in this
2 Plea Agreement were insufficient to satisfy the elements of the charged offense.

3 D. The defendant admits and declares under penalty of perjury that the facts set forth
4 below are true and correct:

5 On March 26, 2017, at approximately 8:29 a.m., Reno Police Department (RPD) officers
6 responded to 2300 Harvard Way, Reno, NV, on report of a person down in a vehicle in an
7 apartment parking lot. When officers arrived, they observed a silver 2008 Dodge Nitro parked
8 across two parking spaces and the front wheels against and pushing over the cement vehicle stop
9 curb. The license plate on the vehicle (N089LEY/NV) was fictitious and came back to a 2007
10 Dodge. As officers approached the vehicle, they observed the driver asleep in the driver's seat
11 with the keys in the ignition and the vehicle running. The driver woke up while the officer was
12 at the driver window and responded to the officer's inquiry that he was fine, just sleeping. The
13 driver identified himself as Andrew Johnson, turned off the vehicle, and exited it. The driver told
14 the officers that he believed he was somewhere in Sparks, but did not know where or why, and
15 admitted to drinking a couple Mike's Hard Lemonades the previous night at a friend's house. He
16 could not tell officers where the friend lived. The driver also stated that he got the vehicle from
17 his friend Chris, and he has known Chris for a couple of weeks, yet did not know his last name,
18 phone number, or address. The driver stated that he always has seen Chris driving the silver
19 Dodge Nitro, including the first time he met him a couple of weeks ago. A VIN check of the
20 vehicle revealed the vehicle was stolen on March 21, 2017, which was five days prior. The
21 officers placed the driver in handcuffs, sat him in a patrol vehicle, and read him the Miranda
22 warning. The driver stated he understood and told officers his real name was Devin and that Chris
23 had given him the car last night so Devin could go talk to a girl.

1 During an inventory search of the vehicle, officers found a green backpack in the
2 passenger seat of the vehicle. Inside the green backpack was a wallet containing a driver's license,
3 social security card, several casino player's cards, and two pawn receipts, all in the name of Devin
4 Kelbch. Officers confronted the driver about his identity and the driver admitted that he was in
5 fact Devin Kelbch and lied about his identity because he was on parole and did not want to get
6 revoked. Also inside the green backpack was a Mossberg 183T 410 shotgun. The shotgun had a
7 sawed off barrel and had been modified to have an approximate overall length of 18 inches. The
8 barrel length as measured from the rear of the breach to the end of the barrel only measured
9 approximately 10 inches. Further, the stock of the shotgun had also been modified. The shotgun
10 was loaded with two shells, one of which was in the chamber, and the safety was in the fire
11 position. The registered owner of the vehicle arrived on scene and confirmed that none of the
12 items found in the vehicle belonged to her or were in the vehicle when it was stolen.

13 An ATF nexus investigation determined that the shotgun had not been manufactured in
14 the State of Nevada and as such, must have traveled in interstate commerce.

15 A review of court records determined that Devin Kelbch had been previously convicted
16 of the following felonies, to wit: Possession of Credit Cards without Consent, on or about January
17 11, 2008, in the Second Judicial District Court of the State of Nevada, in and for the County of
18 Washoe; Carrying a Concealed Pistol, on or about January 11, 2008, in the Second Judicial
19 District Court of the State of Nevada, in and for the County of Washoe; Burglary, on or about
20 July 11, 2012, in the Second Judicial District Court of the State of Nevada, in and for the County
21 of Washoe; and Attempted Burglary, on or about December 23, 2015, in the Second Judicial
22 District Court of the State of Nevada, in and for the County of Washoe.

23 //

24 ///

V. COLLATERAL USE OF FACTUAL ADMISSIONS

The facts set forth in Section IV of this Plea Agreement shall be admissible against the defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does not plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument or representation offered by or on the defendant's behalf. The defendant expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section IV of this Plea Agreement.

VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS

A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that the Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines") in determining the defendant's sentence, but that the Sentencing Guidelines are advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term of imprisonment permitted by statute.

B. Offense Level Calculations. The parties stipulate to the following calculation of the defendant's offense level under the Sentencing Guidelines, acknowledge that these stipulations do not bind the Court, and agree that they will not seek to apply any other specific offense characteristics, enhancements or reductions, except as otherwise set forth in this plea agreement:

1.	Count 1: Felon in Possession of a Firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2)	
	Base Offense Level USSG § 2K2.1(a)(4)(B):	20*
	Reductions:	
	[Acceptance of Responsibility USSG § 3E1.1]:	-3
	Adjusted Offense Level:	17

1 *Defendant's base offense level will be determined by the type and number of defendant's prior
2 felony convictions (whether they qualify as a controlled substance offense or crime of violence)
3 and/or the type of firearm possessed. The defendant acknowledges that the statutory maximum
4 sentence limits the Court's discretion in determining the defendant's sentence notwithstanding
5 any applicable Sentencing Guidelines provisions.

6 C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG
7 § 3E1.1(a), the United States will recommend that the defendant receive a two-level downward
8 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing
9 a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts
10 establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully
11 admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false
12 or misleading information to the United States, the Court, Pretrial Services, or the Probation
13 Office; (e) denies involvement in the offense or provides conflicting statements regarding his
14 involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts
15 to withdraw his guilty plea; or (g) commits or attempts to commit any crime.

16 Under USSG § 3E1.1(b), the United States will move for an additional one-level
17 downward adjustment for acceptance of responsibility before sentencing because the defendant
18 communicated his decision to plead guilty in a timely manner that enabled the United States to
19 avoid preparing for trial and to efficiently allocate its resources.

20 D. Criminal History Category. The defendant acknowledges that the Court may base
21 his sentence in part on the defendant's criminal record or criminal history. The Court will
22 determine the defendant's Criminal History Category under the Sentencing Guidelines.
23
24

1 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
2 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
3 applicable Sentencing Guidelines range and whether to depart from that range.

4 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
5 calculations are based on information now known to the parties. The parties may provide
6 additional information to the United States Probation Office and the Court regarding the nature,
7 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
8 circumstances. Good faith efforts to provide truthful information or to correct factual
9 misstatements shall not be grounds for the defendant to withdraw his guilty plea.

10 The defendant acknowledges that the United States Probation Office may calculate the
11 Sentencing Guidelines differently and may rely on additional information it obtains through its
12 investigation. The defendant also acknowledges that the Court may rely on this and other
13 additional information as it calculates the Sentencing Guidelines range and makes other
14 sentencing determinations, and the Court's reliance on such information shall not be grounds for
15 the defendant to withdraw his guilty plea.

16 VII. APPLICATION OF SENTENCING STATUTES

17 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
18 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a prison sentence of 10 years, a fine of \$250,000,
19 or both.

20 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
21 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
22 sentence and any statutory minimum sentence limit the Court's discretion in determining the
23 defendant's sentence.

1 C. Parole Abolished. The defendant acknowledges that his prison sentence cannot be
2 shortened by early release on parole because parole has been abolished.

3 D. Supervised Release. In addition to imprisonment and a fine, the defendant will be
4 subject to a term of supervised release not to exceed 3 years. 18 U.S.C. § 3583(b)(2). Supervised
5 release is a period of time after release from prison during which the defendant will be subject to
6 various restrictions and requirements. If the defendant violates any condition of supervised
7 release, the Court may order the defendant's return to prison for all or part of the term of
8 supervised release, which could result in the defendant serving a total term of imprisonment
9 greater than the statutory maximum prison sentence of 10 years.

10 E. Special Assessment. The defendant will pay a \$100.00 special assessment per
11 count at the time of sentencing.

12 **VIII. POSITIONS REGARDING SENTENCE**

13 The parties will jointly recommend a sentence at the low end of the guideline as
14 contemplated by this plea agreement. The defendant acknowledges that the Court does not have
15 to follow that recommendation. Notwithstanding its agreement to recommend a low end
16 sentence, the United States reserves its right to defend any lawfully imposed sentence on appeal
17 or in any post-conviction litigation.

18 **IX. RESTITUTION**

19 The parties do not believe that restitution is applicable in this case, but the determination
20 whether restitution is appropriate pursuant to 18 U.S.C. § 3663 rests solely with the Court.

21 **X. FORFEITURE**

22 The defendant knowingly and voluntarily:
23
24

1 A. Agrees to the abandonment, the civil administrative forfeiture, the civil judicial
2 forfeiture, or the criminal forfeiture of a Mossberg 183T 410 shotgun bearing serial number
3 874373, and any and all ammunition ("property");

4 B. Abandons or forfeits the property to the United States;

5 C. Relinquishes all right, title, and interest in the property;

6 D. Waives his right to any abandonment proceedings, any civil administrative
7 forfeiture proceedings, any civil judicial forfeiture proceedings, or any criminal forfeiture
8 proceedings of the property ("proceedings");

9 E. Waives service of process of any and all documents filed in this action or any
10 proceedings concerning the property arising from the facts and circumstances of this case;

11 F. Waives any further notice to him, his agents, or his attorney regarding the
12 abandonment or the forfeiture and disposition of the property;

13 G. Agrees not to file any claim, answer, petition, or other documents in any
14 proceedings concerning the property;

15 H. Waives the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7 and
16 32.2, the constitutional requirements, and the constitutional due process requirements of any
17 proceedings concerning the property;

18 I. Waives his right to a jury trial on the forfeiture of the property;

19 J. Waives all constitutional, legal, and equitable defenses to the forfeiture or
20 abandonment of the property in any proceedings, including but not limited to (1) constitutional
21 or statutory double jeopardy defenses; and (2) defenses under the Excessive Fines or Cruel and
22 Unusual Punishments Clauses of the Eighth Amendment to the United States Constitution;

23 K. Agrees to the entry of an Order of Forfeiture of the property to the United States;
24

1 L. Agrees that forfeiture is immediately due and payable and subject to immediate
2 collection by the United States;

3 M. Agrees and understands the abandonment, the civil administrative forfeiture, the
4 civil judicial forfeiture, or the criminal forfeiture of the property shall not be treated as satisfaction
5 of any assessment, fine, restitution, cost of imprisonment, or any other penalty the Court may
6 impose upon the defendant in addition to the abandonment or the forfeiture; and

7 N. The defendant acknowledges that the amount of the forfeiture may differ from,
8 and may be significantly greater than, the amount of restitution.

9 **XI. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

10 Before or after sentencing, upon request by the Court, the United States, or the Probation
11 Office, the defendant will provide accurate and complete financial information, submit sworn
12 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
13 defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
14 release funds and property under his control in order to pay any fine, forfeiture, or restitution
15 ordered by the Court.

16 **XII. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

17 A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

18 (1) He has read this Plea Agreement and understands its terms and conditions;

19 (2) He has had adequate time to discuss this case, the evidence, and this Plea
20 Agreement with his attorney;

21 (3) He has discussed the terms of this Plea Agreement with his attorney;

22 (4) The representations contained in this Plea Agreement are true and correct,
23 including the facts set forth in Section IV; and
24

1 (5) He was not under the influence of any alcohol, drug, or medicine that
2 would impair his ability to understand the Agreement when he considered signing this Plea
3 Agreement and when he signed it.

4 The defendant understands that he alone decides whether to plead guilty or go to trial, and
5 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against
6 him, his possible defenses, and the benefits and possible detriments of proceeding to trial. The
7 defendant also acknowledges that he decided to plead guilty voluntarily and that no one coerced
8 or threatened him to enter into this Plea Agreement.

9 B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly
10 and expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
11 Sentencing Guideline range as contemplated by this plea agreement; (b) the right to appeal the
12 manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742;
13 and (c) the right to appeal any other aspect of the conviction or sentence and any order of
14 restitution or forfeiture.

15 The defendant also knowingly and expressly waives all collateral challenges, including
16 any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
17 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
18 assistance of counsel.

19 The defendant reserves only the right to appeal any portion of the sentence that is an
20 upward departure from the Sentencing Guidelines range as contemplated by this plea agreement.

21 The defendant acknowledges that the United States is not obligated or required to preserve
22 any evidence obtained in the investigation of this case.

23 ///

24 ///

XIII. ADDITIONAL ACKNOWLEDGMENTS

This Plea Agreement resulted from an arms-length negotiation in which both parties bargained for and received valuable benefits in exchange for valuable concessions. It constitutes the entire agreement negotiated and agreed to by the parties. No promises, agreements or conditions other than those set forth in this agreement have been made or implied by the defendant, the defendant's attorney, or the United States, and no additional promises, agreements or conditions shall have any force or effect unless set forth in writing and signed by all parties or confirmed on the record before the Court.

STEVEN W. MYHRE
Acting United States Attorney

DATE

11/21/17

MEGAN RACHOW
Assistant United States Attorney

DATE

10/17/17

LAUREN GORMAN, Esq.
Counsel for the Defendant

DATE

10/17/17

DEVIN RAY KELBCH
Defendant

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
APR 19 2017	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

3:17-cr-00040-LRH-WGC

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEVIN RAY KELBCH,
aka Andrew Johnson,

Defendant.

INDICTMENT FOR VIOLATIONS OF:

Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) – Felon in Possession of a Firearm (Count One)

Title 26, United States Code, Sections 5841, 5861(d), and 5871 – Possession of an Unregistered Firearm (Count Two)

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Felon in Possession of a Firearm)

On or about March 26, 2017, in the State and District of Nevada, DEVIN RAY KELBCH, also known as Andrew Johnson, defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to wit: on or about January 11, 2008, Possession of Credit Cards without Consent; on or about January 11, 2008, Carrying a Concealed Pistol; on or about July 11, 2012, Burglary; on or about December 23, 2015, Attempted Burglary; did knowingly possess a Mossberg 183T 410

1 shotgun bearing serial number 874373, said possession being in and affecting commerce; in violation of
2 Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

3
4 COUNT TWO

5 (Possession of an Unregistered Firearm)

6 On or about March 26, 2017, in the State and District of Nevada, DEVIN RAY KELBCH, also
7 known as Andrew Johnson, defendant herein, knowingly possessed a firearm as defined in Title 26,
8 United States Code, Section 5845(a)(2), to wit: a weapon made from a Mossberg 183T 410 shotgun
9 bearing serial number 874373, modified to have a barrel or barrels of less than 18 inches in length; not
10 registered to him in the National Firearms Registration and Transfer Record, all in violation of Title 26,
11 United States Code, Sections 5841, 5861(d), and 5871.

12
13 **FORFEITURE ALLEGATION**

14 1. The allegations of Count One and Two of this Criminal Indictment are hereby realleged
15 and incorporated herein by reference for the purpose of alleging forfeiture pursuant to Title 18, United
16 States Code, Section 924(d)(1), and Title 28, United States Code, Section 5872.

17 2. Upon conviction of the felony offense charged in Counts One and Two of this Criminal
18 Indictment, DEVIN RAY KELBCH, also known as Andrew Johnson, defendant herein, shall forfeit to
19 the United States of America, any firearm or ammunition involved in or used in any knowing violation
20 of Title 18, United States Code, Section 922(g)(1) and 924(a)(2), and Title 26, United States Code,
21 Sections 5841, 5861(d), and 5871:

22 a. a weapon made from a Mossberg 183T 410 shotgun bearing serial number 874373;

23 and

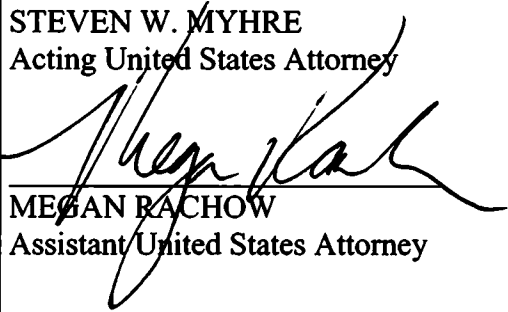
24 b. any and all ammunition ("property").

1 All pursuant to Title 18, United States Code, Section 922(g)(1); Title 18, United States Code,
2 Section 924(d)(1); and Title 28, United States Code, Section 5872.

4 A TRUE BILL:

5
6 /S/
FOREPERSON OF THE GRAND JURY

7 STEVEN W. MYHRE
Acting United States Attorney

8
9 
10 MEGAN RACHOW
Assistant United States Attorney

2022 WL 986681

Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Shaelon Dawnee MITCHELL, Defendant-Appellant.

No. 21-15551

|

FILED MARCH 30, 2022

D.C. Nos. 3:20-cv-00357-HDM, 3:16-cr-00082-HDM-VPC-1, District of Nevada, Reno

Attorneys and Law Firms

Megan Rachow, Esquire, Assistant U.S., USRE - Office of the US Attorney, Reno, NV, for Plaintiff-Appellee.

Amy B. Cleary, Assistant Federal Public Defender, Federal Public Defender's Office, Las Vegas, NV, for Defendant-Appellant.

Before: CALLAHAN and MILLER, Circuit Judges.

ORDER

***1** The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 986681

End of Document

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2021 WL 244764

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Shaelon MITCHELL, Defendant.

Case No. 3:16-cr-00082-HDM-
VPC, Case No. 3:20-cv-00357-HDM

I

Signed 01/25/2021

Attorneys and Law FirmsMegan Rachow, AUSA, U.S. Attorney's Office, Reno, NV,
for Plaintiff.**ORDER**HOWARD D. McKIBBEN, UNITED STATES DISTRICT
JUDGE

*1 Defendant Shaelon Mitchell has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 30). The government has opposed (ECF No. 32), and Mitchell has replied (ECF No. 33).

On December 14, 2016, Mitchell was charged by way of indictment with one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Mitchell entered a plea of guilty to the charge. (ECF Nos. 22 & 24). The court thereafter sentenced Mitchell to 36 months in prison. (ECF No. 27 & 28).

Section 922(g) prohibits the possession of firearms by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Mitchell had four prior felonies. When Mitchell was charged and entered his plea in this case, the government was not required to prove that he knew he was a felon. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). But in 2019, the U.S. Supreme Court concluded that a defendant may be convicted under § 922(g) only if the government proves that the defendant “knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191, 2200

(2019). On the basis of *Rehaif* and the government's failure to charge or prove his knowledge of status, Mitchell now moves to vacate his conviction.

Pursuant to 28 U.S.C. § 2255, a federal inmate may move to vacate, set aside, or correct his sentence if: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *Id.* § 2255(a).

Mitchell argues that the omission of the *Rehaif* element from the indictment violated his Fifth Amendment rights guaranteeing that a grand jury find probable cause to support all the necessary elements of the crime and his Sixth Amendment rights to notice of the charges and effective assistance of counsel.¹ He also alleges that the defective indictment deprived the court of jurisdiction. The government asserts that Mitchell has waived his right to bring these claims, that his claims are procedurally defaulted, and that the government is not required to prove the defendant knew his possession of firearms was unlawful.

As part of his plea, Mitchell “waive[d] all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” (ECF No. 22 at 11). Such “[a]n unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Espinoza*, 816 Fed. App'x 82, 85 (9th Cir. June 1, 2020) (unpublished disposition) (unconditional plea waiver precludes all Fifth and Sixth Amendment claims except to the extent they contest the court's jurisdiction or the voluntariness of the plea). Thus, except to the extent Mitchell attacks the jurisdiction of the court, his claims are waived.²

*2 Mitchell's jurisdictional argument is without merit. The omission of an element from the indictment does not affect the court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *United States v. Ratigan*, 351 F.3d 957, 962–63 (9th Cir. 2003); *see also United States v. Burleson*, 2020 WL 4218317, at *1 (July 23, 2020) (unpublished disposition) (rejecting the defendant's argument that omission of the

Rehaif element deprived the district court of jurisdiction); *Espinoza*, 2020 WL 2844542, at *1 (same); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 88-92 (2d Cir. 2019); *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). *Cf. United States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission of *Rehaif* element from indictment for plain error).

Moreover, Mitchell's Fifth and Sixth Amendment claims are procedurally defaulted, even assuming, as Mitchell argues, that they could be considered jurisdictional in nature.

"If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate" either "cause excusing his procedural default, and actual prejudice resulting from the claim of error," *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is actually innocent of the offense, *Bousley v. United States*, 523 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires the petitioner to establish 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation omitted).

Mitchell could have raised his claims on direct appeal but did not do so. They are therefore procedurally defaulted. It is unnecessary to resolve whether Mitchell can demonstrate cause for the default, because even if he could, he cannot demonstrate prejudice.³

Mitchell committed the instant offense less than six months after his conviction for first degree burglary, a felony. (PSR ¶¶ 8-13, 39). In addition, Mitchell had shortly before that been convicted of a crime that required as an element a prior felony conviction. (PSR ¶ 38). Mitchell acknowledged in his plea agreement that he had been previously convicted of a felony. (ECF No. 22 at 4-5). And finally, and most importantly, he acknowledged during his plea colloquy both that he had a prior felony conviction for first degree burglary and that he was aware at the time of his offense that he was not allowed to possess a firearm. In light of Mitchell's admissions that he knew he was a convicted felon and that he

was prohibited from possessing firearms, combined with his criminal history, the court is not persuaded that the outcome of the proceedings would have been any different had the grand jury been presented with, and the indictment had alleged, the *Rehaif* element.

Mitchell argues that he suffered prejudice because he was convicted by a court lacking jurisdiction. For the reasons previously discussed, this argument is without merit because the errors Mitchell complains of did not deprive the court of jurisdiction. Mitchell also asserts prejudice on the basis that the omission deprived him of effective assistance of counsel. For the reasons just discussed, there is no support for Mitchell's argument that the outcome of the proceedings would have been different if the *Rehaif* element had been alleged. Mitchell has not therefore proven deprivation of counsel.

***3** Mitchell alternatively argues that he is not required to demonstrate prejudice to obtain relief because the omission is structural error.

"[C]ertain errors, termed structural errors, might affect substantial rights regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263 (2010) (internal punctuation and citations omitted). Thus, structural error "warrant[s] habeas relief without a showing of specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-64 (9th Cir. 2011). "But structural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." *Marcus*, 560 U.S. at 263 (internal punctuation and citations omitted). Cases in which the Supreme Court has found structural error include total deprivation of counsel, lack of an impartial trial judge, violation of the right to a public trial and an erroneous reasonable-doubt instruction. *See id.* (discussing cases). In contrast, errors that have been found to be non-structural include where the court instructed on an invalid alternative theory of guilt, gave an instruction omitting an element of the offense, or erroneously instructed the jury on an element. *Id.* at 264 (discussing cases).

The Ninth Circuit has not yet addressed in a published opinion whether omission of the *Rehaif* element from the indictment is structural error. But it has held that the error is not structural in at least one unpublished decision. *See United States v. Jackson*, 2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the Third, Fifth, Seventh, Eighth, and Tenth

Circuits have concluded the error is not structural. *United States v. Nasir*, — F.3d. —, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); *see also United States v. Watson*, 820 Fed. App'x 397, 400 (6th Cir. 2020) (unpublished disposition). *But see United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). The court agrees with the well-reasoned opinions of these courts and concludes that a *Rehaif* error does not fall within the limited class of errors the Supreme Court has found to be structural.⁴

*4 Finally, Mitchell argues that *Rehaif* requires the government to prove not only that he knew that he was a convicted felon but also that he knew he was barred from possessing firearms. Notwithstanding the fact that Mitchell admitted to the court that he knew he was barred from possessing a firearm, Mitchell's legal argument is also without merit. *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020) (“[The defendant] contends that *Rehaif* requires the

Government to prove he knew not only his status, but also that he knew his status prohibited him from owning a firearm. But this interpretation is not supported by *Rehaif*).

Accordingly, because the claims raised in Mitchell's § 2255 motion are waived, procedurally defaulted and/or without merit, IT IS THEREFORE ORDERED that the motion to vacate, set aside or correct sentence (ECF No. 30) is hereby DENIED.

IT IS FURTHER ORDERED that Mitchell is DENIED a certificate of appealability, as jurists of reason would not find the court's denial of the motion to be debatable or wrong.

The Clerk of Court shall enter final judgment accordingly.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 244764

Footnotes

- 1 In his reply, Mitchell clarifies that he is not asserting an independent claim of ineffective assistance of counsel claim but, rather, that he asserts a Sixth Amendment violation to show that the *Rehaif* omission caused him prejudice.
- 2 The court agrees with the well-reasoned opinions of several courts that none of the exceptions under *Tollett* to the plea waiver applies in this case. *See, e.g., United States v. Kelbch*, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).
- 3 Mitchell does not argue actual innocence.
- 4 While there is some case law holding that defects in the indictment are structural error, those cases apply only where the claim is timely raised. *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) (“We hold that, if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.... Untimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard.”). Mitchell argues that he raised his argument at the earliest possible opportunity and so the timeliness limitation does not apply. The court does not agree. As previously discussed, Mitchell could have challenged the indictment on direct appeal but failed to do so. The claim is not therefore timely raised.

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA)

v.)

SHAELON DAWNEE MITCHELL)

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:16-cr-00082-HDM-VPC

USM Number: 54199-048

Christopher Frey, AFPD
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to Count One of Single Count Indictment filed 12/14/2016.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18, U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	10/26/2016	One

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.

December 20, 2017

Date of Imposition of Judgment


Signature of JudgeHOWARD D. McKIBBEN, Senior U.S. District Judge
Name and Title of Judge12/21/17
Date

DEFENDANT: SHAELON DAWNEE MITCHELL
CASE NUMBER: 3:16-cr-00082-HDM-VPC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **Thirty-six (36) months with credit for time served in Federal custody, to be served consecutive to the defendant's case in 187th District Court, Bexar County, San Antonio, Texas, Case No. 2017CR4567W.**

X The court makes the following recommendations to the Bureau of Prisons:
Recommendation for placement of defendant at a facility near San Antonio, Texas.

X 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 _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: SHAELON DAWNEE MITCHELL
CASE NUMBER: 3:16-cr-00082-HDM-VPC

SUPERVISED RELEASE

Upon release from imprisonment, you will 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, not to exceed 104 tests annually.
 - ☐ 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 (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, or 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 other conditions on the attached page.

DEFENDANT: SHAELON DAWNEE MITCHELL
CASE NUMBER: 3:16-cr-00082-HDM-VPC

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 nunchukus 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 User 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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's signature _____

Date _____

DEFENDANT: SHAELON DAWNEE MITCHELL
CASE NUMBER: 3:16-cr-00082-HDM-VPC

SPECIAL CONDITIONS OF SUPERVISION

1. Search and Seizure- You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release.
2. Substance Abuse Treatment - You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program, based upon your ability to pay.
3. Drug Testing - You must submit to substance abuse testing to determine if you have used a prohibited substance. *Testing shall not exceed 104 tests per year.* You must pay the costs of the testing. You must not attempt to obstruct or tamper with the testing methods.
4. Mental Health Treatment - You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program, based upon your ability to pay.
5. Community Service - You must complete 100 hours of community service within twelve (12) months. The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.

DEFENDANT: SHAELON DAWNEE MITCHELL
CASE NUMBER: 3:16-cr-00082-HDM-VPC

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 payment of \$100.00 due immediately, based upon ability to pay, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____
_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60
days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____
_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days)
after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after
release from imprisonment. The court will set the payment plan based on an assessment of the defendant's
ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE HOWARD D. McKIBBEN, SENIOR DISTRICT JUDGE
4 ---o0o---

4 UNITED STATES OF AMERICA, :
5 :
6 Plaintiff, : No. 3:16-CR-82-HDM-VPC
7 :
8 -vs- : September 14, 2017
9 :
10 SHAELON DAWNEE MITCHELL, : Reno, Nevada
11 :
12 Defendant. :
13 _____ :

11 TRANSCRIPT OF CHANGE OF PLEA

13 APPEARANCES:

14 FOR THE PLAINTIFF: SHANNON BRYANT
15 Assistant United States Attorney
16 Reno, Nevada

17 FOR THE DEFENDANT: CHRISTOPHER P. FREY
18 Assistant Federal Public Defender
19 Reno, Nevada

20
21 Reported by: Margaret E. Griener, CCR #3, FCRR
22 Official Reporter
23 400 South Virginia Street
24 Reno, Nevada 89501
25

1 RENO, NEVADA, THURSDAY, SEPTEMBER 19, 2017, 11:37 A.M.

2 ---o0o---

3
4 THE COURT: Is there any shackling issue here at
5 all or not? Was there anything filed on it? I guess there
6 are leg irons, are there?

7 THE CLERK: Judge Cobb had made a --

8 MR. FREY: No, I think the magistrate judge
9 entered an order concerning the shackling.

10 THE COURT: And there was no appeal on that?

11 MR. FREY: No.

12 THE CLERK: This is the date and time set for a
13 change of plea in case number 3:16-cr-82-HDM-VPC, United
14 States of America versus Shaelon Dawnee Mitchell.

15 The defendant is present in custody with counsel
16 Christopher Frey, and Shannon Bryant is appearing for Megan
17 Rachow.

18 THE COURT: All right. If you'll raise your
19 right hand and be sworn, please.

20 (The defendant was sworn.)

21 THE COURT: All right. Thank you. Are you on
22 any medication today?

23 THE DEFENDANT: No, sir.

24 THE COURT: Do you read, write, and understand
25 the English language?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: What is your level of education?

3 THE DEFENDANT: I graduated, sir.

4 THE COURT: From high school?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Are you satisfied with Mr. Frey's
7 representation of you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Has he failed to do anything you
10 wanted him to do on your behalf?

11 THE DEFENDANT: No, sir.

12 THE COURT: And he's done everything you wanted
13 him to do; is that correct?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Have you received the
16 indictment in this case?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you wish to have it read to you
19 or do you waive the reading of it?

20 MR. FREY: We waive a reading, your Honor.

21 THE COURT: All right. The indictment charges
22 you under Count 1 with being a felon in possession of a
23 firearm, a violation of Title 18 US Code 922(g)(1) and
24 924(a)(2). Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you also understand you have the
2 right to continue to be represented by Mr. Frey and continue
3 to plead not guilty and have a speedy and public jury trial?
4 Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: You would have the right to
7 cross-examine through Mr. Frey the witnesses called against
8 you at that trial. You understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And you would confront them and hear
11 what they had to say. Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You also have the privilege against
14 self-incrimination during trial. You could remain silent, and
15 that would not be held against you. The presumption of
16 innocence would apply throughout the proceedings.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: In addition, you would have the
20 right to give testimony on your own behalf and have the clerk
21 of court issue subpoenas to compel witnesses to appear on your
22 behalf at trial.

23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Any defenses you may have had you

1 would waive as a result of a plea of guilty.

2 Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: You will probably not be permitted
5 to withdraw your plea later on if you are unhappy with
6 entering that plea if I accept it today.

7 Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: The government has agreed not to
10 bring any additional charges against you if you enter a plea
11 today that arise out of any of the facts or circumstances
12 involved in this charge.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: This charge is under 18 USC
16 section 922(g) (1) and 924(a) (2), that you knowingly possessed
17 a firearm.

18 The firearm had been shipped from one state to
19 another.

20 At the time you possessed the firearm, you had
21 been convicted of a crime punishable by imprisonment for a
22 term exceeding one year.

23 Each of those elements, each of those things,
24 would have to be established by the government beyond a
25 reasonable doubt before the jury would convict you.

1 Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Those are the elements of
4 possession, being a felon in possession of a firearm.

5 The facts to support your plea are contained on
6 pages 3, 4, and 5. Are those facts true to the best of your
7 knowledge?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: If for some reason you were
10 successful in withdrawing your plea and went to trial, the
11 government could use those facts against you to impeach you if
12 you were to testify.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: The sentencing guidelines are a
16 guide to the Court. Have you discussed them with your
17 attorney, Mr. Frey?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And you understand them; is that
20 correct?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: I'm not bound by them but I'm
23 certainly going to give them heavy consideration.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: The parties believe, and this is
2 subject to proof at the time of sentencing and after I've
3 considered the presentence agreement, but the parties now
4 believe that the base offense level for this offense is 14.

5 Because the firearm was stolen, there would be a
6 two-level enhancement and a three-level reduction for
7 acceptance of responsibility, and the offense level then would
8 be adjusted to 13.

9 Of course, your offense level is determined by
10 the type and number of your prior felony convictions, whether
11 they qualify as a controlled substance offense or a crime of
12 violence.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: It also will be based on the type of
16 firearm that was possessed.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And the Court will have to make
20 those determinations at sentencing.

21 Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you also acknowledge that the
24 statutory maximum limits the Court's discretion in determining
25 your sentence notwithstanding the applicable sentencing

1 guideline provisions.

2 Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: The government is going to recommend
5 a three-level reduction for acceptance of responsibility as
6 long as you continue to accept responsibility.

7 Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Your criminal history will be based
10 upon what prior offenses you have, and I'll determine that at
11 sentencing.

12 Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And the government may argue for the
15 Court to consider any relevant conduct that would be related
16 to the offense that you're charged with in making the
17 appropriate sentence, recommending the sentence to the Court.
18 Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 (Discussion held off the record.)

21 THE COURT: The maximum penalty for felon in
22 possession of a firearm is ten years imprisonment and a fine
23 of \$250,000 or both.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Parole has been abolished so
2 whatever sentence the Court imposes, you'll serve that
3 full time in custody without the possibility of parole.

4 Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And supervised release would be a
7 period not to exceed three years.

8 Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And if you violate any conditions of
11 supervised release, then you could face up to the maximum
12 sentence under the statute.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And I will impose a \$100 special
16 assessment at the time of sentencing.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: The parties are going to jointly
20 recommend a sentence at the low end of the sentencing
21 guideline range. The Court is not bound by that, but they
22 will make that recommendation.

23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: They're also going to argue that if

1 the sentence imposed in the case -- well, I guess each party
2 is going to be free to argue whether or not the sentence
3 should be concurrent or consecutive.

4 Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And the government reserves its
7 right to defend any lawfully imposed sentence.

8 Restitution is not an issue in the case. You'll
9 provide requested financial information.

10 Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Now, you're knowingly and expressly
13 waiving your right to any appeal, the right to appeal any
14 sentence imposed within or below the applicable guideline
15 range, to appeal the manner in which the Court determined the
16 sentence, and the right to appeal any other aspect of the
17 conviction or sentence.

18 You also knowingly and expressly waive any
19 collateral challenges, including claims under Section 2255 of
20 Title 28 of the United States Code, and the collateral
21 challenges you waive to conviction, sentence, and procedure by
22 which the Court adjudicated guilt.

23 You only reserve the right to appeal any
24 sentence that's an upward departure above the guideline range.
25 Do you clearly understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And that's an important right that
3 you're waiving.

4 Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: So going back to what I discussed
7 with you earlier in this plea agreement, and that is that
8 there are certain things that the Court may have to decide,
9 and that relates to the type and number of your prior felony
10 convictions, whether they qualify as a controlled substance
11 offense or a crime of violence, and the type of firearm
12 possessed, that can have an impact on your sentence.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you'll be bound by the Court's
16 ruling on that.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And you won't be able to appeal
20 that.

21 Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: The only thing you could appeal is
24 if I impose a sentence above the guideline range once I
25 determine what that guideline range is.

1 Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. Do you have any questions
4 about the nature of the offense or the possible penalty?

5 THE DEFENDANT: No, sir.

6 THE COURT: All right. Are you ready to enter
7 your plea at this time then?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: To the indictment which charges you
10 with being a felon in possession of a firearm, a violation of
11 Title 18 US Code section 922(g)(1) and 924(a)(2), what is your
12 plea, are you guilty or not guilty?

13 THE DEFENDANT: Guilty, sir.

14 THE COURT: Have you entered that plea freely
15 and voluntarily?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Has anyone threatened you to have
18 you plead guilty?

19 THE DEFENDANT: No, sir.

20 THE COURT: Has anyone, including Mr. Frey,
21 promised you anything to have you plead guilty?

22 THE DEFENDANT: No, sir.

23 THE COURT: Are you doing it of your own free
24 will?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Do you understand now
2 you've waived the right to continue to plead not guilty and
3 have Mr. Frey represent you at a speedy and public jury trial.
4 Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: You're waiving the right to confront
7 the witnesses against and to cross-examine those witnesses.
8 Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: You're waiving the privilege against
11 self-incrimination and the presumption of innocence.

12 Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You're waiving the right to give
15 testimony on your own behalf at trial and call witnesses,
16 subpoena them to be here on your behalf.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And you're waiving any defenses you
20 may have had. For example, if you made a statement in
21 violation of your constitutional rights, or if evidence was
22 seized in violation of your constitutional rights, you can't
23 raise that at a later time.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And parole has been abolished so
2 whatever sentence I impose, you will serve that full time in
3 custody without the possibility of parole.

4 Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And understanding that, do you still
7 wish to enter a guilty plea?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. I'll accept the plea as
10 having been made freely and voluntarily.

11 Can you tell me in your open words what you did
12 that now caused you to plead guilty? Have you previously been
13 convicted of a felony?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And what kind of felony was that?

16 THE DEFENDANT: First degree burglary.

17 THE COURT: Okay. And then subsequent to that
18 time what did you do that now caused you to plead guilty here?

19 THE DEFENDANT: I was caught -- I was in
20 possession of a firearm in my trunk.

21 THE COURT: And what kind of a firearm was that?

22 THE DEFENDANT: A pistol, sir.

23 THE COURT: And was it in your trunk?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Did you know it was there?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Was it yours?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Did you know it was illegal to
5 possess that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. I'll accept the plea as
8 having been made freely and voluntarily with a full
9 understanding of your rights.

10 And I will refer this to the department for a
11 presentence report, and I'll continue this matter for
12 sentencing and imposition of judgment until what date.

13 THE CLERK: Until Wednesday, December 13, 2017,
14 at 10:30 a.m.

15 THE COURT: Is that acceptable to counsel?

16 MR. FREY: Yes, your Honor.

17 MR. BRYANT: Yes, your Honor.

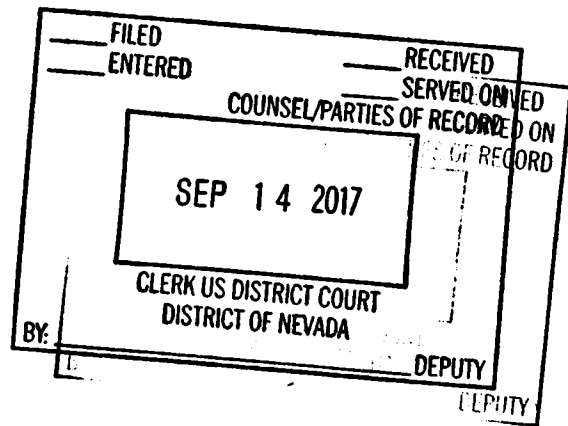
18 THE COURT: Okay. Thank you very much. The
19 defendant will remain in custody.

20 -o0o-

21 I certify that the foregoing is a correct
22 transcript from the record of proceedings
in the above-entitled matter.

23 /s/Margaret E. Griener 5/27/2021
24 Margaret E. Griener, CCR #3, FCRR
25 Official Reporter

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHAELON DAWNEE MITCHELL,

Defendant.

Case No. 3:16-cr-00082-HDM-VPC

**PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11 (c)(1)(A) and (B)**

Plaintiff United States of America, by and through STEVEN W. MYHRE, Acting United States Attorney for the District of Nevada, and MEGAN RACHOW, Assistant United States Attorney, the defendant SHAELON DAWNEE MITCHELL, and the defendant's attorney, CHRIS FREY, Assistant Federal Public Defender, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A and B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and SHAELON DAWNEE MITCHELL, the defendant. This Plea Agreement binds the defendant and the United States Attorney's Office for the District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

1 The Plea Agreement sets forth the parties' agreement regarding criminal charge
 2 referenced in the Plea Agreement and applicable sentences, fines, restitution and forfeiture. It
 3 does not control or prohibit the United States or any agency or third party from seeking any other
 4 civil or administrative remedies directly or indirectly against the defendant.

5 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

6 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to
 7 the following charge as set forth in the indictment returned by the grand jury on December 14,
 8 2016:

9 Count 1: Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and
 10 924(a)(2).

11 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised and
 12 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
 13 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically,
 14 the defendant is giving up:

15 1. The right to proceed to trial by jury on all charges, or to a trial by a judge
 16 if the defendant and the United States both agree;

17 2. The right to confront the witnesses against the defendant at such a trial, and
 18 to cross-examine them;

19 3. The right to remain silent at such a trial, with assurance that his silence
 20 could not be used against him in any way;

21 4. The right to testify in his own defense at such a trial if he so chooses;

22 5. The right to compel witnesses to appear at such a trial and testify in the
 23 defendant's behalf; and
 24

1 6. The right to have the assistance of an attorney at all stages of such
2 proceedings.

3 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
4 plea after he has entered it in court.

5 D. Additional Charges. The United States agrees not to bring any additional charges
6 against the defendant arising out of the investigation in the District of Nevada which culminated
7 in this Plea Agreement and based on conduct known to the United States.

8 The United States will move to dismiss any additional charges pending against the
9 defendant in this case at the time of sentencing.

10 **III. ELEMENTS OF THE OFFENSES**

11 Count 1: The elements of Felon in Possession of a Firearm under 18 U.S.C. §§ 922(g)(1)
12 and 924(a)(2) are:

13 First: The defendant knowingly possessed a firearm;

14 Second: The firearm had been shipped from one state to another; and

15 Third: At the time the defendant possessed the firearm, the defendant had been
16 convicted of a crime punishable by imprisonment for a term exceeding one
17 year.

18 See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65A (Approved 6/2016).

19 **IV. FACTS SUPPORTING GUILTY PLEA**

20 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
21 the crime charged.

22 B. The defendant acknowledges that if he elected to go to trial instead of pleading
23 guilty, the United States could prove his guilt beyond a reasonable doubt. The defendant further
24

1 acknowledges that his admissions and declarations of fact set forth below satisfy every element
2 of the charged offense.

3 C. The defendant waives any potential future claim that the facts he admitted in this
4 Plea Agreement were insufficient to satisfy the elements of the charged offense.

5 D. The defendant admits and declares under penalty of perjury that the facts set forth
6 below are true and correct:

7 On October 26, 2016, Regional Gang Unit (RGU) officers were working a suppression
8 operation in the area of Trainer Way and Butler Street in Reno, Nevada. While traveling
9 southbound on Butler, RGU officers observed a dark blue Infinity sedan bearing Nevada license
10 plate 47D211. A records check of the plate determined that the registration was suspended as of
11 August 11, 2016. Based on the information regarding the suspended registration, officers
12 attempted to conduct a traffic stop. By the time the officers caught up with the vehicle, the driver
13 had exited the vehicle, left it running, and was walking away from the vehicle in an eastbound
14 direction. As officers had observed this person driving the vehicle, they contacted him. The
15 driver was identified as Shaelon Dawnee Mitchell. Mitchell stated the vehicle was registered to
16 his wife but that he drove it regularly and there might be an issue with the insurance. Mitchell
17 did not have a driver's license on his person. While one officer was attempting to verify
18 Mitchell's identity, the second officer looked into the vehicle and saw, in plain sight, a glass jar
19 that appeared to contain marijuana and could also smell the odor of marijuana. The officer told
20 Mitchell that he could see marijuana in the vehicle and Mitchell stated that the marijuana was his
21 but that he had a California medical marijuana card. The officers asked Mitchell if he had any
22 more marijuana on him or any weapons. Mitchell admitted to having more marijuana on his
23 person and that it was in his sweatshirt pocket. The officers removed the marijuana from
24 Mitchell's sweatshirt and detained him while continuing their investigation. The officers had

1 requested a records check on Mitchell and the information came back that Mitchell had an active
2 warrant for his arrest. In addition, the records check showed that Mitchell did not have a medical
3 marijuana card in either California or Nevada and Mitchell did not have a medical marijuana card
4 on his person or in his vehicle. As such, the officers conducted a probable cause search of the
5 vehicle.

6 During the search of the vehicle, the officers located a black hoodie sweatshirt, a black
7 ball cap, a pair of black gloves, and a black ski mask behind the rear seat. In the trunk of the
8 vehicle, officers located a second ski mask that was rolled up. When the ski mask was unrolled,
9 officer located a black and silver handgun identified as a FN, Model FNS40, .40 caliber handgun
10 bearing serial number GKU0037935. A records check of the serial number revealed that the gun
11 had been reported stolen from a gun show on October 22, 2016. Officers also located a blue
12 Smith & Wesson M&P9 9mm handgun box; however, the gun was not in the box. A criminal
13 history check showed that Mitchell had been previously convicted of a felony. As such, Mitchell
14 was placed under arrest.

15 On October 27, 2016, one of the officers reviewed jail calls made by Mitchell to his wife.
16 In five of the calls, Mitchell admitted to knowing about the firearm in the trunk and possessing
17 the firearm as well as possessing the marijuana in the car and on his person.

18 An ATF investigation determined that the firearm was a modern firearm as defined by
19 federal law and had been manufactured outside the state of Nevada. As such, the firearm must
20 have traveled in interstate commerce.

21 A review of court records determined that the defendant had been previously convicted of
22 a felony, to wit: on or about June 17, 2016, Defendant was convicted of First Degree Burglary—
23 Entering with the Intent to Commit Theft in the Superior Court of California, County of Santa
24 Clara.

V. COLLATERAL USE OF FACTUAL ADMISSIONS

The facts set forth in Section IV of this Plea Agreement shall be admissible against the defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does not plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument or representation offered by or on the defendant's behalf. The defendant expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section IV of this Plea Agreement.

VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS

A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that the Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines") in determining the defendant's sentence, but that the Sentencing Guidelines are advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term of imprisonment permitted by statute.

B. Offense Level Calculations. The parties stipulate to the following calculation of the defendant's offense level under the Sentencing Guidelines, acknowledge that these stipulations do not do not bind the Court, and agree that they will not seek to apply any other specific offense characteristics, enhancements or reductions, except as otherwise set forth in this plea agreement:

1. Count 1: Felon in Possession of a Firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2)

Base Offense Level USSG § 2K2.1(a)(4)(B):	14*
Firearm was stolen USSG § 2K2.1(b)(4)(A):	+ 2
Reductions:	
[Acceptance of Responsibility USSG § 3E1.1]:	<u>-3</u>
Adjusted Offense Level:	13

1 *Defendant's base offense level will be determined by the type and number of defendant's prior
2 felony convictions (whether they qualify as a controlled substance offense or crime of violence)
3 and the type of firearm possessed. The defendant acknowledges that the statutory maximum
4 sentence limits the Court's discretion in determining the defendant's sentence notwithstanding
5 any applicable Sentencing Guidelines provisions.

6 C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG
7 § 3E1.1(a), the United States will recommend that the defendant receive a two-level downward
8 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing
9 a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts
10 establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully
11 admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false
12 or misleading information to the United States, the Court, Pretrial Services, or the Probation
13 Office; (e) denies involvement in the offense or provides conflicting statements regarding his
14 involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts
15 to withdraw his guilty plea; or (g) commits or attempts to commit any crime.

16 Under USSG § 3E1.1(b), the United States will move for an additional one-level
17 downward adjustment for acceptance of responsibility before sentencing because the defendant
18 communicated his decision to plead guilty in a timely manner that enabled the United States to
19 avoid preparing for trial and to efficiently allocate its resources.

20 D. Criminal History Category. The defendant acknowledges that the Court may base
21 his sentence in part on the defendant's criminal record or criminal history. The Court will
22 determine the defendant's Criminal History Category under the Sentencing Guidelines.

1 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
2 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
3 applicable Sentencing Guidelines range and whether to depart from that range.

4 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
5 calculations are based on information now known to the parties. The parties may provide
6 additional information to the United States Probation Office and the Court regarding the nature,
7 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
8 circumstances. Good faith efforts to provide truthful information or to correct factual
9 misstatements shall not be grounds for the defendant to withdraw his guilty plea.

10 The defendant acknowledges that the United States Probation Office may calculate the
11 Sentencing Guidelines differently and may rely on additional information it obtains through its
12 investigation. The defendant also acknowledges that the Court may rely on this and other
13 additional information as it calculates the Sentencing Guidelines range and makes other
14 sentencing determinations, and the Court's reliance on such information shall not be grounds for
15 the defendant to withdraw his guilty plea.

16 **VII. APPLICATION OF SENTENCING STATUTES**

17 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
18 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a prison sentence of 10 years, a fine of \$250,000,
19 or both.

20 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
21 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
22 sentence and any statutory minimum sentence limit the Court's discretion in determining the
23 defendant's sentence.

1 C. Parole Abolished. The defendant acknowledges that his prison sentence cannot be
2 shortened by early release on parole because parole has been abolished.

3 D. Supervised Release. In addition to imprisonment and a fine, the defendant will be
4 subject to a term of supervised release not to exceed 3 years. 18 U.S.C. § 3583(b)(2). Supervised
5 release is a period of time after release from prison during which the defendant will be subject to
6 various restrictions and requirements. If the defendant violates any condition of supervised
7 release, the Court may order the defendant's return to prison for all or part of the term of
8 supervised release, which could result in the defendant serving a total term of imprisonment
9 greater than the statutory maximum prison sentence of 10 years.

10 E. Special Assessment. The defendant will pay a \$100.00 special assessment per
11 count at the time of sentencing.

12 **VIII. POSITIONS REGARDING SENTENCE**

13 The parties will be jointly recommend a sentence at the low end of the sentencing
14 guideline as contemplated by this plea agreement. Parties will be free to argue if the sentence
15 imposed in this case will run concurrent or consecutive to the term of imprisonment the defendant
16 is currently serving. The defendant acknowledges that the Court does not have to follow that
17 recommendation. Notwithstanding its agreement to recommend a low end sentence, the United
18 States reserves its right to defend any lawfully imposed sentence on appeal or in any post-
19 conviction litigation.

20 **IX. RESTITUTION**

21 The parties do not believe that restitution is applicable in this case, but the determination
22 whether restitution is appropriate pursuant to 18 U.S.C. § 3663 rests solely with the Court.

23 ///

24 ///

X. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS

Before or after sentencing, upon request by the Court, the United States, or the Probation Office, the defendant will provide accurate and complete financial information, submit sworn statements, and/or give depositions under oath concerning his assets and his ability to pay. The defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will release funds and property under his control in order to pay any fine, forfeiture, or restitution ordered by the Court.

XI. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS

A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

- (1) He has read this Plea Agreement and understands its terms and conditions;
- (2) He has had adequate time to discuss this case, the evidence, and this Plea Agreement with his attorney;
- (3) He has discussed the terms of this Plea Agreement with his attorney;
- (4) The representations contained in this Plea Agreement are true and correct, including the facts set forth in Section IV; and
- (5) He was not under the influence of any alcohol, drug, or medicine that would impair his ability to understand the Agreement when he considered signing this Plea Agreement and when he signed it.

The defendant understands that he alone decides whether to plead guilty or go to trial, and acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him, his possible defenses, and the benefits and possible detriments of proceeding to trial. The defendant also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened him to enter into this Plea Agreement.

1 **B. Waiver of Appeal and Post-Conviction Proceedings.** The defendant knowingly
2 and expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
3 Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in
4 which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c)
5 the right to appeal any other aspect of the conviction or sentence and any order of restitution or
6 forfeiture.

7 The defendant also knowingly and expressly waives all collateral challenges, including
8 any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
9 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
10 assistance of counsel.

11 The defendant reserves only the right to appeal any portion of the sentence that is an
12 upward departure from the Sentencing Guidelines range as determined by the Court.

13 The defendant acknowledges that the United States is not obligated or required to preserve
14 any evidence obtained in the investigation of this case.

15 **XII. ADDITIONAL ACKNOWLEDGMENTS**

16 This Plea Agreement resulted from an arms-length negotiation in which both parties
17 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
18 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
19 conditions other than those set forth in this agreement have been made or implied by the
20 defendant, the defendant's attorney, or the United States, and no additional promises, agreements

21 ///

22 ///

23 ///

24 ///

1 or conditions shall have any force or effect unless set forth in writing and signed by all parties or
2 confirmed on the record before the Court.

3 STEVEN W. MYHRE
Acting United States Attorney

4
5 DATE

9/14/17

6 
MEGAN RACHOW
Assistant United States Attorney

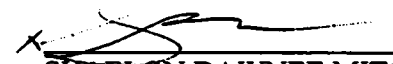
7 DATE

9/14/17

8 
CHRIS FREY, Esq.
Counsel for the Defendant

9 DATE

9/14/17

10 
SHAELON DAWNEE MITCHELL
Defendant

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
DEC 14 2016	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

DANIEL G. BOGDEN
United States Attorney
MEGAN RACHOW
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

3:16-cr-00082-HDM-VPC

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHAELON DAWNEE MITCHELL,

Defendant.

INDICTMENT FOR VIOLATION OF:

Title 18, United States Code, Sections
922(g)(1) and 924(a)(2) – Felon in Possession
of a Firearm (Count One)

THE GRAND JURY CHARGES THAT:

Count One

(Felon in Possession of a Firearm)

On or about October 26, 2016, in the State and District of Nevada, SHAELON DAWNEE MITCHELL, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year in the Superior Court of California, County of Santa Clara, to wit: First Degree Burglary-Entering with the Intent to Commit Theft, on or about May 6, 2016; did knowingly possess a FN, Model FNS40, .40 caliber handgun bearing serial number GKU0037935, said possession being in

///

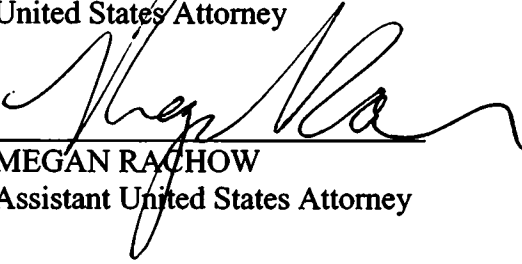
///

1 and affecting commerce; all in violation of Title 18, United States Code, Sections 922(g)(1) and
2 924(a)(2).

3 A TRUE BILL:

4
5 /s/
FOREPERSON OF THE GRAND JURY

6 DANIEL G. BOGDEN
United States Attorney

7
8 
9 MEGAN RACHOW
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 29 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLIFTON GEORGE NEWMAN, Jr.,

Defendant-Appellant.

No. 20-17224

D.C. Nos. 2:20-cv-00620-JCM

2:18-cr-00041-JCM-CWH-1

District of Nevada,
Las Vegas

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 11, 2021 (Docket Entry No. 3) is lifted.

The request for a certificate of appealability (Docket Entry Nos. 2 & 4) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.



KeyCite Blue Flag – Appeal Notification

Appeal Filed by USA v. CLIFTON NEWMAN, JR., 9th Cir., November 13, 2020

2020 WL 5517652

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff(s),

v.

Clifton George NEWMAN, Jr., Defendant(s).

Case No. 2:18-CR-41 JCM (CWH)

|

Signed 09/14/2020

Attorneys and Law Firms

Phillip N. Smith, Jr., United States Attorney's Office, Las Vegas, NV, for Plaintiff(s).

Daniel Hill, Hill Firm, Las Vegas, NV, for Defendant(s).

ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

*1 Presently before the court is petitioner Clifton George Newman, Jr.'s motion to vacate, amend, or correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 38). The government filed a response, (ECF No. 40), to which petitioner replied, (ECF No. 41).

I. Background

Prior to his current term of incarceration, petitioner served several felony sentences: In 2001, he was convicted of felony possession of a controlled substance and served time. (ECF No. 40 (citing pre-sentence report)). In 2003, he was convicted of felony possession of a short-barreled shotgun and served time. (*Id.*). In 2005, he pled guilty to felony conspiracy and robbery. (*Id.*). He served time. (*Id.*).

On September 6, 2018, petitioner pled guilty to felon in possession of a firearm. (ECF No. 27). This court sentenced him to 46 months' imprisonment and three years of supervised release. (ECF Nos. 34, 35). An amended judgment was entered on March 18, 2019. (ECF No. 36). Petitioner did not appeal.

On March 31, 2020, petitioner filed his instant § 2255 motion in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019) ("*Rehaif*"). (ECF No. 38).

II. Legal Standard

Federal prisoners "may move ... to vacate, set aside or correct [their] sentence" if the court imposed the sentence "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Relief pursuant to § 2255 should be granted only where "a fundamental defect" caused "a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also Hill v. United States*, 368 U.S. 424, 428 (1962).

Limitations on § 2255 motions exist because the movant "already has had a fair opportunity to present his federal claims to a federal forum," whether or not he took advantage of the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 "is not designed to provide criminal defendants multiple opportunities to challenge their sentence." *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). Furthermore, a petitioner's claims are procedurally barred if they could have been raised on direct appeal are not. *Massaro v. United States*, 538 U.S. 500, 504 (2003); *Bousley v. United States*, 523 U.S. 614, 622 (1998). However, procedural default is excused if the defendant can show cause and prejudice, or actual innocence. *Id.*

III. Discussion

Petitioner brings his claim for relief in light of *Rehaif*. (ECF No. 38). There, the Supreme Court held that, to convict under 18 U.S.C. § 924(c), the government must prove that defendant *knew* he fell into a prohibited category. 139 S. Ct. at 2194. Petitioner's indictment and plea agreement did not include this additional mens rea element—that defendant knew his legal status as a felon prohibited possession of a firearm. (ECF Nos. 1, 28). Petitioner contends that he is entitled to relief due to his indictment's defect. (ECF No. 38). By failing to appropriately describe the crime, defendant was stripped of several constitutional rights, specifically his Fifth Amendment grand jury protections, Fifth Amendment right not to be tried, and Sixth Amendment rights of notice and effective assistance of counsel. (*Id.*); *see* U.S. Const. amend. V; U.S. Const. amend. VI. "*Rehaif's* required mens rea status element is absent from every stage of Mr. Newman's case, infecting the entire proceedings with constitutional errors." (*Id.*). This court disagrees.

*2 As an initial matter, petitioner is timely. *See* 28 U.S.C. § 2255(f)(3) (The one-year statute of limitations for habeas relief runs from “the date on which the right asserted was initially recognized by the Supreme Court.”). *Rehaif* was issued on June 21, 2019, and the instant motion was filed on March 31, 2020. The government concedes that *Rehaif* applies retroactively and that this motion is timely. (ECF No. 40).

Petitioner argues that this court lacked subject-matter jurisdiction due to the indictment's failure to state *Rehaif*'s mens rea element. (ECF No. 38). To establish subject-matter jurisdiction, the indictment must sufficiently allege an “offense[] against the laws of the United States.” 18 U.S.C. § 3231; *see United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003). The government responds that this circuit has held that “defects in an indictment do not deprive a court of its power to adjudicate a case.” *Ratigan*, 351 F.3d at 962–63 (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). The law on this question is clear. “A district court ‘has jurisdiction of all crimes cognizable under the authority of the United States ... [and][t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case.’” *Cotton*, 535 U.S. at 630–31 (2002) (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)). The Ninth Circuit has found that petitioner's position is “untenable in light of ...*Cotton*.” *United States v. Velasco-Medina*, 305 F.3d 839, 845 (9th Cir. 2002). Indeed, the indictment here refers to the applicable statute and thus adequately informs defendant of the charged offense. *See United States v. Ruelas*, 106 F.3d 1416, 1419 (9th Cir. 1997). This court finds no defect in subject-matter jurisdiction.

Next, this court examines the government's argument that petitioner waived his ability to attack the sufficiency of the indictment when he entered into his guilty plea. (ECF No. 40). “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

Petitioner responds that he has not waived his claims because they are jurisdictional. (ECF No. 41); *see United States v. Johnston*, 199 F.3d 1015, 1020 (9th Cir. 1999) (finding an exception to waiver for cases in which “the indictment failed to state a valid claim.”). As this court has already found, his

claims are not jurisdictional. *See Cotton*, 535 U.S. at 630–31 (2002) (“A district court ‘has jurisdiction of all crimes cognizable under the authority of the United States ... [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case.’”).

Here, petitioner challenges only the missing *Rehaif* element throughout his proceedings prior to the entry of his guilty plea—an issue that may be cured by a new indictment. (ECF No. 38). Courts have identified these types of challenges as non-jurisdictional and waivable by guilty plea. *See Class v. United States*, 138 S. Ct. 798, 805 (2018); *see also United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020) (“[A] guilty plea waive[s] the right to assert that the indictment fail[s] to state an offense.”); *United States v. Lavalais*, 960 F.3d 180, 186 (5th Cir. 2020) (“To the extent [the defendant] argues his indictment is fatally defective because it did not contain an element of the offense under § 922(g), he failed to preserve that claim by pleading guilty.”). This court finds that petitioner's guilty plea bars his instant claims. However, recognizing that the Ninth Circuit has yet to speak on this issue, this court will proceed to examine procedural bar as well.

*3 To overcome procedural bar, petitioner's claim must demonstrate “cause and prejudice, or actual innocence” in order to overcome his failure to raise the claim on direct appeal. *Massaro*, 538 U.S. at 504. Petitioner does not claim actual innocence; thus, he must demonstrate 1) cause and 2) prejudice. (ECF No. 38).

Petitioner appropriately satisfies “cause” not to raise the issue of *Rehaif* on direct appeal. At the time, Ninth Circuit law found in opposite to *Rehaif*. *See United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003) (“No mens rea is required for the felon status element of the felon in possession statute.”). “[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.” *Reed v. Ross*, 468 U.S. 1, 16 (1984).

However, petitioner was not prejudiced. In the context of a guilty plea, prejudice requires that petitioner demonstrate “a reasonable probability that, but for [the] errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A growing number of courts have denied § 2255 challenges regarding *Rehaif* for their failure to show prejudice as to overcome procedural default. *United States v. Lowe*, No. 214CR00004JADVCF,

2020 WL 2200852, at *1 n. 15 (D. Nev. May 6, 2020) (collecting cases); *see also* *United States v. Reynolds*, No. 2:16-CR-00296-JAD-PAL-3, 2020 WL 5235316 (D. Nev. Sept. 2, 2020); *United States v. Bueno*, No. 2:17-CR-00406-RCJ-GWF, 2020 WL 4505525 (D. Nev. Aug. 5, 2020). Here, petitioner served at least two felony sentences, in excess of seven years' imprisonment, long before his current conviction. The record demonstrates that petitioner knew that he had been convicted of these felonies, having spent more than a year in prison on each occasion. This court finds that petitioner fails to establish a "reasonable probability" that he would not have pled guilty or that the government would not have been able to prove *Rehaif's* mens requirement beyond a reasonable doubt. *Hill*, 474 U.S. at 59.

Alternatively, petitioner suggests that his indictment's defect is a "structural error" which would automatically satisfy prejudice. (ECF Nos. 38, 41). "[S]tructural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess[s] the effect of the error." *United States v. Marcus*, 560 U.S. 258, 263 (2010) (quotations omitted). Petitioner notes that the Ninth Circuit has ruled that an indictment's failure to state a "necessary allegation of criminal intent" is structural error. *United States v. Du Bo*, 186 F.3d 1177, 1181 (9th Cir. 1999). "[I]f properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is ... a fatal flaw requiring dismissal of the indictment." *United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005) (quoting *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999)).

This court is unconvinced that *Du Bo's* statement applies to the instant situation. First, this court takes cues from *Omer's* dissent from denial of rehearing en banc, which—while non-binding—at least demonstrates that *Du Bo* is controversial within the circuit. *United States v. Omer*, 429 F.3d 835, 837 (9th Cir. 2005). Judge Graber, joined by five of her colleagues, call for a reexamination of *Du Bo* in light of *Cotton*, 535 U.S. at 630, which "directly eliminated the jurisdictional premise for the automatic reversal rule." *Id.*

*4 Most persuasively, the *Omer* dissent notes a plethora of cases in which the circuit reviewed defective indictments for plain error and ultimately found the error harmless. *Id.* at 838; *see United States v. Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002) (holding that "any defect in the indictment was harmless"); *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002) ("Leos cannot meet the third condition

[of the plain error standard]."). Indeed, this outcome is at odds with the label of "structural error," where true structural error "def[ies] analysis by harmless error standards." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–08 (2017).

Furthermore, a growing number of circuits have found no structural error in the context of *Rehaif*. *See United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196 (10th Cir. 2020); *United States v. Hicks*, 958 F.3d 399 (5th Cir. 2020); *Ruelas v. Wolfenbarger*, 580 F.3d 403 (6th Cir. 2009); *but see United States v. Gary*, 954 F.3d 194 (4th Cir. 2020). Finally, "in *Rehaif* itself, the Supreme Court remanded for harmless-error review rather than reversing the conviction outright." *Reynolds*, 2020 WL 5235316, at *5 (citing *Rehaif*, 139 S. Ct. at 2200). Thus, this court declines to interpret the instant defect as structural error. Petitioner fails to overcome procedural bar.

In light of the foregoing, this court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

IV. Certificate of Appealability

The court declines to issue a certificate of appealability. Under 28 U.S.C. § 2253, the court may issue a certificate of appealability only when a movant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the movant must establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

The court finds that petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the court's determination that movant is not entitled to relief under § 2255 debatable, wrong, or deserving of encouragement to proceed further. *See id.* Accordingly, the court declines to issue a certificate of appealability.

V. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 38) be, and the same hereby is, DENIED.

The clerk is directed to enter separate civil judgment denying petitioner's § 2255 motion in the matter of *Newman v. United States*, case number 2:20-cv-00620-JCM.

All Citations

Slip Copy, 2020 WL 5517652

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

CLIFTON GEORGE NEWMAN, JR.

Date of Original Judgment: 3/5/2019
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 2:18-cr-00041-JCM-CWH

USM Number: 54742-048

Daniel Hill, CJA

Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☒ pleaded guilty to count(s) Single Count of the Indictment
☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) & 924(a)(2)	Felon in Possession of a Firearm	10/31/2017	1

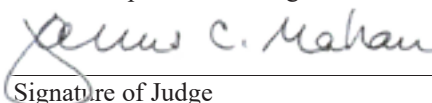
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ 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.

3/5/2019

Date of Imposition of Judgment



Signature of Judge

JAMES C. MAHAN, U.S. DISTRICT JUDGE

Name and Title of Judge

March 18, 2019

Date

DEFENDANT: CLIFTON GEORGE NEWMAN, JR.
CASE NUMBER: 2:18-cr-00041-JCM-CWH

IMPRISONMENT

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

FORTY-SIX (46) MONTHS.

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

The Court recommends that the defendant be permitted to serve his term of incarceration at 1) FCI Safford; 2) FCI Phoenix; or 3) FCI Lompoc.

☐ 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 7/5/2019 .

☐ 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: CLIFTON GEORGE NEWMAN, JR.

CASE NUMBER: 2:18-cr-00041-JCM-CWH

SUPERVISED RELEASE

Upon release from imprisonment, you will 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, not to exceed 104 tests annually.
☐ 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 the location where 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 other conditions on the attached page.

DEFENDANT: CLIFTON GEORGE NEWMAN, JR.

CASE NUMBER: 2:18-cr-00041-JCM-CWH

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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: CLIFTON GEORGE NEWMAN, JR.

CASE NUMBER: 2:18-cr-00041-JCM-CWH

SPECIAL CONDITIONS OF SUPERVISION

1. Search and Seizure – You must submit your person, property, house, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release.

You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

2. Substance Abuse Treatment – You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

3. Drug Testing – You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed 104 tests per year. You must pay the cost of the testing. You must not attempt to obstruct or tamper with the testing methods.

4. No Gambling – You must not engage in any form of gambling (including, but not limited to, lotteries, on-line wagering, sports betting) and you must not enter any casino or other establishment, except for the purpose of employment, as approved and directed by the probation officer, where gambling is the primary purpose (e.g., horse tracks, off-track betting establishments).

5. Gambling Treatment – You must participate in a gambling addiction treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

Note: A written statement of the conditions of release was provided to the Defendant by the Probation Officer in open court at the time of sentencing.

DEFENDANT: CLIFTON GEORGE NEWMAN, JR.

CASE NUMBER: 2:18-cr-00041-JCM-CWH

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ N/A	\$ WAIVED	\$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall 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, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS \$ 0.00 \$ 0.00

☐ 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 Sheet 6 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:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** 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: CLIFTON GEORGE NEWMAN, JR.
CASE NUMBER: 2:18-cr-00041-JCM-CWH

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

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 pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
SEP - 6 2018	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

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 Assistant United States Attorney
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFTON GEORGE NEWMAN, JR.,

Defendant.

2:18-cr-00041-JCM-CWH

PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11(c)(1)(A) and (B)

Plaintiff United States of America, by and through DAYLE ELIESON, United States Attorney; Allison Reese, Assistant United States Attorney; the Defendant CLIFTON GEORGE NEWMAN, JR.; and the Defendant's attorney, Daniel Hill, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and CLIFTON GEORGE NEWMAN, JR. (the Defendant). This Plea Agreement binds the Defendant and the United States Attorney's Office for the District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

The Plea Agreement sets forth the parties' agreement regarding the criminal charges referenced in the Plea Agreement and the applicable sentence, fine, and restitution. It does not control or prohibit the United States or any agency or third party from seeking any other civil or administrative remedies

1 directly or indirectly against the Defendant.

2 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

3 A. Guilty Plea. The Defendant knowingly and voluntarily agrees to plead guilty to the
4 following charge as set forth in the Criminal Indictment:

5 Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

6 B. Waiver of Trial Rights. The Defendant acknowledges that he has been advised and
7 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
8 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically, the
9 Defendant is giving up:

- 10 1. The right to proceed to trial by jury on all charges, or to a trial by a judge if the
11 Defendant and the United States both agree;
- 12 2. The right to confront the witnesses against the Defendant at such a trial, and to
13 cross-examine them;
- 14 3. The right to remain silent at such a trial, with assurance that his silence could
15 not be used against him in any way;
- 16 4. The right to testify in his own defense at such a trial if he so chooses;
- 17 5. The right to compel witnesses to appear at such a trial and testify in the
18 Defendant's behalf; and
- 19 6. The right to have the assistance of an attorney at all stages of such proceedings.

20 C. Withdrawal of Guilty Plea. The Defendant will not seek to withdraw his guilty plea
21 after he has entered it in court.

22 D. Additional Charges. The United States agrees not to bring any additional charges
23 against the Defendant arising out of the investigation in the District of Nevada that culminated in this
24 Plea Agreement and based on conduct known to the United States except that the United States

1 reserves the right to prosecute the Defendant for any crime of violence as defined by 18 U.S.C. § 16.

2 **III. ELEMENTS OF THE OFFENSE**

3 The elements of Felon in Possession of a Firearm under 18 U.S.C. § 922(g)(1) are:

- 4 1. the Defendant knowingly possessed the firearm described in the indictment;
- 5 2. the firearm had been shipped or transported in interstate commerce; and
- 6 3. at the time the Defendant possessed the firearm, the Defendant had been previously
- 7 convicted of a crime punishable by a term of imprisonment exceeding one year.

8 *See Ninth Cir. Manual of Model Jury Instr., Criminal 8.65 (2010 ed.).*

9 **IV. FACTS SUPPORTING GUILTY PLEA**

10 A. The Defendant will plead guilty because he is, in fact and under the law, guilty of the
11 crimes charged.

12 B. The Defendant acknowledges that if he elected to go to trial instead of pleading guilty,
13 the United States could prove his guilt beyond a reasonable doubt. The Defendant further
14 acknowledges that his admissions and declarations of fact set forth below satisfy every element of the
15 charged offenses.

16 C. The Defendant waives any potential future claim that the facts he admitted in this Plea
17 Agreement were insufficient to satisfy the elements of the charged offenses.

18 D. The Defendant admits and declares under penalty of perjury that the facts set forth
19 below:

20 On October 31, 2017, Las Vegas Metropolitan Police Department Officers conducted a traffic
21 stop on a vehicle driven by CLIFTON GEORGE NEWMAN, JR. During the stop, NEWMAN was
22 asked to exit the vehicle. After the officer performed a records check on NEWMAN's license, the
23 officer told NEWMAN that he would only receive a warning for the traffic violations. Prior to
24 allowing NEWMAN to return to the vehicle, however, the officers conducted a valid vehicle frisk and

1 located a Smith & Wesson 9mm handgun bearing serial number TCB6692 on the floorboard of the
2 driver's seat. NEWMAN was then placed under arrest and read his *Miranda* rights. NEWMAN
3 admitted to possessing the firearm.

4 At the time NEWMAN was in possession of the aforementioned firearm, he had been
5 previously convicted of a crime punishable by a term of imprisonment exceeding one year. The
6 firearm had also been shipped and transported in interstate commerce.

7 All of the foregoing occurred in the State and Federal District of Nevada.

8 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

9 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
10 Defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the Defendant does not
11 plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea Agreement shall
12 be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument
13 or representation offered by or on the Defendant's behalf. The Defendant expressly waives all rights
14 under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section
15 IV of this Plea Agreement.

16 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

17 A. Discretionary Nature of Sentencing Guidelines. The Defendant acknowledges that the
18 Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines")
19 in determining the Defendant's sentence, but that the Sentencing Guidelines are advisory, not
20 mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term
21 of imprisonment permitted by statute.

22 B. Offense Level Calculations. The parties stipulate to the following calculation of the
23 Defendant's offense level under the Sentencing Guidelines, acknowledge that these stipulations do not
24 bind the Court, and agree that they will not seek to apply any other specific offense characteristics,

enhancements or reductions:

1. [Felon in Possession of a Firearm]

Base Offense Level [USSG § 2K2.1(a)(4)(A)]: 20

Reductions:

[Acceptance of Responsibility / USSG § 3E1.1(a)]: -2

[Timeliness of Plea / USSG § 3E1.1(b)]: -1

C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG § 3E1.1(a), the United States will recommend that the Defendant receive a two-level downward adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false or misleading information to the United States, the Court, Pretrial Services, or the Probation Office; (e) denies involvement in the offense or provides conflicting statements regarding his involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts to withdraw his guilty plea; (g) commits or attempts to commit any crime; (h) fails to appear in court; or (i) violates the conditions of pretrial release.

Under USSG § 3E1.1(b), if the Court determines that the Defendant's total offense level, before operation of § 3E1.1(a), is 16 or higher, and if the United States recommends a two-level downward adjustment pursuant to the preceding paragraph, the United States will move for an additional one-level downward adjustment for acceptance of responsibility before sentencing because the Defendant communicated his decision to plead guilty in a timely manner that enabled the United States to avoid preparing for trial and to efficiently allocate its resources.

These Sentencing Guidelines provisions, if applied, will result in a total offense level of 17.

1 D. Criminal History Category. The Defendant acknowledges that the Court may base his
2 sentence in part on the Defendant's criminal record or criminal history. The Court will determine the
3 Defendant's Criminal History Category under the Sentencing Guidelines.

4 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
5 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
6 applicable Sentencing Guidelines range and whether to depart from that range.

7 F. Additional Sentencing Information. The stipulated Sentencing Guidelines calculations
8 are based on information now known to the parties. The parties may provide additional information
9 to the United States Probation Office and the Court regarding the nature, scope, and extent of the
10 Defendant's criminal conduct and any aggravating or mitigating facts or circumstances.

11 Good faith efforts to provide truthful information or to correct factual misstatements shall not
12 be grounds for the Defendant to withdraw his guilty plea.

13 The Defendant acknowledges that the United States Probation Office may calculate the
14 Sentencing Guidelines differently and may rely on additional information it obtains through its
15 investigation. The Defendant also acknowledges that the Court may rely on this and other additional
16 information as it calculates the Sentencing Guidelines range and makes other sentencing
17 determinations, and the Court's reliance on such information shall not be grounds for the Defendant
18 to withdraw his guilty plea.

19 **VII. APPLICATION OF SENTENCING STATUTES**

20 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
21 under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a 10-year prison sentence, a fine of not more than two-
22 hundred fifty thousand dollars (\$250,000), or both.

23 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in 18
24 U.S.C. § 3553(a) in determining the Defendant's sentence. However, the statutory maximum sentence

limits the Court's discretion in determining the Defendant's sentence.

C. Parole Abolished. The Defendant acknowledges that his prison sentence cannot be shortened by early release on parole because parole has been abolished.

D. Supervised Release. In addition to imprisonment and a fine, the Defendant will be subject to a term of supervised release not to exceed three years. 18 U.S.C. §§ 3559(a)(3) and 3583(b)(2). Supervised release is a period of time after release from prison during which the Defendant will be subject to various restrictions and requirements. If the Defendant violates any condition of supervised release, the Court may order the Defendant's return to prison for all or part of the term of supervised release, which could result in the Defendant serving a total term of imprisonment greater than the statutory maximum prison sentence of 10 years.

E. Special Assessment. The Defendant will pay a \$100.00 special assessment per count of conviction at the time of sentencing.

VIII. POSITIONS REGARDING SENTENCE

The parties will jointly recommend that the Court sentence the Defendant to a sentence at the low end of the Sentencing Guidelines range as determined by the Court, unless the Defendant commits any act that could result in a loss of the downward adjustment for acceptance of responsibility. The Defendant acknowledges that the Court does not have to follow this recommendation. Notwithstanding its agreement to recommend a sentence at the low end of the Sentencing Guidelines range, the United States reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction litigation.

The Defendant will not, directly or indirectly, request a sentence below the low end of the Sentencing Guidelines range as determined by the Court, and will not seek a downward adjustment pursuant to 18 U.S.C. § 3553 or USSG § 4A1.3(b)(1) from any sentence the Court may impose.

1 **IX. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

2 Before or after sentencing, upon request by the Court, the United States, or the Probation
 3 Office, the Defendant will provide accurate and complete financial information, submit sworn
 4 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
 5 Defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
 6 release funds and property under his control in order to pay any fine, forfeiture, or restitution ordered
 7 by the Court.

8 **X. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

9 A. Plea Agreement and Decision to Plead Guilty. The Defendant acknowledges that:

- 10 (1) He has read this Plea Agreement and understands its terms and conditions;
 11 (2) He has had adequate time to discuss this case, the evidence, and this Plea
 12 Agreement with his attorney;
 13 (3) He has discussed the terms of this Plea Agreement with his attorney;
 14 (4) The representations contained in this Plea Agreement are true and correct,
 15 including the facts set forth in Section IV; and
 16 (5) He was not under the influence of any alcohol, drug, or medicine that would
 17 impair his ability to understand the Agreement when he considered signing this
 18 Plea Agreement and when he signed it.

19 The Defendant understands that he alone decides whether to plead guilty or go to trial, and
 20 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him,
 21 his possible defenses, and the benefits and possible detriments of proceeding to trial. The Defendant
 22 also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened
 23 him to enter into this Plea Agreement.
 24

1 B. Waiver of Appeal and Post-Conviction Proceedings. The Defendant knowingly and
2 expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
3 Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which
4 the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) the right to
5 appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

6 The Defendant also knowingly and expressly waives all collateral challenges, including any
7 claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court
8 adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of
9 counsel.

10 The Defendant reserves only the right to appeal any portion of the sentence that is an upward
11 departure or an upward variance from the Sentencing Guidelines range determined by the Court.

12 The Defendant acknowledges that the United States is not obligated or required to preserve
13 any evidence obtained in the investigation of this case.

14 C. Removal / Deportation Consequences. The Defendant understands and acknowledges
15 that if he is not a United States citizen, then it is highly probable that he will be permanently removed
16 (deported) from the United States as a consequence of pleading guilty under the terms of this Plea
17 Agreement. The Defendant has also been advised if his conviction is for an offense described in 8
18 U.S.C. § 1101(a)(43), he will be deported and removed from the United States and will not be allowed
19 to return to the United States at any time in the future. The Defendant desires to plead guilty regardless
20 of any immigration consequences that may result from his guilty plea, even if the consequence is
21 automatic removal from the United States with no possibility of returning. The Defendant
22 acknowledges that he has specifically discussed these removal / deportation consequences with his
23 attorney.

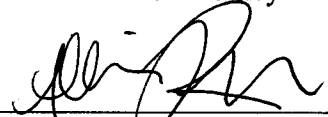
1 **XI. ADDITIONAL ACKNOWLEDGMENTS**

2 This Plea Agreement resulted from an arms-length negotiation in which both parties bargained
 3 for and received valuable benefits in exchange for valuable concessions. It constitutes the entire
 4 agreement negotiated and agreed to by the parties. No promises, agreements or conditions other than
 5 those set forth in this agreement have been made or implied by the Defendant, the Defendant's
 6 attorney, or the United States, and no additional promises, agreements or conditions shall have any
 7 force or effect unless set forth in writing and signed by all parties or confirmed on the record before
 8 the Court.

9 DAYLE ELIESON,
 10 United States Attorney

11 DATE

7/31/18

12 
 ALLISON REESE

Assistant United States Attorney

13
 14 DATE

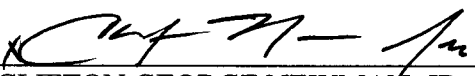
7/26/18

15 
 DANIEL HILL

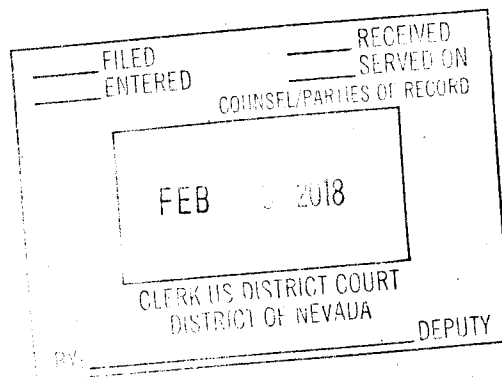
Attorney for Defendant

16
 17 DATE

7/26/18

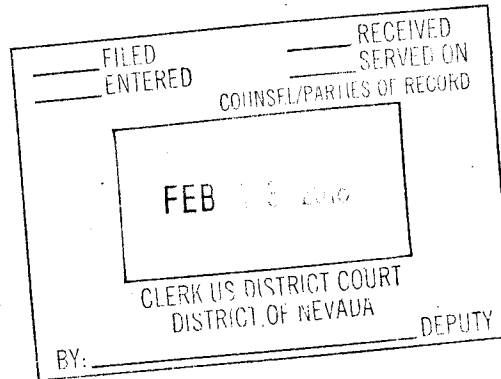
18 
 CLIFTON GEORGE NEWMAN, JR.

Defendant



SEALED

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Attorney for the Plaintiff

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

CLIFTON GEORGE NEWMAN, JR.,

DEFENDANT.

**SEALED
CRIMINAL INDICTMENT**

2:18-CR- 41

VIOLATION:

18 U.S.C. §§ 922(g)(1) and 924(a)(2) –
Felon in Possession of a Firearm.

THE GRAND JURY CHARGES THAT:

On or about October 31, 2017, in the State and Federal District of Nevada,

CLIFTON GEORGE NEWMAN, JR.,

defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of Nevada, to wit: Possession of a Controlled Substance, in the Eighth Judicial District Court for Clark County, on or about February 3, 2003, in Case No. C182057; Possession of Short Barreled Shotgun, in the Eighth Judicial District Court

1 for Clark County, on or about June 6, 2003, in Case No. C189084; Conspiracy to Commit
2 Robbery (Count 1) and Robbery (Count 2), in the Eighth Judicial District Court for Clark
3 County, on or about April 20, 2006, in Case No. C203499; and Grand Larceny, in the Eighth
4 Judicial District Court for Clark County, on or about May 1, 2006, in Case No. C221419,
5 did knowingly possess a firearm, to wit: a Smith and Wesson 9-millimeter pistol bearing
6 serial number TCB6692, said possession being in and affecting interstate commerce and
7 said firearm having been shipped and transported in interstate commerce, all in violation
8 of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).
9

11 **DATED:** this 13th day of February, 2018.

12 **A TRUE BILL:**

13
14
15 /S/
16 FOREPERSON OF THE GRAND JURY

17 DAYLE ELIESON
18 United States Attorney

19
20 
21 PHILLIP N. SMITH, JR.
22 Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW DENG PHAM,

Defendant-Appellant.

No. 21-15401

D.C. Nos. 3:20-cv-00277-LRH
3:17-cr-00104-LRH-CLB-1

District of Nevada,
Reno

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 12, 2021 (Docket Entry No. 2) is lifted.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.