

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 2 of 2**

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2021 WL 66401

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,

v.

Andrew Deng PHAM, Petitioner/Defendant.

Case No. 3:17-cr-00104-LRH-CLB

|

Signed 01/06/2021

Attorneys and Law Firms

Andrew Deng Pham, pro se.

ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

*1 Before the Court is petitioner Andrew Deng Pham's ("Pham") motion, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 51). Pham filed his motion considering the recent ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The government opposes (ECF No. 53), arguing that Pham's claims are procedurally barred because he did not raise them on direct appeal. In his reply (ECF No. 54), Pham maintains that the constitutional errors are structural.

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

I. BACKGROUND

Pham has an extensive criminal history dating back to 1995. Most notably, in 2007, Pham was convicted of attempted murder. After serving almost nine years for that conviction, he was paroled in September of 2016.

The current motion relates to Pham's conduct on October 20, 2017, when West Wendover Police officers responded to a report at a local casino of two men attempting to cash fraudulent checks and who might be in possession of a firearm. After seeing Pham and another individual at the check cashing counter, the officers approached. Upon searching Pham, the officers found a loaded Glock, Model

33, .357 handgun in his waistband. Pham was still on parole for his attempted homicide conviction from 2007.

In August 2018, per a plea agreement, Pham pleaded guilty to Unlawful Possession of a Firearm by a Previously Convicted Felon. ECF No. 38. This Court sentenced Pham to 42 months' imprisonment followed by three years of supervised release. ECF Nos. 45, 46. Now, Pham 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 Pham argues that by leaving out the new *Rehaif* element from the original indictment, this Court lacked jurisdiction. ECF No. 51, 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, Pham 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. 53, at 12.

As part of his plea, Pham 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. 39, at 11. Consequently waiving “all non-jurisdictional defenses ... 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 Pham's claims are barred by his guilty plea even in view of the exceptions to *Tollet 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-CWH (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 Pham's case despite *Rehaif*.

C. Procedural Default

*3 The government also argues that Pham's claims are procedurally defaulted. ECF No. 53, 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).

Pham 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

Pham 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, Pham 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 Pham's.

Here, Pham admitted to being a previously convicted felon at the time he possessed the weapon. ECF No. 39, at 3. In addition, Pham was on parole for attempted murder at the time of his arrest after serving nine years in prison. The Court is not persuaded the inclusion of the *Rehaif* element would have changed Pham's decision to plead guilty or that his plea was involuntary. It seems clear Pham would have known he had been convicted of crimes for which he could be sentenced to more than a year imprisonment.

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

D. Structural Error

Alternatively, Pham 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, Pham 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, Pham has failed to raise a meritorious challenge to his conviction and sentence pursuant to 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 Pham a certificate of appealability.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Pham's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 51) 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 Pham'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 66401

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 Pham claims such an exception exists in the present instance (ECF No. 51, 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.”).

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

ANDREW DENG PHAM

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:17-cr-0104-LRH-CBC

USM Number: 54666-048

Christopher Frey, AFPD
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count 1 and the Forfeiture Allegation in the Indictment filed 11/15/2017☐ 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:

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	10/20/2017	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 _____ 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.

11/13/2018

Date of Imposition of Judgment


Signature of JudgeLarry R. Hicks, United States District Judge

Name and Title of Judge

11/14/18
Date

DEFENDANT: Andrew Deng Pham
CASE NUMBER: 3:17-cr-0104-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: **FORTY-TWO (42) MONTHS**

X The court makes the following recommendations to the Bureau of Prisons:
FCI Lompoc, 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: Andrew Deng Pham
CASE NUMBER: 3:17-cr-0104-LRH-CBC

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: Andrew Deng Pham
CASE NUMBER: 3:17-cr-0104-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: Andrew Deng Pham
CASE NUMBER: 3:17-cr-0104-LRH-CBC

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 may be required to contribute to the costs of the program based on your ability to pay.
3. **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.
4. **No Gang Affiliation** - You must not communicate, or otherwise interact, with any known member of any gang, without first obtaining the permission of the probation officer.

DEFENDANT: Andrew Deng Pham
CASE NUMBER: 3:17-cr-0104-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	\$100.00	\$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: Andrew Deng Pham
CASE NUMBER: 3:17-cr-0104-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 \$ 100.00 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 assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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

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

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

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

10 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED all possessory rights,
11 ownership rights, and all rights, titles, and interests of ANDREW DENG PHAM in the
12 aforementioned property are forfeited and are vested in the United States of America and shall be
13 safely held by the United States of America until further order of the Court.

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

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

26 ///

1 and extent of the petitioner's right, title, or interest in the forfeited property and any additional
2 facts supporting the petitioner's petition and the relief sought.

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

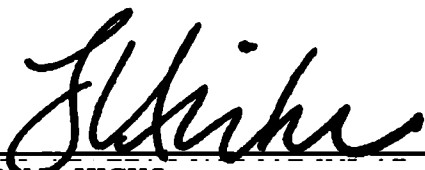
8 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED a copy of the petition, if
9 any, shall be served upon the Asset Forfeiture Attorney of the United States Attorney's Office at
10 the following address at the time of filing:

11 Greg Addington
12 Assistant United States Attorney
13 400 South Virginia Street, Suite 900
14 Reno, NV 89501

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

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 August, 2018.

22
23 
24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
26

DAYLE ELIESON
 United States Attorney
 MEGAN RACHOW
 Nevada Bar No. 8231
 Assistant United States Attorney
 400 South Virginia Street, Suite 900
 Reno, Nevada 89501
 (775) 784-5438
Megan.Rachow@usdoj.gov
 Attorneys for United States of America

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
AUG 13 2018	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: <u>OBW</u>	DEPUTY

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDREW DENG PHAM,

Defendant.

Case No. 3:17-cr-00104-LRH-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 ANDREW DENG PHAM, 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 ANDREW DENG PHAM, 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 November 15,
6 2017:

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

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

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

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

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

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

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

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

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 OFFENSE**

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 October 20, 2017, Officer Pantelakis was dispatched to the Rainbow Casino
6 located in West Wendover, Nevada, regarding the report of an in-progress check fraud. When
7 Officer Pantelakis arrived at the Rainbow Casino, he was met by a casino security supervisor,
8 J.L. J.L. told the officer that there were two males at the cashier's cage attempting to cash a
9 check. J.L. stated that one of the males had been identified as a suspect in two previous
10 incidents of cashing fraudulent checks. Officer Pantelakis observed the two males and initially
11 approached the male wearing a baseball cap who was later identified as Andrew Deng Pham.
12 The officer asked Pham if he had a weapon on him and Pham replied "no." The officer noted
13 that Pham was avoiding eye contact, was looking around and clearly saw another officer before
14 facing Officer Pantelakis. Officer Pantelakis asked Pham to keep his hands up several times
15 and conducted a Terry frisk of Pham's outer clothing. During the Terry frisk, Officer Pantelakis
16 felt a hard metallic object on Pham's waist. Through his training and experience, Officer
17 Pantelakis believed the object to be a small concealed handgun. Officer Pantelakis removed the
18 item and it was a loaded black handgun

19 The firearm retrieved from Pham was identified as a Glock, Model 33, .357
20 caliber pistol bearing serial number GHZ677. An ATF investigation determined that the above
21 listed firearm was a modern firearm as defined by federal law and the firearm had been
22 manufactured outside the state of Nevada. As such, the firearm must have traveled in interstate
23 commerce.

24 A review of court records determined that the defendant had been previously
convicted of Attempted Murder with Injury on or about November 26, 2007 in the First District
Court, Cache County, State of Utah.

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 ("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)(A): | 20* |
| Reductions: | |
| [Acceptance of Responsibility U.S.S.G. § 3E1.1]: | -3 |
| Adjusted Offense Level: | 17 |

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

7 C. Reduction of Offense Level for Acceptance of Responsibility. Under U.S.S.G.
8 § 3E1.1(a), the United States will recommend that the defendant receive a two-level downward
9 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing
10 a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts
11 establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully
12 admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false
13 or misleading information to the United States, the Court, Pretrial Services, or the Probation
14 Office; (e) denies involvement in the offense or provides conflicting statements regarding his
15 involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts
16 to withdraw his guilty plea; or (g) commits or attempts to commit any crime.

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

1 D. Criminal History Category. The defendant acknowledges that the Court may base
 2 his sentence in part on the defendant's criminal record or criminal history. The Court will
 3 determine the 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
 8 calculations are based on information now known to the parties. The parties may provide
 9 additional information to the United States Probation Office and the Court regarding the nature,
 10 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
 11 circumstances. Good faith efforts to provide truthful information or to correct factual
 12 misstatements shall not 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
 16 additional information as it calculates the Sentencing Guidelines range and makes other
 17 sentencing determinations, and the Court's reliance on such information shall not be grounds for
 18 the defendant 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 prison sentence of 10 years, a fine of \$250,000,
 22 or both.

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

1 sentence and any statutory minimum sentence limit the Court's discretion in determining the
2 defendant's sentence.

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

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

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

14 **VIII. POSITIONS REGARDING SENTENCE**

15 The parties will recommend a sentence within the applicable Sentencing Guideline range
16 as determined by the Court. The defendant acknowledges that the Court does not have to follow
17 either parties' recommendation. Notwithstanding its agreement to recommend a guideline
18 sentence, the United States reserves its right to defend any lawfully imposed sentence on appeal
19 or in any post-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 **X. FORFEITURE**

24 The defendant knowingly and voluntarily:

1 A. Agrees to the abandonment, the civil administrative forfeiture, the civil judicial
2 forfeiture, or the criminal forfeiture of a Glock, Model 33, .357 caliber pistol bearing serial
3 number GHZ677, 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 determined by the Court; (b) the right to appeal the manner in
12 which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c)
13 with only the exceptions explicitly noted below in the third paragraph of this subsection, the right
14 to appeal any other aspect of the conviction or sentence and any order of 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 the right to appeal any portion of his sentence that is above the
20 guideline range as determined by the Court. In addition, the defendant reserves the right to appeal
21 the Court's order denying his Motion to Suppress [Doc 16].

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

DAYLE ELIESON
United States Attorney

DATE

8/13/18

MEGAN RACHOW
Assistant United States Attorney

DATE

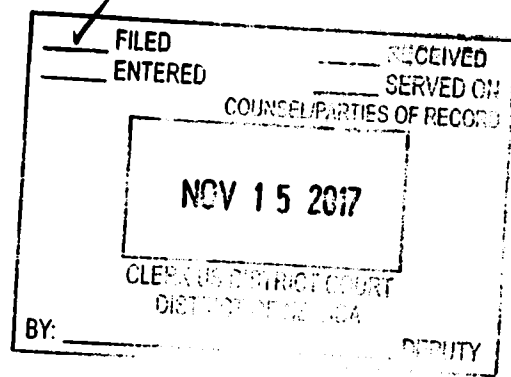
8/13/18

CHRIS FREY, Esq.
Counsel for the Defendant

DATE

8/13/18

ANDREW DENG PHAM
Defendant



STEVEN W. MYHRE
Acting United States Attorney
Nevada Bar No. 9635
MEGAN RACHOW
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Representing the United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:17-cr-00104-LRH-VPC

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDREW DENG PHAM,

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 1)

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Felon in Possession of a Firearm)

On or about October 20, 2017, in the State and District of Nevada, ANDREW DENG PHAM, defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year in the First District Court, Cache County, State of Utah, to wit: Attempted Murder with Injury on or about November 26, 2007; did knowingly possess a Glock, Model 33, .357 caliber pistol bearing serial number GHZ677; 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

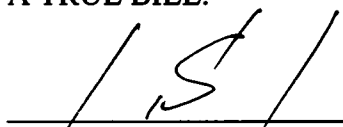
1. The allegations of Count One of this Criminal Indictment are hereby realleged and incorporated herein by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c).

2. Upon conviction of the felony offense charged in Count One of this Criminal Indictment, ANDREW DENG PHAM, 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):

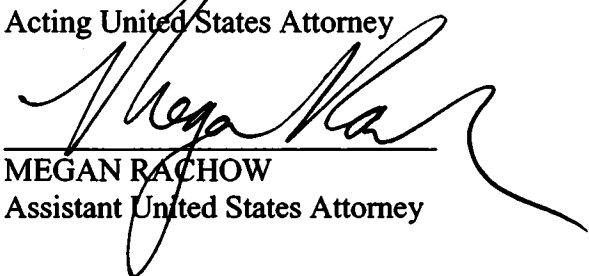
- a. a Glock, Model 33, .357 caliber pistol bearing serial number GHZ677; and
- b. any and all ammunition ("property").

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

STEVEN W. MYHRE
Acting United States Attorney


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.

DEONTE MARQUIS STROUBLE,

Defendant-Appellant.

No. 20-16922

D.C. Nos. 2:20-cv-01128-RCJ

2:16-cr-00233-RCJ-NJK-1

District of Nevada,
Las Vegas

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 15, 2021 (Docket Entry No. 4) is lifted.

The request for a certificate of appealability (Docket Entry Nos. 3 & 5) 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. DEONTE STROUBLE, 9th Cir., October 2, 2020

2020 WL 4506772

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Deonte Marquis STROUBLE, Defendant.

Case No. 2:16-CR-00233-RCJ-

NJK, Case No. 2:20-CV-01128-RCJ

I

Signed 08/05/2020

Attorneys and Law Firms

Phillip N. Smith, Jr., United States Attorney's Office, Las Vegas, NV, for Plaintiff.

ORDER

ROBERT C. JONES, United States District Judge

*1 Defendant moves this Court to vacate, set aside, or correct his conviction and sentence under 28 U.S.C. § 2255, arguing that *Rehaif v. United States*, 139 S. Ct. 2191 (2019), retroactively rendered the indictment fatally defective. Thorough review of the record demonstrates conclusively that Defendant is neither entitled to relief nor a certificate of appealability. The Court therefore denies the motion.

FACTUAL BACKGROUND

In 2016, Defendant was indicted on three counts: Count I – Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2); Count II – Possession of a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(D); and Count III – Possession of a Firearm During, in Relation to, and in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1) (A). (ECF No. 1.) The factual basis in the indictment of Count I states:

On or about June 27, 2016, in the State and Federal District of Nevada, [Defendant] having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of California, to wit: Second Degree Burglary, in 2007; and Possession of Cocaine Base for Sale, in 2009, did knowingly possess a firearm, to wit: a High Point .380 caliber handgun bearing serial number P8068238, 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).

(*Id.*) In 2017, Defendant pleaded guilty to Counts I and II. (ECF No. 27.) Two years later, the Supreme Court issued *Rehaif*, holding that the word “knowingly” in § 924(a)(2) must be applied to both the status element and the possession element of § 922(g). 139 S. Ct. at 2200.¹ Within one year of the Supreme Court issuing *Rehaif*, Defendant filed this § 2255 motion challenging his conviction and sentence for Count I.²

LEGAL STANDARD

*2 A prisoner in custody “may move the court which imposed the sentence to vacate, set aside or correct the sentence” where the sentence is unconstitutional or unlawful, the court lacked “jurisdiction to impose such sentence,” “the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). This remedy is available only where the error is jurisdictional, constitutional, contains “a fundamental defect which inherently results in a complete miscarriage of justice,” or includes “an omission inconsistent with the rudimentary demands of fair procedure.” *Hill v. United States*, 368 U.S. 424, 428 (1962). A petitioner must prove, by a preponderance of the evidence, any grounds for vacating or modifying a sentence. *Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938).

A court should deny the petition without an evidentiary hearing if the record “conclusively show[s] that the prisoner is entitled to no relief.” § 2255(b); *accord Shah v. United States*, 878 F.2d 1156, 1160 (9th Cir. 1989). Otherwise, a court should serve notice upon the government and grant a hearing to make the necessary findings of fact and conclusions of law to rule on the petition. § 2255(b).

Upon denial, a court should determine whether to issue a certificate of appealability. Rules Governing § 2255 Proceedings 11(a). A certificate is appropriate when the applicant has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). That is, the petitioner must show that “reasonable jurists could debate whether ... the petition should [be] resolved in a different manner or that the issues presented [are] ‘adequate to deserve encouragement to proceed further.’ ” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

ANALYSIS

Defendant argues that the failure of the indictment to include an allegation that Defendant knew he was in the class of persons covered by § 922(g)(1) for Count I is a structural error, depriving the Court of jurisdiction and rendering his conviction of this crime unconstitutional. Specifically, he claims the criminal prosecution of this crime based on the defective indictment violated his Fifth Amendment right not to be tried absent a valid indictment from a grand jury and his Sixth Amendment rights to notice and effective assistance of counsel. Finding that it has jurisdiction for this crime and that Defendant's guilty plea waived the remaining challenges, the Court denies the motion.

I. The Court has Subject-Matter Jurisdiction

Defendant's first argument is that the defect in the indictment deprived this Court of jurisdiction over Count I. Although he is correct that the indictment in this case is defective, this defect does not deprive this Court of jurisdiction.

Framing the issue in such a way is not without consequence because, if true, Defendant did not waive it—he could not have. *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *see also United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (analyzing subject-matter jurisdiction of a criminal case despite procedural default).

Defendant notes that district courts have jurisdiction over “all offenses against the laws of the United States,” 18 U.S.C. § 3231, and argues that, since Count I of the indictment fails to state an offense, this Court lacks jurisdiction over it. While prior Ninth Circuit cases have held that a failure to state a claim in an indictment is a jurisdictional issue, *see, e.g., United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989) (citing *United States v. Broncheau*, 597 F.2d 1260, 1262 n. 1 (9th Cir. 1979)), the Supreme Court has overruled these cases in *United States v. Cotton*, 535 U.S. 625 (2002). *See United States v. Salazar-Lopez*, 506 F.3d 748, 754 n.5 (9th Cir. 2007) (recognizing that *Cotton* overruled the circuit's prior precedent).

*3 In *Cotton*, the superseding indictment “did not allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b),” which defendants did not object to before trial. *Cotton*, 535 U.S. at 628. During the pendency of the their appeal to the Fourth Circuit, the Supreme Court held, in an unrelated case that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Fourth Circuit therefore found this omission from the indictment to deprive the court of subject-matter jurisdiction and vacated the sentences. *United States v. Cotton*, 261 F.3d 397, 407 (4th Cir. 2001). The Court found jurisdiction and reversed, noting that it “some time ago departed from [the] view that indictment defects are ‘jurisdictional.’ ” *Cotton*, 535 U.S. at 631; *see Lamar v. United States*, 240 U.S. 60, 65 (1916) (“The objection that indictment does not charge a crime against the United States goes only to the merits of the case.”); *United States v. Williams*, 341 U.S. 58, 66 (1951) (“[T]hat the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.”).

Attempting to distinguish *Cotton*, Defendant advocates for a narrow reading of the opinion. Defendant claims that since the omitted facts in the indictment went toward sentencing, the indictment, while defective, still stated a federal crime and, for that reason, the Supreme Court still had jurisdiction in the case. On the other hand, the indictment in the instant case, Defendant argues, omitted a fact that went to an element of the underlying crime. In making this argument, however, Defendant contravenes the text of the Court's reasoning and lower courts' ubiquitous interpretation of the case.

First, the Supreme Court failed to provide for the caveat that Defendant propounds. It, rather, spoke broadly, stating, “[D]efects in an indictment do not deprive a court of its power to adjudicate a case.” *Cotton*, 535 U.S. at 630. Second, lower courts have rejected Defendant’s reading of *Cotton*. For example, the Ninth Circuit held that the failure to include the mens rea element of a crime—as Defendant claims here—does not deprive a court of jurisdiction. *United States v. Velasco-Medina*, 305 F.3d 839, 845–46 (9th Cir. 2002) (overruled on other grounds as recognized in *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 923 (9th Cir. 2011)). It stated that the defendant’s argument to the contrary was “untenable in light of [*Cotton*.]” *Id.*

To support his contention, Defendant points to a case from the Eleventh Circuit, *United States v. Izurieta*, 710 F.3d 1176 (11th Cir. 2013). In that case, the court held that there was no subject matter jurisdiction when the indictment alleged that the defendant violated a regulation that only carried civil penalties and not a criminal statute. *Id.* at 1179. The Eleventh Circuit, however, later distinguished *Izurieta* on that ground and stated, “The district court’s power over [a criminal] case did not vanish simply because the indictment omitted one element of the charged offense.” *United States v. Brown*, 752 F.3d 1344, 1353 (11th Cir. 2014).

Indeed, at least three circuits—including the Eleventh Circuit—and this District have squarely addressed Defendant’s argument and rejected it. *See, e.g., United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 92 (2d Cir. 2019); *United States v. Dillard*, No. 2:09-CR-00057-JAD-GWF, 2020 WL 2199614, at *4 (D. Nev. May 6, 2020). This Court likewise finds that the defect is not a jurisdictional issue.

II. The Remaining Claims are Barred by Defendant’s Guilty Plea

Satisfied that this Court has jurisdiction, it turns to Defendant’s remaining claims that the defects in the indictment violated his Fifth and Sixth Amendment rights. The Court finds that these claims are barred by Defendant’s guilty plea.

*4 In *Tollett v. Henderson*, 411 U.S. 258 (1973), the Supreme Court addressed whether it could consider a challenge to a grand jury proceeding for the first time through a habeas challenge after the defendant pleaded guilty. The Court held that “a guilty plea represents a break in the chain of

events which has preceded it in the criminal process.” *Id.* at 267. A defendant therefore may not “raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of [a] guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel [was constitutionally inadequate].” *Id.*

Despite the broad language of this rule, the Court has recognized an exception to it: a claim may be brought where it “implicates ‘the very power of the State’ to prosecute the defendant.” *Class v. United States*, 138 S. Ct. 798, 803 (2018) (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). This exception is narrow and only applies where “the government cannot prosecute the defendant *at all*.” *United States v. Chavez-Diaz*, 949 F.3d 1202, 1208 (9th Cir. 2020); *see, e.g., Menna v. New York*, 423 U.S. 61, 62 (1975) (double jeopardy); *Blackledge*, 417 U.S. at 30–31 (vindictive prosecution); *Class*, 138 S. Ct. at 801–02 (constitutionality of the criminal statute). In such instances, the Court distinguished *Tollett* on the basis that these violations could not “have been ‘cured’ through a new indictment.” *Class*, 138 S. Ct. at 805 (quoting *Blackledge*, 417 U.S. at 30).

This rule applies even if the alleged defect in the indictment is structural. *See United States v. Moussaoui*, 591 F.3d 263, 280 n.12 (4th Cir. 2010), as amended (Feb. 9, 2010). A “structural” defect is a “fundamental flaw,” which is “never ... thought [to be] harmless” and “undermines the structural integrity of the criminal tribunal itself.” *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986). Although *Tollett* did not explicitly discuss whether the underlying constitutional defect—the charge that the government had systematically excluded racial minorities from the grand jury—was structural, such discrimination was a well-established structural defect by the time *Tollett* was decided. *See id.* at 261–62 (collecting cases for this proposition dating back to 1881).

Defendant neither argues that he entered into the plea agreement unknowingly or involuntarily through ineffective assistance of counsel nor that the Government could not prosecute him for the crime at all. Rather, all of the arguments he raises—that the defect in the indictment infringed on his right to be free from prosecution absent a valid grand jury indictment and his rights to adequate counsel and notice—could have been remedied by a new indictment. Although this reasoning has not been directly addressed by the Ninth Circuit, two other circuits have held that the *Tollett* rule bars

habeas relief based on defects in the indictment because of *Rehaif*. *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.” (citing *Class*, 138 S. Ct. at 804–05)); *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.”). Defendant’s guilty plea therefore bars these claims.

III. Certificate of Appealability

As the Court denies the petition, it must determine whether to issue a certificate of appealability. Defendant has not shown that reasonable jurists would debate these claims nor that the claims should proceed further. *See Slack*, 529 U.S. at 484. Rather, as discussed above, binding precedent clearly forecloses them. The Court therefore declines to issue a certificate of appealability.

CONCLUSION

***5** IT IS HEREBY ORDERED that Defendant’s Motion to Vacate, Set Aside, or Correct Sentence (ECF No. 39) is DENIED.

IT IS FURTHER ORDERED that no certificate of appealability shall issue.

IT IS FURTHER ORDERED that the Clerk shall ENTER a separate and final judgment under Federal Rule of Civil Procedure 58(a) as directed by *Kingsbury v. United States*, 900 F.3d 1147 (9th Cir. 2018).

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 4506772

Footnotes

- 1 Defendant claims that *Rehaif* mandates that the Government must prove both that a defendant knew of his felony status *and* knew that this status prohibited him from possessing a firearm. This is error. Following *Rehaif*, the entirety of the Government’s burden for a conviction under § 922(g)(1) is to prove “(1) the defendant was a felon; (2) the defendant knew he was a felon; (3) the defendant knowingly possessed a firearm or ammunition; and (4) the firearm or ammunition was in or affecting interstate commerce.” *United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020).
- 2 This motion is only timely if *Rehaif* applies retroactively. The courts are divided on this issue. *Compare, e.g., In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019) (“[*Rehaif*] was not made retroactive....”), *with e.g., United States v. Dace*, No. 16-CR-00383-RBJ, 2020 WL 3603678, at *5 (D. Colo. June 24, 2020) (“*Rehaif* ... applies retroactively to cases on collateral review....”). This Court will assume that *Rehaif* applies retroactively for the purposes of this motion.

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

DEONTE MARQUIS STROUBLE

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16-CR-0233-RCJ-NJK

USM Number: 53564-048

Adam Solinger, Retained
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) ONE AND TWO 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.

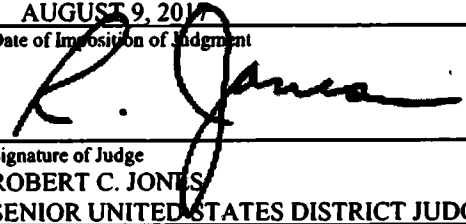
The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§ 922(g)(1) and 924(a)(2)	Felon in Possession of Firearm	6/27/2016	ONE
21 USC §§ 841(a)(1) and 841 (b)(1)(D)	Possession of a Controlled Substance with Intent to Distribute (Marijuana)	6/27/2016	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) _____X Count(s) ALL REMAINING X 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.

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
AUG 22 2017	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

AUGUST 9, 2017
Date of Imposition of Judgment

 Signature of Judge
 ROBERT C. JONES
 SENIOR UNITED STATES DISTRICT JUDGE
 Name and Title of Judge
DATED: This 22nd day of August, 2017.

DEFENDANT: DEONTE MARQUIS STROUBLE
 CASE NUMBER: 2:16-CR-0233-RCJ-NJK

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: SEVENTY-ONE (71) MONTHS AS TO COUNT ONE AND SIXTY (60) MONTHS AS TO COUNT TWO; COUNTS ONE AND TWO TO RUN CONCURRENTLY.

- ☒ The court makes the following recommendations to the Bureau of Prisons:
- THAT THE DEFENDANT BE DESIGNATED TO FCI LOMPOC, CALIFORNIA
 - FURTHER, THAT THE DEFENDANT BE ALLOWED TO PARTICIPATE IN A RESIDENTIAL DRUG TREATMENT 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

 DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEONTE MARQUIS STROUBLE
CASE NUMBER: 2:16-CR-0233-RCJ-NJK

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: THREE (3) YEARS PER COUNT; COUNTS TO RUN CONCURRENTLY.

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, or 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)*
8. ☐ You must pay the assessment imposed in accordance with 18 U.S.C. § 3013. *(check if applicable)*
9. ☐ You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines or special assessments.

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: DEONTE MARQUIS STROUBLE
CASE NUMBER: 2:16-CR-0233-RCJ-NJK

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: DEONTE MARQUIS STROUBLE
CASE NUMBER: 2:16-CR-0233-RCJ-NJK

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) **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.
- 4) **No Gang Affiliation** - You must not communicate, or otherwise interact, with any known member of the Denver Lanes Bloods criminal gang, without first obtaining the permission of the probation officer.
- 5) **Report to Probation Officer After Release from Custody** - 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.

DEFENDANT: DEONTE MARQUIS STROUBLE
CASE NUMBER: 2:16-CR-0233-RCJ-NJK

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	\$200.00	\$	\$WAIVED	\$

- ☐ 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>
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Clerk of the Court
Attention: Finance
Case No. 2:16-CR-0233-RCJ-NJK
333 Las Vegas Blvd. South, Room 1334
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: DEONTE MARQUIS STROUBLE
CASE NUMBER: 2:16-CR-0233-RCJ-NJK

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 \$ 200.00 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) JVT assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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PHILLIP N. SMITH, JR.
Assistant United States Attorney
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEONTE MARQUIS STROUBLE,

Defendant.

2:16-cr-233-RCJ-NJK

**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 DEONTE MARQUIS STROUBLE; and the Defendant's attorney, Michael L. Becker, Esq., 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 DEONTE MARQUIS STROUBLE (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 charges as set forth in the Criminal Indictment:

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

Count Two – Possession of a Controlled Substance with Intent to Distribute (Marijuana) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

The Government will dismiss the remaining count of the Indictment against the Defendant after the imposition of sentence.

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 which culminated in this Plea Agreement and based on conduct known to the United States, except that the United States reserves the right to prosecute the Defendant for any crime of violence as defined by 18 U.S.C. § 16 in which the Defendant may have participated if the Defendant commits such a crime after the execution of this Plea Agreement, or for any crime committed before the execution of this Agreement if the United States had no knowledge of the facts underlying this crime through its investigation, or the Defendant did not disclose the crime before the execution of the Agreement.

III. ELEMENTS OF THE OFFENSES

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

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. Manual of Model Jury Instr., Criminal 8.65 (2010 ed.).

The elements of Possession of a Controlled Substance with Intent to Distribute (Marijuana) (Count Two) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) are:

1. the Defendant knowingly possessed marijuana; and
2. the Defendant possessed it with the intent to distribute it to another person.

See Ninth Cir. Manual of Model Jury Instr., Criminal 9.15 (2010 ed.).

1 **IV. FACTS SUPPORTING GUILTY PLEA**

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

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

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

10 D. The Defendant admits and declares under penalty of perjury that the facts set forth
11 below are true and correct:

12 On June 27, 2016, Deonte Marquis Strouble was driving a vehicle when he made an illegal U-
13 Turn at a red light and then proceeded to pull into a Wendy's drive-thru. An LVMPD sergeant
14 conducted a traffic stop on Strouble's vehicle while it was in the drive-thru. Upon approaching the
15 vehicle, the officer asked for Strouble's driver license, registration, and insurance. Strouble was very
16 slow to retrieve all items that were requested and the officer could smell the odor of marijuana coming
17 from the vehicle. The officer asked Strouble to step out of the vehicle. The Defendant was not
18 compliant, so the officer had to forcibly remove the Defendant from the vehicle.

19 During a probable cause search of the vehicle, 27.7 grams of marijuana was located inside the
20 trunk, and under the driver's seat was a Highpoint .380 caliber handgun bearing serial number serial
21 number P8068238. During a search incident to arrest of Strouble's person, officers located a plastic
22 bag which contained 25 grams of marijuana individually packaged in seven plastic bags in the right
23 bottom pocket of Strouble's cargo shorts. The total amount of marijuana was 52.7 grams.

24 The Defendant admits that at the time he possessed the aforementioned firearm, he had been

1 convicted of a felony offense, that is, a crime punishable by more than a year in prison. The Defendant
 2 also admits that the firearm he is charged with possessing traveled in, or affected, interstate commerce.
 3 The Defendant also admits that he possessed the aforementioned marijuana with the intent to distribute
 4 it to another person.

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

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

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

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

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

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

24 . . .

1	1.	[Felon in Possession of a Firearm]	
2		Base Offense Level [USSG § 2K2.1(a)(4)(A)]:	20
3		Enhancements:	
4		[Poss. In Conn. w/ Felony / USSG § 2K2.1(b)(6)(B)]:	+4
5		Reductions:	
6		[Acceptance of Responsibility / USSG § 3E1.1(a)]:	-2
7		[Timeliness of Plea / USSG § 3E1.1(b)]:	-1

8 C. The Defendant understands that the Defendant's base offense level could be
 9 increased if the Defendant qualifies as a career offender under U.S.S.G. §§ 4B1.1 and 4B1.2. In
 10 the event that the Defendant's offense level is so altered, the parties are not bound by the base
 11 offense level stipulated to above.

12 D. 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 Under USSG § 3E1.1(b), if the Court determines that the Defendant's total offense level,
 24 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.

1 These Sentencing Guidelines provisions, if applied, will result in a total offense level of 21.

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

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

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

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

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

20 **VII. APPLICATION OF SENTENCING STATUTES**

21 A. Maximum Penalty. The penalty for the offense of Felon in Possession of a Firearm
22 (Count One), in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is a 10-year prison sentence, a fine
23 of not more than two-hundred fifty thousand dollars (\$250,000), or both. The maximum penalty for
24 Possession of a Controlled Substance with Intent to Distribute (Marijuana) (Count Two) under 21

1 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) is a 5-year prison sentence, a fine of not more than two-hundred
 2 fifty thousand dollars (\$250,000), or both.

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

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

9 D. Supervised Release. In addition to imprisonment and a fine, the Defendant will be
 10 subject to a term of supervised release of at least 2 years. Supervised release is a period of time after
 11 release from prison during which the Defendant will be subject to various restrictions and
 12 requirements. If the Defendant violates any condition of supervised release, the Court may order the
 13 Defendant's return to prison for all or part of the term of supervised release.

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

16 **VIII. POSITIONS REGARDING SENTENCE**

17 The parties will recommend that the Court sentence the Defendant to a sentence at the **high**
 18 **end** of the Sentencing Guidelines range determined by the parties unless the Defendant commits any
 19 act that could result in a loss of the downward adjustment for acceptance of responsibility. The
 20 Defendant acknowledges that the Court does not have to follow the parties' recommendation.
 21 Notwithstanding its agreement to recommend a sentence at the high end of the Sentencing Guidelines
 22 range, the United States reserves its right to defend any lawfully imposed sentence on appeal or in any
 23 post-conviction litigation.

24 This Plea Agreement does not require the United States to file any pre- or post-sentence

1 downward departure motion under USSG § 5K1.1 or Fed. R. Crim. P. 35.

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

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

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

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

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

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

23 The Defendant understands that he alone decides whether to plead guilty or go to trial, and
24 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him,

1 his possible defenses, and the benefits and possible detriments of proceeding to trial. The Defendant
2 also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened
3 him to enter into this Plea Agreement.

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

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

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

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

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

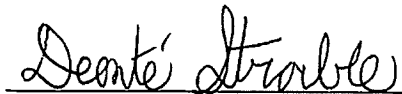
DATE 3-20-17


 PHILLIP N. SMITH, JR.
 Assistant United States Attorney

DATE 3-20-17


 MICHAEL L. BECKER, ESQ.
 Counsel for the Defendant

DATE 3-20-17


 DEONTE MARQUIS STROUBLE
 Defendant

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Attorney for the Plaintiff

FILED	RECEIVED
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COUNSEL/PARTIES OF RECORD	
AUG - 2 2016	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,)
)
 PLAINTIFF,)
)
 vs.)
)
 DEONTE MARQUIS STROUBLE,)
)
 DEFENDANT.)

SEALED CRIMINAL INDICTMENT

2:16-CR- 233

VIOLATIONS:

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

21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) –
 Possession of a Controlled Substance with
 Intent to Distribute (Marijuana); and

18 U.S.C. § 924(c)(1)(A) - Possession of a
 Firearm During, in Relation to, and in
 Furtherance of a Drug Trafficking Crime.

THE GRAND JURY CHARGES THAT:

COUNT ONE

Felon in Possession of a Firearm

On or about June 27, 2016, in the State and Federal District of Nevada,

DEONTE MARQUIS STROUBLE,

defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of California, to wit: Second Degree Burglary, in 2007; and Possession of Cocaine Base for Sale, in 2009, did knowingly possess a firearm, to wit: a High Point .380 caliber handgun bearing serial number P8068238, 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

Possession of a Controlled Substance with Intent to Distribute (Marijuana)

On or about June 27, 2016, in the State and Federal District of Nevada,

DEONTE MARQUIS STROUBLE,

defendant herein, did knowingly possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D).

COUNT THREE

(Possession of a Firearm During, in Relation to, and in Furtherance of a Drug Trafficking Crime)

On or about June 27, 2016, in the State and Federal District of Nevada,

DEONTE MARQUIS STROUBLE,

defendant herein, during and in relation to and in furtherance of the drug trafficking crime charged in Count Two of this Indictment, knowingly and intentionally possessed and carried a

1 firearm, to wit: a High Point .380 caliber handgun bearing serial number P8068238, in
2 violation of Title 18, United States Code, Section 924(c)(1)(A).

3 **DATED:** this 2nd day of August, 2016.

4 **A TRUE BILL:**

5
6 */s/*
7 FOREPERSON OF THE GRAND JURY

8
9 DANIEL G. BOGDEN
10 United States Attorney

11 
12 PHILLIP N. SMITH, JR.
13 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.

DAVID TORRES,

Defendant-Appellant.

No. 20-17259

D.C. Nos. 2:20-cv-01115-JCM

2:11-cr-00141-JCM-CWH

District of Nevada,
Las Vegas

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 12, 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.



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by Cruickshank v. United States, W.D.Wash.,
December 4, 2020

2020 WL 5518606

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff(s),

v.

David TORRES, Defendant(s).

Case No. 2:11-CR-141 JCM (CWH)

|

Signed 09/14/2020

Attorneys and Law Firms

David Torres, pro se.

ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

*1 Presently before the court is petitioner David Torres' motion to vacate, amend, or correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 45). The government filed a response, (ECF No. 48), to which petitioner replied, (ECF No. 49).

I. Background

Prior to his current term of incarceration, petitioner served several felony sentences: In 2006, he pled guilty to felony burglary and served time. (ECF Nos. 1, 48 (citing pre-sentence report)). In 2008, he was convicted of felony battery with substantial time. (*Id.*). He served time. (*Id.*).

On March 15, 2011, petitioner fled the police who were attempting to stop him for speeding. (*Id.*). In the process, he fired shots at the officers. (*Id.*). When apprehended, petitioner stated that he fled, in part, because he had a firearm and was only recently released from prison. (*Id.*). On January 13, 2012, petitioner pled guilty to felon in possession of a firearm. (ECF No. 22). The court sentenced him to 120 months' imprisonment and three years of supervised release. (ECF Nos. 27, 29). Judgment was entered on April 27, 2012. (ECF No. 28). Petitioner appealed, but the Ninth Circuit

dismissed his appeal due to his guilty plea's appellate waiver. (ECF No. 40).

On June 18, 2020, petitioner filed his instant § 2255 motion in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019) ("*Rehaif*"). (ECF No. 45).

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. 45). 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, 25). Petitioner contends that he is entitled to relief due to his indictment's defect. (ECF No. 45). 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 June 18, 2020. The government concedes that *Rehaif* applies retroactively and that this motion is timely. (ECF No. 48).

Petitioner argues that this court lacked subject-matter jurisdiction due to the indictment's failure to state *Rehaif*'s mens rea element. (ECF No. 45). 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. 48). “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. 45); *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. 45). 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. 45).

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 three 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. 45, 49). "[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 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. 45) 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 *Torres v. United States*, case number 2:20-cv-01115-JCM.

All Citations

Slip Copy, 2020 WL 5518606

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UNITED STATES DISTRICT COURT

_____ District of _____

UNITED STATES OF AMERICA)
v.) **JUDGMENT IN A CRIMINAL CASE**
DAVID TORRES)
Case Number: 2:11-cr-141-RLH-CWH
USM Number: 45861-048
WILLIAM CARRICO, AFPD
Defendant's Attorney

THE DEFENDANT:X pleaded guilty to count(s) One 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:

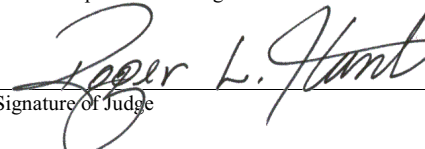
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC § 922(g)(1) and § 924 (a)(2)	Possession of a Firearm by a Convicted Felon	3/15/2011	1

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.

April 27, 2012

Date of Imposition of Judgment



Signature of Judge

ROGER L. HUNT, UNITED STATES DISTRICT JUDGE

Name and Title of Judge

April 27, 2012

Date

DEFENDANT: DAVID TORRES
CASE NUMBER: 2:11-cr-141-RLH-CWH

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **120 MONTHS**

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends the Defendant be permitted to serve his term of incarceration in an Arizona facility.

☒ 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: DAVID TORRES
CASE NUMBER: 2:11-cr-141-RLH-CWH

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 placement on probation and at least two periodic drug tests thereafter, as determined by the court, not to exceed 104 tests annually. Revocation is mandatory for refusal to comply.

- ☐ 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: DAVID TORRES
CASE NUMBER: 2:11-cr-141-RLH-CWH

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant shall not possess, have under his control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by Federal, state or local law.
- 2) The defendant shall submit to the search of his person, property, residence, 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 to ensure compliance with all conditions of release.
- 3) The defendant 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. The defendant shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in substance abuse treatment. Further, the defendant shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon his ability to pay.
- 4) The defendant shall use his true name at all times and will be prohibited from the use of any aliases, false date of birth, social security numbers, places of birth, and any other pertinent demographic information.

Note: A written copy of the conditions of release was provided to the Defendant by the Probation Officer in open Court at the time of sentencing.

DEFENDANT: DAVID TORRES
CASE NUMBER: 2:11-cr-141-RLH-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>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 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>
----------------------	--------------------	----------------------------	-------------------------------

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: DAVID TORRES
CASE NUMBER: 2:11-cr-141-RLH-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 ☐ 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):

X The defendant shall forfeit the defendant's interest in the following property to the United States:
(See Attached Preliminary and Final Orders of Forfeiture)

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 DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) 2:11-CR-141-RLH (CWH)
)
DAVID TORRES,)
)
Defendant.)

PRELIMINARY ORDER OF FORFEITURE

This Court finds that on January 13, 2012, defendant DAVID TORRES pled guilty to a One-Count Criminal Indictment charging him in Count One with Possession of a Firearm by a Convicted Felon in violation of Title 18, United States Code, Section 922(g)(1). Docket #1, #22.

This Court finds defendant DAVID TORRES agreed to the forfeiture of the property set forth in Forfeiture Allegation of the Criminal Indictment and agreed to in the Plea Memorandum. #1, #22.

This Court finds, pursuant to Fed. R. Crim. P. 32.2(b)(1) and (2), the United States of America has shown the requisite nexus between the property set forth in the Forfeiture Allegation of the Criminal Indictment and the Plea Memorandum and the offense to which defendant DAVID TORRES pled guilty. #1, #22.

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

- a. a Black Keltec, CNC Industries P11, semi-automatic handgun, serial number 04626; and

b. any and all ammunition (“property”).

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED all right, title, and interest of
DAVID TORRES in the aforementioned property is forfeited and is vested in the United States of
America and shall be safely held by the United States of America until further order of the Court.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED a petition, if any, must be
filed with the Clerk of the Court, 333 Las Vegas Boulevard South, Las Vegas, Nevada 89101.

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

Michael A. Humphreys
Assistant United States Attorney
Daniel D. Hollingsworth
Assistant United States Attorney
Lloyd D. George United States Courthouse
333 Las Vegas Boulevard South, Suite 5000
Las Vegas, Nevada 89101.

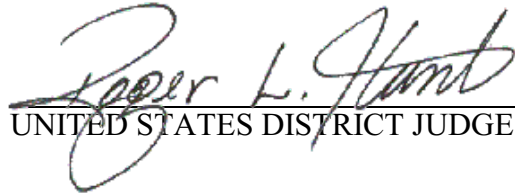
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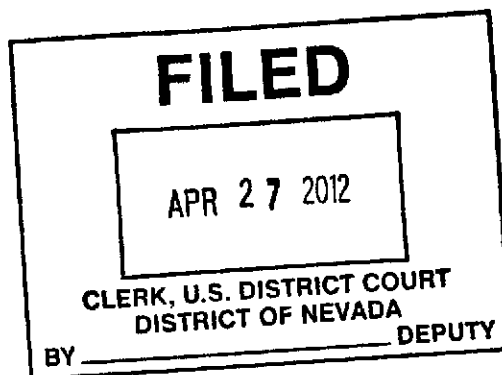
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1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the notice described herein
2 need not be published in the event a Declaration of Forfeiture is issued by the appropriate agency
3 following publication of notice of seizure and intent to administratively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

5 DATED this 17th day of January, 2012.

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8 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID TORRES,

Defendant.

2:11-CR-141-RLH (CWH)

FINAL ORDER OF FORFEITURE

On January 17, 2012, 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); and Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461(c), based upon the plea of guilty by defendant DAVID TORRES to a criminal offense, forfeiting specific property alleged in the Criminal Indictment and agreed to in the Plea Memorandum, and shown by the United States to have the requisite nexus to the offense to which defendant DAVID TORRES pled guilty. Docket #1, #22, #24, #25.

This Court finds the United States of America published the notice of the forfeiture in accordance with the law via the official government internet forfeiture site, www.forfeiture.gov, consecutively from January 19, 2012, through February 17, 2012, notifying all third parties of their right to petition the Court. #26.

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

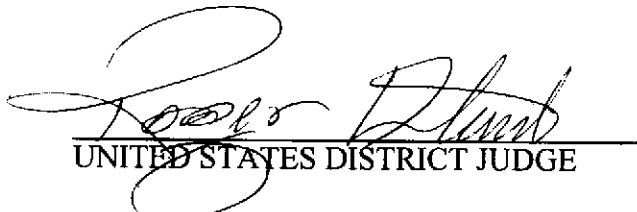
1 This Court finds no petitions are pending with regard to the assets named herein and the time
2 for presenting such petitions has expired.

3 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all right,
4 title, and interest in the property hereinafter described is condemned, forfeited, and vested in the
5 United States of America pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); Fed. R. Crim. P.
6 32.2(c)(2); Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section
7 2461(c); and Title 21, United States Code, Section 853(n)(7) and shall be disposed of according to
8 law:

- 9 a. a Black Keltec, CNC Industries P11, semi-automatic handgun, serial number
10 04626; and
11 b. any and all ammunition.

12 The Clerk is hereby directed to send copies of this Order to all counsel of record and
13 three certified copies to the United States Attorney's Office.

14 DATED this 27 day of April, 2012.

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17 UNITED STATES DISTRICT JUDGE
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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 THE HONORABLE ROGER L. HUNT, SENIOR JUDGE PRESIDING

4
5 UNITED STATES OF AMERICA,)

6 Plaintiff,)

7 vs.)

8 DAVID TORRES,)

9 Defendant,)

CASE NO.:
2:11-cr-141-RLH-CWH

C E R T I F I E D C O P Y

10
11
12 REPORTER'S TRANSCRIPT OF CHANGE OF PLEA AT CALENDAR CALL

13 Friday, January 13, 2012

14
15
16 APPEARANCES:

17 FOR THE PLAINTIFF:

UNITED STATES ATTORNEY
BY: CRISTINA D. SILVA
333 South Las Vegas Boulevard
Suite 5000
Las Vegas, NV 89101
(702) 388-6336

20 FOR THE DEFENDANT:

FEDERAL PUBLIC DEFENDER
BY: WILLIAM C. CARRICO
411 East Bonneville, Suite 250
Las Vegas, NV 89101
(702) 388-6577

23
24
25 HEATHER K. NEWMAN, CCR 774
Official Federal Reporter

1 LAS VEGAS, NEVADA; FRIDAY, JANUARY 13, 2012; AT 9:52 A.M.

2 -000-

3 P R O C E E D I N G S

4

5 THE CLERK: Number 5, United States of America vs.

6 David Torres, 2:11-cr-141-RLH-CWH.

7 Counsel, please note your appearances for the record.

8 MS. SILVA: Cristina Silva on behalf of the

9 United States.

10 MR. CARRICO: Your Honor, good morning.

11 William Carrico representing David Torres.

12 THE COURT: Would you swear the defendant.

13 THE CLERK: Please raise your right hand.

14 Do you solemnly swear that the information you shall
15 give in the cause now pending before this Court shall be the
16 truth, the whole truth, and nothing but the truth, so help you
17 God?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: What is your true name, sir?

20 THE DEFENDANT: David Antonio Torres.

21 THE COURT: And Mr. Torres, do you understand that
22 having been sworn, your answers to my questions this morning
23 are subject to the penalties of perjury if you do not tell the
24 truth?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Has the defendant been furnished with a
2 copy of the Indictment, counsel?

3 MR. CARRICO: He has, Your Honor.

4 THE COURT: Does he waive the reading of the
5 Indictment?

6 MR. CARRICO: So waived.

7 THE COURT: You understand the charge against you,
8 sir?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: I gather that you understand and read and
11 write the English language; is that correct?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: How does the defendant intend to plead,
14 Mr. Carrico?

15 MR. CARRICO: Your Honor, this is a single count
16 Indictment. My client has elected to plead pursuant to a
17 negotiated Plea Agreement to the terms of the Indictment.

18 THE COURT: And that's to the charge of Possession of
19 a Firearm by a Convicted Felon?

20 MR. CARRICO: It is.

21 THE COURT: Is that your understanding of what you're
22 going to do?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Before I accept your plea, I need to ask
25 you some questions to make sure you understand what you're

1 doing, that you're doing it voluntarily, and that you
2 understand the possible consequences of your plea. If you
3 don't understand any of my questions, please tell me and I'll
4 try to rephrase the question so you can respond to it
5 appropriately.

6 If you wish to speak with your attorney at any time
7 before answering any question, please feel free to do so.

8 How old are you, sir?

9 THE DEFENDANT: 25.

10 THE COURT: And how far did you go in school?

11 THE DEFENDANT: 12th grade.

12 THE COURT: In the last 24 hours have you used any
13 drugs, pills, medications or alcoholic beverages?

14 THE DEFENDANT: No, sir.

15 THE COURT: Have you ever been treated for mental
16 illness or addiction to narcotic drugs?

17 THE DEFENDANT: No, sir.

18 THE COURT: Do you understand what's happening here
19 this morning?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Counsel, do either of you have any doubt
22 as to the defendant's competency to enter a plea?

23 MS. SILVA: No, Your Honor.

24 MR. CARRICO: No, Your Honor.

25 THE COURT: Based upon those representations and the

1 Court's observation of the defendant, I find that he is
2 competent to enter a plea.

3 Have you discussed this case with your attorney?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Are you satisfied with Mr. Carrico's
6 representation of you?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand in this case that you
9 are entitled to a trial by a jury in which all of the jurors
10 would have to find you guilty in order for you to be convicted?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you understand that at that trial you
13 would be presumed innocent, that is, you would not be required
14 to prove your innocence but the Government would have the
15 obligation to prove your guilt beyond a reasonable doubt?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You understand that at that trial the
18 witnesses would have to come into the court and testify in your
19 presence and that your attorney could cross-examine those
20 witnesses and object to evidence that might be offered against
21 you?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that at that trial you
24 could call witnesses on your own behalf or offer evidence on
25 your own behalf?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you understand that at that trial you
3 could testify on your own behalf if you chose to but that you
4 would not be required to testify if you chose not to?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand that if the Court
7 accepts your guilty plea, you will be waiving your right to
8 trial and these other rights we've discussed?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Specifically, since you are under oath
11 and I'm going to be asking you questions about what it is that
12 you did that causes you to plead guilty to this charge that
13 you'll be waiving your right not to testify against yourself?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Are you willing to waive your right not
16 to testify against yourself in order for the Court to accept
17 your guilty plea?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Have you read the Indictment?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And you've discussed it with your
22 attorney?

23 THE DEFENDANT: Yes.

24 THE COURT: You're charged in the Indictment with
25 Possession of a Firearm by a Convicted Felon in violation of

1 Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).
2 Do you understand that in order to be convicted of that charge
3 that the Government would have to prove beyond a reasonable
4 doubt that you knowingly possessed a firearm; that the firearm
5 had been in or affected interstate commerce; and that you had
6 previously been convicted of a felony at the time you possessed
7 that firearm?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand what the maximum
10 possible penalty is if you are convicted of this charge?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You understand you could be imprisoned up
13 to 10 years and fined up to \$250,000, or both?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Do you understand that in addition to
16 any -- well, do you understand that at the time of sentencing
17 there will be a 100 dollar special assessment that will be due?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you understand that in addition to any
20 period of imprisonment the Court may impose that the Court may
21 also impose a period of supervised release to follow
22 imprisonment for up to 3 years?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand that during that period
25 of supervised release you would be required to abide by

1 conditions that the Court will impose?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you understand that if you violate any
4 of those conditions, that your release could be revoked and you
5 could be imprisoned up to the -- for the full term of that
6 release without any credit for the time you had spent on
7 release?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And do you understand that if that
10 happens, it's possible that the total amount of time you spend
11 in prison could be more than the original sentence?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand that this is a felony
14 charge?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And you understand, I presume because of
17 this charge, that if you're convicted of a felony, you are
18 deprived of certain valuable civil rights, such as the right to
19 possess a firearm, the right to vote, the right to serve on a
20 jury and other valuable rights?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Has anyone threatened you or forced you
23 to plead guilty?

24 THE DEFENDANT: No, sir.

25 THE COURT: Have you entered into a written Plea

1 Agreement between you and your attorney and the Government and
2 its attorney?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Did you sign that agreement?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Before you signed it, did you read it?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: When you read it, did you understand it?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And did you discuss it with your
11 attorney?

12 THE DEFENDANT: Yes.

13 THE COURT: Did he answer all of your questions about
14 it?

15 THE DEFENDANT: Yes.

16 THE COURT: Miss Silva, would you give us a brief
17 summary of the essential elements of that Plea Agreement.

18 MS. SILVA: Yes, Your Honor.

19 The defendant will plead guilty to the April 12th,
20 2011 criminal Indictment charging defendant with one count of
21 Possession of a Firearm by a Convicted Felon. The defendant
22 also agrees to the forfeiture of the property set forth in the
23 forfeiture allegation.

24 The United States Attorney's Office for the District
25 of Nevada will bring no additional charge or charges against

1 the defendant arising out of the investigation in the District
2 of Nevada which culminated in this Plea Memorandum. However,
3 this agreement does not foreclose prosecution for an act of
4 murder, attempted murder, an act of physical violence against
5 the person of another or any conspiracy to commit such violent
6 unlawful activity.

7 The defendant understands that the Court is required
8 to consider the United States Sentencing Guidelines, among
9 other factors, in determining the defendant's sentence.
10 Defendant understands that the sentencing guidelines are
11 advisory and that after considering the guidelines, the Court
12 may be free to exercise its discretion to impose any reasonable
13 sentence up to the maximum set forth by statute for the crimes
14 of conviction.

15 The parties agree that 4 additional specific offense
16 characteristic points apply to the defendant's Base Offense
17 Level because the firearm was possessed in connection with
18 another felony offense. The Government asserts that two
19 additional levels are added because the defendant recklessly
20 created a substantial risk of death or serious bodily harm to
21 another person or persons in the course of fleeing from a law
22 enforcement officer. However, the defendant reserves the right
23 to argue that the two levels should not be added under United
24 States Sentencing Guideline Section 3C1.2 at the time of
25 sentencing. The parties agree that no other specific offense

1 characteristics apply.

2 The defendant understands that he is subjected to 2
3 to 3 years of supervised release after his release from
4 imprisonment, and he also understands that he must pay a
5 hundred dollar special assessment for a total of \$100 at the
6 time of sentencing.

7 In exchange for the concessions made by the United
8 States in this Plea Memorandum the defendant knowingly and
9 expressly waives the right to appeal his imposed sentence that
10 is within or below the applicable sentencing guideline range as
11 determined by the Court; the right to appeal the manner in
12 which the sentence was determined on the grounds set forth in
13 Title 18, United States Code, Section 3742; the right to appeal
14 any other aspect of the conviction or sentence, including any
15 order of restitution; and the right to bring any collateral
16 challenges, including claims under Title 28, United States
17 Code, Section 2255 to his conviction, sentence and the
18 procedure by which the Court adjudicated guilt and imposed
19 sentence except non-waivable claims of ineffective assistance
20 of counsel.

21 The forfeiture allegations are outlined in the
22 Plea Memorandum.

23 THE COURT: Mr. Carrico, is that a correct
24 representation of the Plea Agreement?

25 MR. CARRICO: It is, Your Honor, but I've noticed

1 that there is a contradictory -- contradiction in Paragraph 5
2 which reads -- well --

3 THE COURT: Paragraph?

4 MR. CARRICO: I'm sorry, in Section C, Paragraph 5 on
5 Page 3, it does not comport with what's stated in Paragraph 3
6 of that same section and I would ask that it read as follows:

7 Based on what the parties now know, after the
8 deduction of 3 points from the offense level, they believe the
9 defendant's final level will be either a 23 or 21. I think
10 that comports with the language in the Plea Agreement.

11 MS. SILVA: I have no objection with that,
12 Your Honor.

13 THE COURT: All right. It -- the Court will note
14 that correction for the record.

15 MR. CARRICO: Otherwise, it is a correct summary,
16 Your Honor.

17 THE COURT: All right.

18 Mr. Torres, is that your understanding of that
19 Plea Agreement?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Has anyone made any promises to you other
22 than those contained in the Plea Agreement to induce you to
23 plead guilty?

24 THE DEFENDANT: No, sir.

25 THE COURT: You understand that the Plea Agreement is

1 not binding on the Court, that the Court may impose a more
2 severe sentence than called for by the Plea Agreement?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: You understand that if that happens, you
5 will not be able to withdraw your guilty plea?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Under the Sentencing Reform Act of 1984
8 sentencing guidelines have been established to assist the Court
9 in sentencing in criminal cases. Have you discussed those
10 sentencing guidelines with your attorney as they apply to your
11 case?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Did he answer all of your questions about
14 them?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you understand that I will not be able
17 to determine what those guidelines are until after the
18 Pre-Sentence Report has been prepared?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And do you understand that even once they
21 have been established, under appropriate circumstances the
22 Court may impose a more or a less severe sentence than called
23 for by the guidelines?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You understand that if that happens, you

1 still will not be able to withdraw your guilty plea?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you understand that in this
4 Plea Agreement that you've entered into that you're waiving
5 your right to appeal this Court's sentence so long as that
6 sentence is not greater than the sentencing guidelines?

7 THE DEFENDANT: Yes.

8 THE COURT: And are you waiving your right to appeal
9 voluntarily?

10 (Discussion between defendant and counsel.)

11 THE DEFENDANT: Yes.

12 THE COURT: And did you discuss the waiver of your
13 right to appeal with your attorney?

14 THE DEFENDANT: Yes.

15 THE COURT: You understand that in the federal system
16 there's no parole, that parole has been abolished?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you understand that if the Government
19 is agreeing or has agreed not to prosecute you for other
20 activities, that the Court may still consider those activities
21 in its sentencing?

22 THE DEFENDANT: Yes.

23 THE COURT: There is a Statement of Facts in support
24 of the guilty plea beginning on Page 9 and going to Page 11.

25 Mr. Carrico, you've read that Statement of Facts?

1 MR. CARRICO: I have, Your Honor.

2 THE COURT: With the exception of certain portions
3 that has been indicated to the Court that are to be excised
4 from that Statement of Facts, are the rest of the statements
5 contained in that Statement of Facts accurate?

6 MR. CARRICO: Yes, Your Honor. After consultation
7 with my client, I agree on the Statement of Facts.

8 THE COURT: All right.

9 And, sir, do you -- well, let me remind you again
10 that you're under oath as I ask you these questions.

11 Have you read that Statement of Facts?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And do you admit to the statements
14 contained in that Statement of Facts?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Is it true then that on March 15th, 2011
17 you were driving a red Dodge Caravan that was traveling at a
18 high rate of speed; that an officer attempted to stop you; and
19 that you accelerated and engaged in or participated in a high
20 speed chase by that officer; and that while you were engaged in
21 that, you fired a handgun from the window of the vehicle at
22 another officer as he passed going in an opposite direction
23 which bullet struck his vehicle; that there was an attempt to
24 disable or to stop you; and that you -- that the attempt spun
25 you around and that you jumped from the Caravan and ran from

1 the vehicle as it continued westbound; and that pursuant to the
2 foot pursuit, you reached into your waistband to remove an
3 unidentified object and then as you were taken to the ground, a
4 handgun fell on to the street? And is it true that you
5 resisted arrest and injured Officer O'Donnell's ear while being
6 placed into custody? And that pursuant to a search warrant, a
7 firearm was recovered which was a black, Keltec semi-automatic
8 handgun which had six rounds in the magazine, one round in the
9 chamber with the hammer forward; and that the head stamps on
10 those casings were the same as that recovered from a shooting
11 at Hollywood and Bonanza; and that you apologized for shooting
12 at the officer? And is it true that at the time all of this
13 occurred you had previously been convicted of a felony, that
14 is, a -- been convicted of a thing that you were sentenced to
15 more than 1 year? Is all that true?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: With respect to the charge in this
18 Indictment of Possession of a Firearm by a Convicted Felon how
19 do you plead, guilty or not guilty?

20 THE DEFENDANT: Guilty.

21 THE COURT: Are you pleading guilty freely and
22 voluntarily?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Are you pleading guilty because you are,
25 in fact, guilty and not for some other reason?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Since you acknowledge your guilt and you
3 do so freely and voluntarily, and you understand and waive your
4 right to trial, you understand the maximum possible penalty the
5 Court can impose --

6 THE DEFENDANT: Yes, I do.

7 THE COURT: -- the Court will accept your guilty
8 plea.

9 It is the finding of the Court in the case of United
10 States of America vs. David Torres that the defendant is
11 competent and capable of entering an informed plea; that he's
12 done so freely and voluntarily; and that the plea is supported
13 by an independent basis in fact which contains the essential
14 elements of the charge. The plea is therefore accepted, and
15 the Court will order a Pre-Sentence Report prepared.

16 It is important for you, sir, to cooperate in the
17 preparation of that report. You have the right to have your
18 attorney present when you're interviewed. You'll have the
19 right to read that report when it's completed and to make any
20 objections to the Court about its contents prior to your
21 sentencing.

22 We will set the sentencing for . . .

23 THE CLERK: April the 27th at 10:00 a.m.

24 THE COURT: Is there anything further?

25 MR. CARRICO: Not on behalf of Mr. Torres,

1 Your Honor. Thank you.

2 MS. SILVA: Just that a Preliminary Order or
3 Forfeiture will be filed shortly after this hearing,
4 Your Honor.

5 THE COURT: All right.

6 The defendant has no objection to the signing of that
7 Order of Forfeiture?

8 MR. CARRICO: No, Your Honor. Thank you.

9 THE COURT: All right.

10 (Proceedings adjourned at 10:09 a.m.)

11

12 * * *

13 I hereby certify that pursuant to Section 753, Title 28,
14 United States Code, the foregoing is a true and correct
15 transcript of the stenographically reported proceedings held in
the above-entitled matter.

16 DATED: 6-15-2012

/s/ Heather K. Newman
HEATHER K. NEWMAN
U.S. Court Reporter
CCR 774

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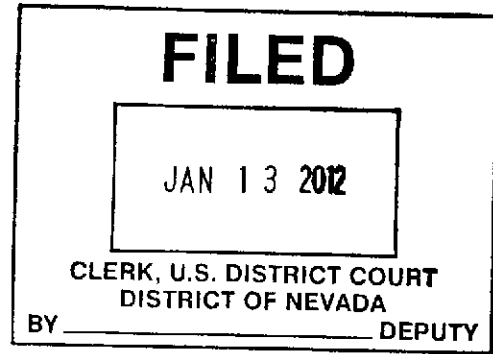
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DANIEL BOGDEN
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CRISTINA D. SILVA
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333 Las Vegas Blvd. South, Suite 5000
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PHONE: (702) 388-6336
FAX: (702) 388-6418



***UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA***

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID TORRES,

Defendant.

2:11-cr-00141-RLH-CWH

PLEA MEMORANDUM

The United States, by and through DANIEL G. BOGDEN, United States Attorney, and Cristina D. Silva, Assistant United States Attorney, District of Nevada, and the defendant DAVID TORRES, and defendant's attorney, Assistant Federal Public Defender William Carrico, submit this plea memorandum.

I.

PLEA AGREEMENT

The United States and defendant have reached the following plea agreement, which under Federal Rule of Criminal Procedure 11(c)(1)(C) is not binding on the Court.

...

...

1 **A. The Plea**

2 Defendant will plead guilty to the April 12, 2011 Criminal Indictment charging the
3 Defendant with one count of Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C.
4 §§ 922(g)(1) and 924(a)(2). Defendant also agrees to the forfeiture of the property set forth in the
5 Forfeiture Allegation.

6
7 **B. Agreement not to Bring Additional Charges**

8 The United States Attorney's Office for the District of Nevada ("United States") will bring
9 no additional charge or charges against Defendant arising out of the investigation in the District of
10 Nevada which culminated in this Plea Memorandum. However, this agreement does not foreclose
11 prosecution for an act of murder, attempted murder, an act of physical violence against the person of
12 another, or any conspiracy to commit any such violent unlawful activity.

13
14 **C. Sentencing Determinations**

15 The parties agree to the following calculations of the Sentencing Guidelines:

16 1. Defendant understands that the court is required to consider the United States
17 Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") among other factors in determining
18 defendant's sentence. Defendant understands that the Sentencing Guidelines are advisory, and that
19 after considering the Sentencing Guidelines, the court may be free to exercise its discretion to
20 impose any reasonable sentence up to the maximum set by statute for the crimes of conviction.

21 2. The parties agree that the defendant's final offense level will be determined by the
22 Court, with the assistance of the United States Probation Office, but the parties believe that the base
23 offense level for Felon in Possession of a Firearm will be a twenty (20). (U.S.S.G. §
24 2K2.1(a)(4)(A)).

1 3. The parties also agree that four (4) additional specific offense characteristic points
2 apply to defendant's base offense level because the firearm was possessed in connection with
3 another felony offense. U.S.S.G. § 2K2.1(b)(6). The Government asserts that two (2) additional
4 levels are added because the defendant recklessly created a substantial risk of death or serious bodily
5 injury to another person(s) in the course of fleeing from a law enforcement officer. U.S.S.G. §
6 3C1.2. However, the Defendant reserves the right to argue that the two-levels should not be added
7 under USSG § 3C1.2 at the time of sentencing. The parties agree that no other specific offense
8 characteristics apply.

9 4. Pursuant to U.S.S.G. §3E1.1(a), the United States will recommend that defendant
10 receive a three (3) level adjustment for acceptance of responsibility, unless defendant (a) fails to
11 make a complete factual basis for the guilty plea at the time it is entered; (b) is untruthful with the
12 Court or probation officers; (c) denies involvement in the offense or provides conflicting statements
13 regarding defendant's involvement; (d) attempts to withdraw the guilty plea; (e) engages in criminal
14 conduct; (f) fails to appear in court; or (g) violates the conditions of pretrial release.

15 5. Based on what the parties now know, after the deduction of three (3) points from the
16 total offense level, they believe the defendant's final offense level will be a twenty-three (23).

17 6. Defendant also agrees that the court may consider all other relevant conduct whether
18 charged or uncharged, in determining the applicable sentencing guidelines range, the propriety and
19 extent of any departure from that range, and the determination of the sentence to be imposed after
20 consideration of the sentencing guidelines and all other relevant factors.

21 7. Defendant's Criminal History Category will be determined by the Court, but the
22 parties believe that his Criminal History will be a Category III.

23 8. If the Defendant's Criminal History is a Category III, and his final offense level is a
24 twenty-three (23), the applicable sentencing guideline range would fall within Zone D of the

1 guidelines and would result in a recommended sentence of 57-71 months.

2
3 **D. Other Sentencing Matters**

4 1. Defendant understands that he is subject to two to three years supervised release after
5 his release from imprisonment and that he will be subject to standard conditions of release and such
6 other special conditions of release as the Court or Office of Probation may impose.

7 2. Defendant agrees that the Court may consider any counts dismissed under this
8 agreement, along with all other relevant conduct whether charged or uncharged, in determining the
9 applicable sentencing Guidelines range, the propriety and extent of any departure from that range,
10 and the determination of the sentence to be imposed after consideration of the sentencing Guidelines
11 and all other relevant factors.

12 3. The stipulations in this agreement do not bind either the United States Probation
13 Office or the Court. Both Defendant and the United States are free to: (a) supplement the facts by
14 supplying relevant information to the United States Probation Office and the Court, and (b) correct
15 any and all factual misstatements relating to the calculation of the sentence.

16
17 **E. Fines and Special Assessment**

18 1. Defendant agrees that the court may impose a fine due and payable immediately upon
19 sentencing.

20 2. Defendant will pay the special assessment of \$100 per count of conviction at the time
21 of sentencing, for a total of \$100.

22
23 **F. Restitution**

24 Defendant agrees to make full restitution in an amount to be determined by the Court, which

1 defendant agrees shall include all relevant conduct as determined by the Court. Defendant
2 understands that any restitution imposed by the Court may not be discharged in whole or in part in
3 any present or future bankruptcy proceeding.
4

5 **G. Waiver of Appeal**

6 In exchange for the concessions made by the United States in this plea agreement, defendant
7 knowingly and expressly waives: (1) the right to appeal his imposed sentence that is within or below
8 the applicable sentencing guideline range as determined by the Court; (2) the right to appeal the
9 manner in which that sentence was determined on the grounds set forth in Title 18, United States
10 Code, Section 3742; (3) the right to appeal any other aspect of the conviction or sentence, including
11 any order of restitution; and (4) the right to bring any collateral challenges, including any claims
12 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

16 **H. Additional Promises, Agreements, and Conditions**

17 1. In exchange for the United States entering into this agreement, defendant agrees that
18 (a) the facts set forth in Section IV of this Plea Agreement shall be admissible against defendant
19 under Fed. R. Evid. 801(d)(2)(A) in the following circumstances: (1) for any purpose at sentencing;
20 and (2) in any subsequent proceeding, including a trial in the event defendant does not plead guilty
21 or withdraws defendant's guilty plea, to impeach or rebut any evidence, argument or representation
22 offered by or on defendant's behalf; and (b) defendant expressly waives any and all rights under
23 Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 with regard to the facts set forth in Section IV of the
24 Plea Agreement to the extent set forth above.

1 2. The parties agree that no promises, agreements, and conditions have been entered
2 into other than those set forth in this plea memorandum, and none will be entered into unless in
3 writing and signed by all parties.

4
5 **I. Limitations**

6 This Plea Agreement is limited to the United States Attorney's Office for the District
7 of Nevada and cannot bind any other federal, state or local prosecuting, administrative, or regulatory
8 authority. However, this Plea Memorandum does not prohibit the United States through any agency
9 thereof, the United States Attorney's office for the District of Nevada, or any third party from
10 initiating or prosecuting any civil proceeding directly or indirectly involving defendant, including
11 but not limited to, proceedings under the False Claims Act relating to potential civil monetary
12 liability or by the Internal Revenue Service relating to potential tax liability.

13
14 **J. Forfeiture**

15 1. Defendant knowingly and voluntarily agrees to the abandonment, the civil
16 administrative forfeiture, the civil judicial forfeiture, or the criminal forfeiture of:

- 17 (a) One (1) black Keltec semi-automatic handgun, bearing serial number 04626;
18 and
19 (b) any and all ammunition ("property").

20 2. Defendant knowingly and voluntarily agrees to abandon or to forfeit the property to
21 the United States.

22 3. Defendant knowingly and voluntarily agrees to relinquish all right, title, and interest
23 in the property.

24 4. Defendant knowingly and voluntarily agrees to waive his right to any abandonment
proceedings, any civil administrative forfeiture proceedings, any civil judicial forfeiture

1 proceedings, or any criminal forfeiture proceedings ("proceedings") of the property.

2 5. Defendant knowingly and voluntarily agrees to waive service of process of any and
3 all documents filed in this action or any proceedings concerning the property arising from the facts
4 and circumstances of this case.

5 6. Defendant knowingly and voluntarily agrees to waive any further notice to him, his
6 agents, or his attorney regarding the abandonment or the forfeiture and disposition of the property.

7 7. Defendant knowingly and voluntarily agrees not to file any claim, answer, petition, or
8 other documents in any proceedings concerning the property.

9 8. Defendant knowingly and voluntarily agrees to waive the statute of limitations, the
10 CAFRA requirements, Fed. R. Crim. P. 7 and 32.2, the constitutional requirements, and the
11 constitutional due process requirements of any abandonment proceeding or any forfeiture
12 proceeding concerning the property.

13 9. Defendant knowingly and voluntarily agrees to waive his right to a jury trial on the
14 forfeiture of the property.

15 10. Defendant knowingly and voluntarily agrees to waive (a) all constitutional, legal, and
16 equitable defenses to, (b) any constitutional or statutory double jeopardy defense or claim
17 concerning, and (c) any claim or defense under the Eighth Amendment to the United States
18 Constitution, including, but not limited to, any claim or defense of excessive fine in any proceedings
19 concerning the property.

20 11. Defendant knowingly and voluntarily agrees to the entry of an Order of Forfeiture of
21 the property to the United States.

22 12. Defendant knowingly and voluntarily agrees and understands the abandonment, the
23 civil administrative forfeiture, the civil judicial forfeiture, or the criminal forfeiture of the property
24 shall not be treated as satisfaction of any assessment, fine, restitution, cost of imprisonment, or any

1 other penalty this Court may impose upon the Defendant in addition to the abandonment or the
2 forfeiture.

3 **II.**

4 **PENALTY**

5 1. The maximum penalty for a violation of Title 18, United States Code, Sections
6 922(g)(1) and 924(a)(2), Felon in Possession of a Firearm, is up to ten (10) years of imprisonment, a
7 \$250,000 fine, and up to three years of supervised released.

8 2. Defendant is subject to supervised release for a term of at least two years and up to
9 three years. Supervised release is a period of time following imprisonment during which defendant
10 will be subject to various restrictions and requirements. Defendant understands that if defendant
11 violates one or more of the conditions of any supervised release imposed, defendant may be returned
12 to prison for all or part of the term of supervised release, which could result in defendant serving a
13 total term of imprisonment greater than the statutory maximum stated above.

14 3. Defendant must pay a special assessment of \$100 for the conviction.

15 4. Defendant is required to pay for the costs of imprisonment, probation, and supervised
16 release, unless defendant establishes that defendant does not have the ability to pay such costs, in
17 which case the court may impose an alternative sanction such as community service.

18 **III.**

19 **ELEMENTS**

20 The essential elements for the crime of Felon in Possession of a Firearm, in violation of
21 Title 18, United States Code, Sections 922(g)(1) and 924(a)(1), are the following:

- 22 1. Defendant David Torres ("Torres") knowingly possessed a firearm;
23 2. Defendant Torres was previously convicted of a felony offense; and
24 3. The firearm that defendant Torres possessed was in or affected interstate commerce.

IV.

FACTS THAT SUPPORT GUILTY PLEA

1. The defendant is pleading guilty because the defendant is guilty of the charged offense.

2. On March 15, 2011, at approximately 2:43 pm, Officer W. Oettinger of the Las Vegas Metropolitan Police Department (LVMPD) was on patrol when he observed a Red Dodge Caravan traveling at a high rate of speed. Officer Oettinger called out a vehicle stop and activated his emergency lights with sirens, and began to pursue the vehicle. The Officer notified dispatch that the vehicle was not stopping, and was accelerating away from the Officer, reaching a speed of approximately 80 miles per hour (MPH).

3. Because the vehicle was not stopping, Officer Oettinger called in back up. The Red Dodge Caravan, which was being driven by the defendant David Torres, and Officer Oettinger continued in the high speed chase. Subsequently, Officer C. Schelin observed the vehicles traveling northbound on Hollywood at Bonzana, as he was traveling Southbound. As the Caravan passed Officer Schelin, defendant David Torres held a handgun out the driver side window with his left hand. Torres fired the handgun out the window at Officer Schelin as the two vehicles passed by in opposite directions. One bullet projectile struck Officer Schelin's patrol vehicle on the driver's side front windshield door frame, just above the spot light. Officer Schelin then made a U-turn and joined the pursuit.

4. Additional LVMPD Officers attempted to disable the defendant's vehicle at Lake Mead and Nellis with stop sticks. Unfortunately, defendant's vehicle traveled through the intersection and missed the stop stick device. Defendant's vehicle continued northbound on Nellis until it turned westbound onto Cartier. While continuing on Cartier, Officer O'Donnell, who had joined the pursuit, utilized the driver's side front fender of his police to make contact with the

1 Caravan's passenger side rear quarter panel. After contact, the Caravan spun around and slowed
2 down.

3 5. Defendant Torres jumped from the Caravan and ran away from the vehicle as it
4 continued to roll westbound on Cartier. A brief foot pursuit of Torres ensued. While Torres was
5 running away from Officers, they observed him reaching into his waistband and removing an
6 unidentified object. Then, as Officers took Torres to the ground, a handgun fell onto the street.

7 6. Torres resisted arrest, and injured Officer O'Donnell's ear while being placed into
8 custody. Once the Caravan stopped, Officers located a passenger inside the van, who was identified
9 as defendant's girlfriend, Brittany Reynolds. Reynolds advised that she was three months pregnant.

10 7. A telephonic search warrant for the scene was obtained, and the firearm was
11 recovered. The firearm was identified as a black Keltec semi-automatic handgun, bearing serial
12 number 04626. The firearm had six rounds in the magazine, and one round in the chamber with the
13 hammer forward. Head stamps for the cartridge casings were "RP 9mm Luger." The three casings
14 that were recovered from the shooting at Hollywood and Bonanza were head stamped "RP 9mm
15 Luger."

16 8. The passenger, Ms. Reynolds, conducted a post-Miranda recorded interview with
17 Detectives Crane and Long. Reynolds advised that ~~Torres had borrowed her sister's Caravan that~~
18 ~~morning in order to take Reynold's on several errands, that included checking in with Reynolds'~~
19 ~~probation officer.~~ ^W While running errands, the police attempted to stop the vehicle, but Torres
20 accelerated away. According to Reynolds, ~~she asked Torres why he wasn't stopping, and Torres~~
21 ~~replied in a calm voice "I got you baby." The next thing she knew, they are speeding away. She~~
22 ~~also stated~~ that at some point Torres fired several shots from the vehicle. ~~According to Ms.~~
23 ~~Reynolds, she had seen a friend showing Torres a small black handgun several days prior, but she~~
24 ~~was unsure if it was the same gun.~~ CS D.A.T. M

9. The defendant was interviewed by LVMPD Sgt. Scott and Detective Long. Post-Miranda, Torres apologized for shooting at the officer.

10. The Government could prove that the firearms defendant is charged with possessing
traveled in and affected interstate commerce.

11. The Government could prove that prior to the March 15, 2011, defendant had been previously convicted of a felony offense, that is, a crime punishable by more than one year in prison.

V.

ACKNOWLEDGMENT

1. Defendant, acknowledges by defendant's signature below that defendant has read this Memorandum of Plea Agreement, that defendant understands the terms and conditions, and the factual basis set forth herein, that defendant has discussed these matters with defendant's attorney, and that the matters set forth in this memorandum, including the facts set forth in Part IV above are true and correct.

2. Defendant acknowledges that defendant has been advised, and understands, that by entering a plea of guilty defendant is waiving, that is, giving up, certain rights guaranteed to defendant by law and by the Constitution of the United States. Specifically, defendant is giving up:

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

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

c. The right to remain silent at such trial, with such silence not to be used against defendant in any way;

d. The right, should defendant so choose, to testify in defendant's own behalf at such a trial;

c. The right to compel witnesses to appear at such a trial and to testify in defendant's behalf; and

f. The right to have the assistance of an attorney at all stages of such proceedings.

3. Defendant, defendant's attorney, and the attorney for the United States acknowledge that this Plea Memorandum contains the entire agreement negotiated and agreed to by and between the parties, and that no other promise has been made or implied by either defendant, defendant's attorney, or the attorney for the United States.

1/13/12
DATED

1/13/2012
DATED

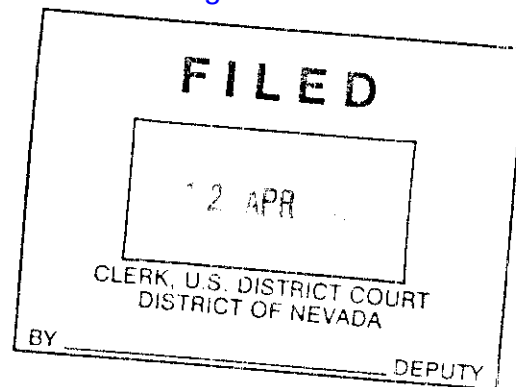
January 13, 2012
DATED

DANIEL G. BOGDEN
United States Attorney

CRISTINA D. SILVA,
Assistant United States Attorney

DAVID TORRES,
Defendant

WILLIAM CARRICO, Esq.
Counsel for Defendant -
DAVID TORRES



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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

-oOo-

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

DAVID TORRES,

DEFENDANT.

CRIMINAL INDICTMENT

2:11-CR- 14

VIOLATIONS:

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

THE GRAND JURY CHARGES THAT:

On or about March 15, 2011, in the State and Federal District of Nevada,

DAVID TORRES,

defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, to wit: a 2008 conviction, in the State of Nevada, for Battery with Substantial Bodily Harm; and a 2006 conviction, in the State of Nevada, for Burglary, did knowingly possess a black Keltec semi-automatic handgun, bearing serial number 04626, said possession being in and affecting interstate commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATION

1. The allegations of this Indictment are hereby re-alleged and incorporated herein by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 924(d)(1); and Title 28, United States Code, Section 2461(c).

2. As a result of the foregoing offense,

DAVID TORRES,

the defendant, if convicted under this Indictment, shall forfeit to the United States the firearms and ammunition involved or used in violation of Title 18, United States Code, Section 922(g), including but not limited to the following:

(a) A black Keltec semi-automatic handgun, bearing serial number 04626;

(b) and any and all ammunition.

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

DATED: this ____ day of April 2011.

A TRUE BILL:

/S/
FOREPERSON OF THE GRAND JURY

DANIEL G. BOGDEN
United States Attorney

CRISTINA D. SILVA
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.

ROMIE LE'MON TURNER,

Defendant-Appellant.

No. 20-17227

D.C. Nos. 2:20-cv-01090-JCM

2:16-cr-00073-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 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.



KeyCite Blue Flag – Appeal Notification

Appeal Filed by USA v. ROMIE TURNER, 9th Cir., November 13, 2020

2020 WL 5517665

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff(s),

v.

Romie Le'mon TURNER, Defendant(s).

Case No. 2:16-CR-73 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).

ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

*1 Presently before the court is petitioner Romie Le'mon Turner's motion to vacate, amend, or correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 43). The government filed a response, (ECF No. 45), to which petitioner replied, (ECF No. 46).

I. Background

Prior to his current term of incarceration, petitioner served several felony sentences: In 1987, he was convicted of felony burglary. (ECF Nos. 1, 45 (citing pre-sentence report)). In 1991, he was again convicted of felony taking a vehicle without the owner's consent. (*Id.*). In 1996, petitioner was convicted of felon in possession of a firearm, and in 2003, petitioner was again convicted of felon in possession of a firearm. (*Id.*). In 2006, petitioner was convicted of assault with a deadly weapon. (*Id.*). For the foregoing crimes, he served multiple distinct sentences of incarceration, each in excess of one year. (*Id.*).

On November 9, 2016, petitioner pled guilty to felon in possession of a firearm. (ECF No. 37). The court sentenced him to 76 months' imprisonment to run concurrent with his

state sentences and three years of supervised release. (ECF Nos. 40, 41). Judgment was entered on February 16, 2017. (*Id.*). Petitioner did not appeal.

On June 16, 2020, petitioner filed his instant § 2255 motion in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019) ("*Rehaif*"). (ECF No. 43).

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. 43). 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, 38). Petitioner contends that he is entitled to relief due to his indictment's defect. (ECF No. 43). 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 June 18, 2020. The government concedes that *Rehaif* applies retroactively and that this motion is timely. (ECF No. 45).

Petitioner argues that this court lacked subject-matter jurisdiction due to the indictment's failure to state *Rehaif*'s mens rea element. (ECF No. 43). 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. 45). “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. 43); *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. 43). 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. 43).

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 multiple felony sentences, including for prior charges of felon in possession of a firearm, 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. 43, 46). “[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 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. 43) 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 *Turner v. United States*, case number 2:20-cv-01090-JCM.

All Citations

Slip Copy, 2020 WL 5517665

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

ROMIE LE'MON TURNER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16-CR-0073-JCM-CWH

USM Number: 53170-048

BRENDA WEKSLER, AFPD

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) ONE [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:

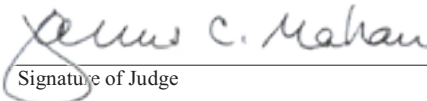
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC§922(g)(1) & 18 USC§924(a)(2)	Felon in Possession of a Firearm	2/13/2016	1

The defendant is sentenced as provided in pages 2 through 1 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.

2/13/2017

Date of Imposition of Judgment



Signature of Judge

James C. Mahan, U.S. District Judge

Name and Title of Judge

February 16, 2017

Date

DEFENDANT: ROMIE LE'MON TURNER
CASE NUMBER: 2:16-CR-0073-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:

(76) months

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

1. Arizona
2. Victorville, California

☒ 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: ROMIE LE'MON TURNER
CASE NUMBER: 2:16-CR-0073-JCM-CWH

SUPERVISED RELEASE

Upon 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)*

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: ROMIE LE'MON TURNER
CASE NUMBER: 2:16-CR-0073-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: ROMIE LE'MON TURNER
CASE NUMBER: 2:16-CR-0073-JCM-CWH

SPECIAL CONDITIONS OF SUPERVISION

1. Community Service - You shall complete 60 hours of community service, as approved and directed by the probation officer.
2. Mental Health Treatment - 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. Warrantless Search - You shall submit your person, property, residence, place of business and vehicle under your control to a search, conducted by the United States probation officer or any authorized person under the immediate and personal supervision of the probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.
4. Substance Abuse Treatment - 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.

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: ROMIE LE'MON TURNER
CASE NUMBER: 2:16-CR-0073-JCM-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	\$ 0.00	\$ 0.00	\$ 0.00

☐ 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: ROMIE LE'MON TURNER
CASE NUMBER: 2:16-CR-0073-JCM-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.

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Attorney for the Plaintiff

☒ FILED	☐ RECEIVED
☐ ENTERED	☐ SERVED ON
COUNSEL/PARTIES OF RECORD	
NOV - 9 2016	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROMIE LEMON TURNER,

Defendant.

2:16-cr-073-JCM-CWH

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

Plaintiff United States of America, by and through DANIEL G. BOGDEN, United States Attorney; Phillip N. Smith, Jr., Assistant United States Attorney; the Defendant ROMIE LEMON TURNER; and the Defendant's attorney, Brenda Weksler, 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 ROMIE TURNER (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 charge 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 February 13, 2016, at approximately 8:00 p.m., NLVPD officers responded to 3300 Civic
22 Center Drive #13K in reference to a domestic battery/assault with a deadly weapon call in progress.
23 The caller stated that her boyfriend had slapped her numerous times and pulled a gun on her. Upon
24 arrival, Officers met with the person reporting, later identified as R.D., who was standing outside of

1 the apartment. R.D. stated that she and her boyfriend of five years, ROMIE LEMON TURNER, had
2 been involved in a domestic disturbance. R.D. also stated that a weapon was involved. The police
3 then cleared R.D.'s son and TURNER from the apartment, and conducted a protective sweep of the
4 residence.

5 During the protective sweep of the apartment, an officer entered the northern most (master)
6 bedroom, and he saw an empty handgun holster on top of a black luggage bag. The officer continued
7 into the bedroom and he observed a Marlin 12-gauge shotgun bearing serial number A18963 propped
8 up inside of the closet. The police applied for and obtained a telephonic search warrant for the
9 residence and TURNER's vehicle. Incident to the execution of the search warrant, the shotgun and a
10 Hi Point .380 caliber semi-automatic handgun bearing serial number P8088907 were recovered from
11 the master bedroom of the apartment. The handgun was located under the top mattress of the bed.

12 The Defendant admits that he was in possession of the aforementioned firearms. At the time
13 the Defendant was in possession of the firearms, he had been previously convicted of a crime
14 punishable by a term of imprisonment exceeding one year. The firearms had also been shipped and
15 transported in 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 Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the Defendant does not
20 plead guilty or withdraws his guilty plea, the facts set forth in Section IV of this Plea Agreement shall
21 be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument
22 or representation offered by or on the Defendant's behalf. The Defendant expressly waives all rights
23 under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section
24 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.

1.	[Felon in Possession of a Firearm]	
	Base Offense Level [USSG § 2K2.1(a)(4)(A)]:	20
	Enhancements:	
	[Poss. In Conn. w/ Felony / USSG § 2K2.1(b)(6)(B)]:	+4
	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

1 of pretrial release.

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

7 These Sentencing Guidelines provisions, if applied, will result in a total offense level of 21.

8 D. Criminal History Category. The Defendant acknowledges that the Court may base his
9 sentence in part on the Defendant's criminal record or criminal history. The Court will determine the
10 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 calculations
15 are based on information now known to the parties. The parties may provide additional information
16 to the United States Probation Office and the Court regarding the nature, scope, and extent of the
17 Defendant's criminal conduct and any aggravating or mitigating facts or circumstances.

18 Good faith efforts to provide truthful information or to correct factual misstatements shall not
19 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 additional
23 information as it calculates the Sentencing Guidelines range and makes other sentencing
24 determinations, and the Court's reliance on such information shall not be grounds for the Defendant

1 to withdraw his guilty plea.

2 **VII. APPLICATION OF SENTENCING STATUTES**

3 A. Maximum Penalty. The maximum penalty for Felon in Possession of a Firearm
4 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-
5 hundred fifty thousand dollars (\$250,000), or both.

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

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

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

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

20 **VIII. POSITIONS REGARDING SENTENCE**

21 The Government will recommend that the Court sentence the Defendant to a sentence of 77
22 months' imprisonment unless the Defendant commits any act that could result in a loss of the
23 downward adjustment for acceptance of responsibility. The Defendant acknowledges that the Court
24 does not have to follow that recommendation. This Plea Agreement does not require the United States

1 to file any pre- or post-sentence downward departure motion under USSG § 5K1.1 or Fed. R. Crim.
 2 P. 35. Notwithstanding its agreement to recommend a sentence within the Defendant's anticipated
 3 Sentencing Guidelines range, the United States reserves its right to defend any lawfully imposed
 4 sentence on appeal or in any post-conviction litigation.

5 The Defendant will not request a sentence below 77 months of imprisonment, and will not seek
 6 a downward adjustment pursuant to 18 U.S.C. § 3553 or USSG § 4A1.3(b)(1) from any sentence the
 7 Court may impose.

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 Plea Agreement and
3 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
23 that if 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

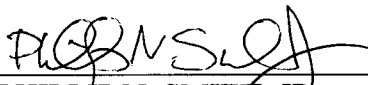
Agreement. The Defendant has also been advised if his conviction is for an offense described in 8 U.S.C. § 1101(a)(43), he will be deported and removed from the United States and will not be allowed to return to the United States at any time in the future. The Defendant desires to plead guilty regardless 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.

DANIEL G. BOGDEN,
United States Attorney

DATE 11-9-16


PHILLIP N. SMITH, JR.
Assistant United States Attorney

DATE 11.9.16


BRENDA WEKSLER, AFD
Counsel for the Defendant

DATE 11-9-16


ROMIE LEMON TURNER
Defendant

1 DANIEL G. BOGDEN
 2 United States Attorney
 3 PHILLIP N. SMITH, JR.
 4 Assistant United States Attorney
 5 333 Las Vegas Blvd. South, Suite 5000
 6 Las Vegas, Nevada 89101
 7 PHONE: (702) 388-6503
 8 FAX: (702) 388-6418
 9 Attorneys for the Plaintiff

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UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

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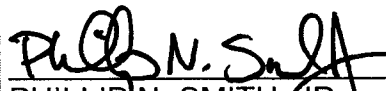
1 interstate commerce and said firearm having been shipped and transported in interstate
2 commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

3 **DATED:** this 9th day of March, 2016.

4 **A TRUE BILL:**

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

9 DANIEL G. BOGDEN
10 United States Attorney

11 
12 PHILLIP N. SMITH, JR.
13 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.

TAJH DION WEATHERSPOON,

Defendant-Appellant.

No. 21-16223

D.C. Nos. 2:20-cv-01133-HDM

2:16-cr-00377-HDM-CWH-1

District of Nevada,
Las Vegas

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

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.



KeyCite Blue Flag – Appeal Notification

Appeal Filed by USA v. TAJH WEATHERSPOON, 9th Cir., July 23, 2021

2021 WL 2092987

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Tajh Dion WEATHERSPOON, Defendant.

Case No. 2:16-cr-00377-HDM-
CWH, Case No. 2:20-cv-01133-HDM

I

Signed 05/24/2021

Attorneys and Law Firms

Elizabeth Olson White, United States Attorneys Office, Reno, NV, Patrick Burns, United States Department of Justice, Tax Division, Washington, DC, Richard (Tony) Anthony Lopez, U.S. Attorney's Office, Las Vegas, NV, for Plaintiff.

ORDER

Howard D. McKibben, UNITED STATES DISTRICT JUDGE

*1 Before the court is defendant Tajh Dion Weatherspoon's motion to vacate pursuant to 28 U.S.C. § 2255 (ECF No. 103). The government has responded (ECF No. 105), and Weatherspoon has replied (ECF No. 106).

I. Factual and Procedural Background

On December 28, 2016, Weatherspoon 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). A superseding indictment later added a second count of felon in possession of a firearm. (ECF No. 35). Weatherspoon went to trial on Count One of the indictment and was found guilty. (ECF No. 63). Following the guilty verdict, Weatherspoon entered a plea of guilty to Count of Two. (ECF No. 67). The court thereafter sentenced Weatherspoon to 120-month concurrent prison terms for each count. (ECF Nos. 80 & 81).

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, Weatherspoon had two prior felony convictions: (1) attempted burglary; and (2) ex-felon in possession of a firearm. When Weatherspoon was charged and convicted 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 Weatherspoon 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, Weatherspoon now moves to vacate his conviction.

II. Standard

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).

III. Analysis

Weatherspoon 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 right to notice of the charges.¹ He alleges that the defective indictment also deprived the court of jurisdiction. Further, Weatherspoon asserts that his plea was not knowing and voluntary due to the absence of the *Rehaif* element and that his trial conviction violated his due process rights because the jury instructions lacked the *Rehaif* element, and the government did not prove, nor did the jury find, the *Rehaif* element was satisfied.

A. Conviction by Guilty Plea

*2 Weatherspoon pleaded guilty to Count Two without the benefit of a plea agreement. The plea was not conditional, and “[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).² Thus, as to Count Two, Weatherspoon’s plea bars his claims of constitutional deprivations that occurred prior to entry of the plea except to the extent the claims allege the court lacked jurisdiction or that his plea was not knowing and voluntary.

As to Weatherspoon’s jurisdictional argument, it 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). The indictment otherwise sufficiently states a cognizable criminal offense: possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

Weatherspoon’s claims that the court lacked jurisdiction and that the indictment was deficient are moreover 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).

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

***3** First, Weatherspoon admitted at his change of plea that he knew it was unlawful for him to possess the firearm and that at the time he possessed the firearm he had been previously convicted of a felony. The court is not persuaded by Weatherspoon’s argument that he never admitted he knew *at the time he possessed the firearm* that it was unlawful for him to do so. Nevertheless, even if he had not made this direct admission, Weatherspoon’s criminal record forecloses any argument that he was unaware of his status as a convicted felon at the time he possessed the firearms in question. Weatherspoon committed the offenses in this case after receiving a 12- to 36-month sentence for attempted burglary and a 12- to 32-month sentence for ex-felon in possession of a firearm. (PSR ¶¶ 43 & 52). As such, there is no reasonable possibility Weatherspoon did not know he had been convicted of a crime punishable by more than a year in prison. He cannot therefore show that the results of the proceedings would have been any different – *i.e.*, that he would not have entered a plea of guilty to Count Two and would not have been convicted under Count One -- had the indictment contained the *Rehaif* element.

Weatherspoon 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 Weatherspoon complains of did not deprive the court of jurisdiction. Weatherspoon additionally argues that he was prejudiced because the defect deprived him of effective assistance of counsel. For the reasons already discussed, he cannot show a reasonable probability of a different outcome had the *Rehaif* element been included in the indictment, and thus he has not established prejudice on this basis.

Weatherspoon 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); *United States v. Brown*, 2021 WL 1955859, at *6 (11th Cir. May 17, 2021) (unpublished disposition).⁴ This court agrees with the well-reasoned opinions of these courts and concludes that omission of the *Rehaif* element from the indictment does not fall within the limited class of errors the Supreme Court has found to be structural, at least where the error has not been timely challenged.⁵

*4 Weatherspoon's claim that his guilty plea violated his due process rights because it was not knowing and voluntary is likewise without merit.⁶ Weatherspoon asserts that his plea was not knowing and voluntary because neither he, his counsel nor the court understood all the elements of the offense to which he was pleading. A claim of a due process violation is subject to the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *See United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003); *see also United States v. Session*, 2020 WL 6381353, at *2 (N.D. Cal. Oct. 30, 2020). Thus, even assuming a defendant establishes a due process violation, he is entitled to relief only if the error had a “substantial and injurious effect” on the proceedings. *Brecht*, 507 U.S. at 623. In this context, the question is whether there is a reasonable probability that Weatherspoon would have declined to enter a guilty plea had he been aware the government was required to prove the *Rehaif* element. *See United States v. Flynn*, 316 Fed. App'x 658, 659–60 (9th Cir. 2009) (unpublished disposition). *Cf. United States v. Espinoza*, 2020 WL 2844542, at *1 (9th Cir. 2020). For the reasons identified above with respect to the showing of prejudice, the court concludes Weatherspoon cannot show that he would not have entered a plea had he been aware of the *Rehaif* element.

Weatherspoon asserts that this error was structural and that a showing of prejudice is not required. The court does not agree that such an error, at least in the context of this case, amounts to structural error, and therefore finds Weatherspoon's argument in this respect to be without merit. *See e.g., Ibarra v. United States*, 2020 WL 7385713, at *6 (W.D. Wash. Dec. 16, 2020).

B. Conviction by Jury Verdict

Weatherspoon argues that his conviction under Count One violates his due process because the government did not prove, and the court did not instruct the jury on or require the jury to find, the *Rehaif* element. This claim, like Weatherspoon's attack on his guilty plea, is subject to the harmless error standard and thus, Weatherspoon is entitled to habeas relief only if the error has a “substantial and injurious effect or influence in determining the jury's verdict.” *Brecht*, 507 U.S. at 627, 637; *see also United States v. Rodrigues*, 678 F.3d 693, 695 (9th Cir. 2012) (instructional error subject to the *Brecht* harmless error standard). For the reasons set forth above, Weatherspoon has not made this showing. Not only did Weatherspoon admit to this court that he was aware

of his felon status, but he had been twice convicted and sentenced to prison terms exceeding 12 months. Thus, there is no reasonable probability the outcome of the trial would have been different had the jury been instructed on, and the government required to prove, the *Rehaif* element.

Defendant asserts omission of the element from the jury instructions is structural error, relying on *United States v. Becerra*, 939 F.3d 995, 1006 (9th Cir. 2019). Weatherspoon's reliance on *Becerra* is unavailing. In *Becerra*, the Ninth Circuit held that the complete failure to orally instruct the jury amounted to structural error. That is not the error alleged here. In fact, *Becerra* explicitly recognized that “[o]mission of a single element of the charged offense from the jury instructions is error, but not structural error.” *Id.* at 1003. *Cf. United States v. Gear*, 2021 WL 163090 (9th Cir. Jan. 19, 2021) (reviewing *Rehaif* error in jury instructions for plain error). The error is not structural, and Weatherspoon's failure to demonstrate prejudice defeats this due process claim.

Weatherspoon also asserts that the prosecutor's statement in closing that the jury was not required to find Weatherspoon knew of his felon status violated his rights. However, like the jury instruction error, prosecutor misconduct is also subject to the harmless error standard. *Darden v. Wainwright*, 477 U.S. 168, 181-83 (1986). For the reasons already set forth, Weatherspoon cannot demonstrate a substantial and injurious effect on the jury's verdict resulting from the prosecutor's statement.

C. The *Rehaif* Element

*5 Finally, Weatherspoon 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 Weatherspoon admitted to the court that he knew he was barred from possessing a firearm and his criminal history amply supports an inference that he was aware of his felon status, Weatherspoon'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*”).

IV. Conclusion

Accordingly, because the claims raised in Weatherspoon'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. 103) is hereby DENIED.

IT IS FURTHER ORDERED that Weatherspoon 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 2092987

Footnotes

- 1 Although Weatherspoon's motion also alleges violation of his Sixth Amendment right to effective assistance of counsel, Weatherspoon clarifies in his reply that he alleges deprivation of counsel only to show the prejudice that resulted from the defect in the indictment and that it is not a standalone claim.
- 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 Weatherspoon does not argue actual innocence.

- 4 The Fourth Circuit has reached the opposite conclusion. *United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020), *cert. granted United States v. Gary*, 141 S. Ct. 974 (2021).
- 5 While there is 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.”). Weatherspoon’s claim here was not timely raised.
- 6 Weatherspoon correctly argues that the government’s procedural default argument was not extended to this claim and is therefore waived.

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

TAJH DION WEATHERSPOON

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16-cr-00377-HDM-CWH

USM Number: 53826-048

Craig Mueller, Esq.
 Defendant's Attorney
THE DEFENDANT:**X** pleaded guilty to Count Two of Superseding Criminal Indictment filed 3/15/2017.☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.**X** was found guilty on Count One of Superseding Criminal Indictment filed 3/15/2017 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	6/15/2016	One
18, U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	12/22/2016	Two

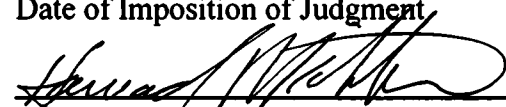
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(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 5, 2017

Date of Imposition of Judgment


 Signature of Judge

HOWARD D. McKIBBEN, Senior U.S. District Judge
 Name and Title of Judge
12/8/17
Date

App. N-7

DEFENDANT: TAJH DION WEATHERSPOON
CASE NUMBER: 2:16-cr-00377-HDM-CWH

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **One hundred twenty (120) months as to Count 1 and One hundred twenty (120) months as to Count 2, each count to run concurrently to the other.**

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

☒ 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: TAJH DION WEATHERSPOON
CASE NUMBER: 2:16-cr-00377-HDM-CWH

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **Three (3) years as to Count One and Three (3) years as to Count 2, each count to run concurrently to the other.**

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, 3663A, or any other statute authorizing 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: TAJH DION WEATHERSPOON
CASE NUMBER: 2:16-cr-00377-HDM-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 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: TAJH DION WEATHERSPOON
CASE NUMBER: 2:16-cr-00377-HDM-CWH

SPECIAL CONDITIONS OF SUPERVISION

1. **No Gang Affiliation** - You must not communicate, or otherwise interact, with any known member of the Gerson Park Kingsmen (GPK) gang, without first obtaining the permission of the probation officer.
2. **Educational Program** - You must participate in an educational services program and follow the rules and regulations of that program. Such programs may include high school equivalency preparation, English as a Second Language classes, and other classes designed to improve your proficiency in skills such as reading, writing, mathematics, or computer use. You must pay the costs of the program.
3. **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: TAJH DION WEATHERSPOON
CASE NUMBER: 2:16-cr-00377-HDM-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	\$200.00	N/A	None	N/A
	Due and payable immediately based upon ability to pay.			

- ☐ 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. 2:16-cr-00377-HDM-CWH 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: TAJH DION WEATHERSPOON
CASE NUMBER: 2:16-cr-00377-HDM-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 \$200.00 due immediately based upon the defendant's 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.

UNITED STATES OF AMERICA, : No. 2-16-cr-0377-HDM-CWH
 :
 :
 : Plaintiff, :
 :
 : May 16, 2017
 :
 : -vs- :
 :
 : United States District Court
 : TAJH DION WEATHERSPOON, : 333 Las Vegas Boulevard
 :
 : Las Vegas, Nevada
 :
 : Defendant. :
 :
 :

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

FOR THE GOVERNMENT: Anthony Lopez
Patrick Burns
Assistant United States Attorney
Las Vegas, Nevada

FOR THE DEFENDANT: Craig Mueller
Attorney at Law
Las Vegas, Nevada

Proceedings recorded by mechanical stenography produced by
computer-aided transcript

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

12:00:18 1 Las Vegas, Nevada, Tuesday, May 16, 2017, 1:45 p.m.

12:00:42 2 ---OoO---

12:00:46 3

12:00:56 4 THE COURT: All right. Let's go ahead and call
12:40:41 5 the case.

12:40:42 6 THE CLERK: Yes, Your Honor.

12:40:43 7 This is the date and time set for a change of plea
12:40:44 8 as to Count Two, in case number 2:16-cv-377-HDM-CWH, United
12:40:52 9 States of America versus Tajh Dion Weatherspoon.

12:40:55 10 Defendant is present in custody with counsel, Craig
12:40:57 11 Mueller.

12:40:57 12 Appearing on behalf of the government is Anthony
12:41:00 13 Lopez and Patrick Burns.

12:41:02 14 THE COURT: All right. Thank you. You may be
12:41:04 15 seated.

12:41:04 16 I've been advised that the defendant wishes to
12:41:09 17 change his plea, is that correct?

12:41:11 18 MR. MUELLER: That's --

12:41:12 19 DEFENDANT WEATHERSPOON: Yes, sir.

12:41:13 20 MR. MUELLER: That's correct, Your Honor.

12:41:14 21 THE COURT: All right. I'm going to go over
12:41:17 22 some things with you. If you have any questions, just stop
12:41:20 23 me, and, Mr. Weatherspoon, and I'll try to explain it more
12:41:25 24 fully. You can always discuss this with your counsel as we
12:41:28 25 go along. All right?

12:41:29 1 DEFENDANT WEATHERSPOON: Yes.

12:41:29 2 THE COURT: You received a copy of the
12:41:30 3 Indictment, is that right?

12:41:31 4 DEFENDANT WEATHERSPOON: Yes, sir.

12:41:32 5 THE COURT: And your level of education --

12:41:35 6 THE CLERK: Do you want me to swear the
12:41:38 7 defendant?

12:41:38 8 THE COURT: Oh. He hasn't been sworn. Let's go
12:41:41 9 ahead and swear the defendant.

12:41:43 10 (Defendant sworn.)

12:41:54 11 THE COURT: All right. Thank you.

12:41:55 12 What is your level of education?

12:41:56 13 DEFENDANT WEATHERSPOON: 11th grade.

12:41:58 14 THE COURT: And do you read, write, and
12:41:59 15 understand the English language?

12:42:01 16 DEFENDANT WEATHERSPOON: Yes, sir.

12:42:02 17 THE COURT: Okay. If there's anything I say or
12:42:04 18 do that you don't understand, please stop me and I'll try to
12:42:07 19 explain it to you.

12:42:08 20 Do you waive the reading of the Indictment or do you
12:42:13 21 want us to read Count Two of the Indictment to you?

12:42:16 22 MR. MUELLER: We'll waive it, judge. I just
12:42:18 23 went through it.

12:42:19 24 THE COURT: Okay.

12:42:20 25 You're charged in that Count with felon in

12:42:22 1 possession of a firearm, which is a violation of Title 18,
12:42:26 2 U.S. Code Section 922(g) (1) and 924(a) (2).

12:42:29 3 Do you understand that?

12:42:30 4 DEFENDANT WEATHERSPOON: Yes, sir.

12:42:31 5 THE COURT: And we were set to go with a jury
12:42:33 6 here this afternoon on this trial.

12:42:35 7 Do you understand that?

12:42:35 8 DEFENDANT WEATHERSPOON: Yes, sir.

12:42:36 9 THE COURT: All right. And have you freely and
12:42:38 10 voluntarily decided that you want to plead, change your plea
12:42:42 11 in this case?

12:42:43 12 DEFENDANT WEATHERSPOON: Yes, sir.

12:42:43 13 THE COURT: Have you been forced by Mr. Mueller
12:42:45 14 to make this decision?

12:42:47 15 DEFENDANT WEATHERSPOON: No, sir.

12:42:47 16 THE COURT: All right. He has made
12:42:49 17 recommendations to you, but the final decision on whether
12:42:52 18 you enter a plea -- just as the final decision on whether you
12:42:56 19 testify -- is yours.

12:42:56 20 Do you understand that?

12:42:57 21 DEFENDANT WEATHERSPOON: Yes, sir.

12:42:57 22 THE COURT: Okay. Have you been promised
12:42:59 23 anything by Mr. Mueller in connection with this matter?

12:43:01 24 DEFENDANT WEATHERSPOON: No, sir.

12:43:02 25 THE COURT: All right.

12:43:03 1 Now, the Sentencing Guidelines are a guide to the
12:43:06 2 Court. Under the statute, the penalty for this offense is not
12:43:10 3 more than 10 years imprisonment, and a fine, \$250,000, or both
12:43:16 4 fine and up to a \$250,000, or both fine and imprisonment.

12:43:21 5 Do you understand that?

12:43:21 6 DEFENDANT WEATHERSPOON: Yes.

12:43:22 7 THE COURT: And you have now been found guilty
12:43:25 8 by the jury. I won't impose sentence and judgment until the
12:43:29 9 date that we gave you earlier. I think it's in September. In
12:43:35 10 all probability, if you enter a plea today, I'll set this case
12:43:38 11 for sentencing on the same date.

12:43:40 12 The Court does have the authority to impose the
12:43:44 13 sentence in this case consecutive to the sentence in the other
12:43:48 14 case, or I could run it partially consecutive or partially
12:43:52 15 concurrent, or I could just run it concurrent.

12:43:55 16 Do you understand that?

12:43:55 17 DEFENDANT WEATHERSPOON: Yes, sir.

12:43:56 18 THE COURT: That means I could run the sentences
12:43:58 19 one to the other, or I would run them one-half or the other.

12:44:04 20 Do you understand that?

12:44:04 21 DEFENDANT WEATHERSPOON: Yes, sir.

12:44:04 22 THE COURT: And again, that's without the
12:44:10 23 possibility of parole.

12:44:11 24 Do you understand that?

12:44:12 25 DEFENDANT WEATHERSPOON: Yes, sir.

12:44:13 1 THE COURT: Parole has been abolished in the
12:44:14 2 federal system and you clearly understand that?

12:44:17 3 DEFENDANT WEATHERSPOON: Yes, sir.

12:44:17 4 THE COURT: Okay. Now, the guidelines are a
12:44:21 5 guide to the Court. I'm not bound by them. But, I certainly
12:44:23 6 will consider the guidelines in imposing a sentence.

12:44:26 7 And I'll consider, you know, the base offense level
12:44:29 8 and what adjustments there would be in that, and what prior
12:44:33 9 offenses you may have. As I've indicated, you cannot be --
12:44:39 10 have a sentenced shortened by parole because that has been
12:44:42 11 abolished.

12:44:43 12 There would be a period of supervised release
12:44:45 13 following any term of imprisonment. And under the appropriate
12:44:49 14 guidelines and statutes, that would be at least one year, up
12:44:53 15 to three years, of supervised release.

12:44:56 16 Do you understand that?

12:44:56 17 DEFENDANT WEATHERSPOON: Yes, sir.

12:44:57 18 THE COURT: And if you violated supervised
12:44:59 19 release, then you could be ordered to spend up to the maximum
12:45:04 20 time under the statute in prison for that violation.

12:45:07 21 Do you understand that?

12:45:07 22 DEFENDANT WEATHERSPOON: Yes, sir.

12:45:08 23 THE COURT: Okay. I don't think restitution is
12:45:14 24 an issue in this case.

12:45:15 25 There would be the mandatory special assessment of

12:45:18 1 \$100 imposed at the time of sentencing based on your ability
12:45:22 2 to pay.

12:45:22 3 Do you understand that?

12:45:23 4 DEFENDANT WEATHERSPOON: Yes, sir.

12:45:23 5 THE COURT: If we went to trial, the government
12:45:25 6 would have to prove the following things beyond a reasonable
12:45:25 7 doubt:

12:45:27 8 First, that you knowingly possessed a firearm;

12:45:31 9 Second, that it been shipped or transported from
12:45:34 10 one state to another; and

12:45:36 11 Third, at the time you possessed the firearm, you
12:45:39 12 had been convicted of a crime punishable by imprisonment
12:45:43 13 exceeding one year.

12:45:44 14 Do you understand each of those things?

12:45:45 15 DEFENDANT WEATHERSPOON: Yes, sir.

12:45:47 16 THE COURT: All right. Do we have some idea,
12:45:54 17 under the guidelines, what the base offense level would be for
12:45:56 18 this offense? And any adjustments? Just a rough guide. The
12:46:03 19 final decision will be made by the Court.

12:46:05 20 Do you understand that?

12:46:06 21 DEFENDANT WEATHERSPOON: Yes, sir.

12:46:07 22 THE COURT: But I'm going to give you a rough
12:46:09 23 idea of what might be the calculations under the guidelines
12:46:13 24 for this offense.

12:46:17 25 MR. LOPEZ: Yes, Your Honor.

12:46:17 1 Because of the -- let's see, the -- well, the
12:46:27 2 firearm that was possessed by the defendant probably won't be
12:46:32 3 an factual dispute over whether there's an extended magazine
12:46:35 4 associated with that second firearm. With the extended
12:46:40 5 magazine, the base offense level would be 20. And then the
12:46:44 6 fact that the firearm was stolen, would put the base offense
12:46:47 7 level at 22, before any acceptance of responsibility.

12:46:50 8 THE COURT: Okay.

12:46:51 9 Then if there is a three-level reduction for
12:46:54 10 acceptance of responsibility, that would bring me down to a
12:47:02 11 17. And under the guidelines, at a 17 -- and let's say you
12:47:08 12 fell at the highest level of the criminal history, I don't
12:47:12 13 know that you would, that would be 51 to 63 months.

12:47:15 14 Do you understand that?

12:47:16 15 MR. LOPEZ: Well, Your Honor, before -- I think
12:47:18 16 with the base offense level 22 --

12:47:20 17 THE COURT: I'm sorry. It would be 19.

12:47:22 18 MR. LOPEZ: 19. And the government does not
12:47:24 19 intend to move for the third point on the second trial because
12:47:27 20 we got so close to trial.

12:47:29 21 THE COURT: Okay.

12:47:29 22 But if you did get the three points, at a 19, it
12:47:32 23 would be 63 to 78 months. If you do not get the three points
12:47:37 24 and it's reduced down to 20, then it would be 70 to 87 months.
12:47:44 25 Again, without parole.

12:47:45 1 Do you understand that?

12:47:47 2 DEFENDANT WEATHERSPOON: Yes.

12:47:48 3 THE COURT: Okay. And that is if you fall at
12:47:50 4 the highest end of the guideline range -- and I have no way of
12:47:53 5 knowing that criminal history until I receive that from the
12:47:57 6 Department.

12:47:57 7 Do you understand that?

12:47:58 8 DEFENDANT WEATHERSPOON: Yes, sir.

12:47:58 9 THE COURT: And again, it may be that you will
12:48:01 10 fall somewhere either slightly above or slightly below 22 for
12:48:06 11 the adjusted offense level. Again, we're not definite on
12:48:11 12 that.

12:48:11 13 Do you understand that?

12:48:11 14 DEFENDANT WEATHERSPOON: Yes sir.

12:48:12 15 THE COURT: But, in any event, whatever it is,
12:48:15 16 you won't be able to withdraw your plea until later on.

12:48:18 17 Do you understand that?

12:48:18 18 DEFENDANT WEATHERSPOON: Yes, sir.

12:48:19 19 THE COURT: And that's one thing for you to
12:48:21 20 understand.

12:48:21 21 I have a jury waiting here right now and I'm fully
12:48:24 22 prepared and we all have the time to go before that jury right
12:48:28 23 now and have that jury trial. But if I take a guilty plea
12:48:31 24 today, it is very unlikely that I'll let you withdraw it later
12:48:35 25 on.

12:48:36 1 Do you understand that?

12:48:36 2 DEFENDANT WEATHERSPOON: Yes, sir.

12:48:38 3 THE COURT: Okay.

12:48:41 4 So are there other things, counsel, that we should
12:48:48 5 go over here before I ask for a factual recitation and then
12:48:53 6 take his plea?

12:48:54 7 MR. LOPEZ: Your Honor, if you could notify the
12:49:00 8 defendant of his appellate rights.

12:49:02 9 THE COURT: Yes. I'll do that in a second.
12:49:04 10 Anything else?

12:49:05 11 MR. LOPEZ: No.

12:49:12 12 THE COURT: There are not mandatory minimum
12:49:14 13 sentences, are there? That's basically what I'm asking.

12:49:17 14 MR. LOPEZ: That's right. There are no
12:49:19 15 mandatory minimum sentence.

12:49:21 16 THE COURT: This is strictly a guideline
12:49:22 17 sentence, is that correct?

12:49:23 18 MR. LOPEZ: Yes.

12:49:24 19 THE COURT: All right. And since this plea is
12:49:37 20 straightup to the Superseding Indictment, you are reserving
12:49:42 21 your right in connection with legal issues in this case, and
12:49:45 22 you have the right to take an appeal. You have to appeal
12:49:49 23 within that -- it's changed, but I think it's 14 days from the
12:49:56 24 date that I would impose judgment and sentence.

12:49:58 25 Do you understand that?

12:50:00 1 DEFENDANT WEATHERSPOON: Yes.

12:50:00 2 THE COURT: All right. Do you have any
12:50:02 3 questions about the nature of the offense or the possible
12:50:04 4 penalty?

12:50:08 5 DEFENDANT WEATHERSPOON: No, sir.

12:50:09 6 THE COURT: Now, you have the right to continue
12:50:12 7 to plead not guilty and have a speedy and public jury trial.
12:50:16 8 Do you understand that?

12:50:17 9 DEFENDANT WEATHERSPOON: Yes.

12:50:17 10 THE COURT: You have the right to confront the
12:50:19 11 witnesses called against you and to cross-examine them.
12:50:22 12 Do you understand that?

12:50:22 13 DEFENDANT WEATHERSPOON: Yes.

12:50:23 14 THE COURT: And you have what we call the
12:50:25 15 privilege against self-incrimination. You can remain silent
12:50:28 16 at trial and that would not be held against you.

12:50:31 17 You're not required to call any witnesses. The
12:50:34 18 presumption of innocence would apply throughout the
12:50:36 19 proceedings. You would waive that if you plead guilty.

12:50:39 20 Do you understand that?

12:50:39 21 DEFENDANT WEATHERSPOON: Yes.

12:50:40 22 THE COURT: In addition, you would have the
12:50:42 23 right to waive your privilege against self-incrimination,
12:50:47 24 give testimony on your own behalf at trial, and to subpoena
12:50:50 25 witnesses to appear on your behalf.

12:50:52 1 Do you understand that?

12:50:52 2 DEFENDANT WEATHERSPOON: Yes.

12:50:52 3 THE COURT: And you will waive all of these
12:50:58 4 important constitutional rights if you enter a plea of guilty
12:51:01 5 here today.

12:51:02 6 Do you understand that?

12:51:02 7 DEFENDANT WEATHERSPOON: Yes.

12:51:03 8 THE COURT: Okay. Do you have any questions now
12:51:05 9 of anything I've gone over.

12:51:07 10 DEFENDANT WEATHERSPOON: No, sir.

12:51:08 11 THE COURT: Okay. To the Indictment, Count Two,
12:51:10 12 charging you with being a felon in possession of a firearm,
12:51:13 13 violation of Title 18 U.S. Code, Section 922(g)(1) and
12:51:18 14 924(a)(2), what is your plea; are you guilty or not guilty.

12:51:21 15 DEFENDANT WEATHERSPOON: Guilty.

12:51:23 16 THE COURT: You have entered that plea freely
12:51:25 17 and voluntarily?

12:51:26 18 DEFENDANT WEATHERSPOON: Yes.

12:51:27 19 THE COURT: Has anyone threatened you to have
12:51:29 20 you plead guilty?

12:51:29 21 DEFENDANT WEATHERSPOON: No, sir.

12:51:30 22 THE COURT: Has anyone, including Mr. Mueller,
12:51:32 23 promised you anything to have you plead guilty?

12:51:35 24 DEFENDANT WEATHERSPOON: No, sir.

12:51:36 25 THE COURT: Do you understand now that you are

12:51:37 1 waiving the right to continue to plead not guilty and have a
12:51:40 2 speedy and public jury trial.

12:51:41 3 Do you understand that?

12:51:42 4 DEFENDANT WEATHERSPOON: Yes, sir.

12:51:42 5 THE COURT: You're waiving the right to confront
12:51:45 6 the witnesses called against you and to cross-examine those
12:51:48 7 witnesses.

12:51:48 8 Do you understand that?

12:51:49 9 DEFENDANT WEATHERSPOON: Yes, sir.

12:51:49 10 THE COURT: And you're waiving the privilege
12:51:51 11 against self-incrimination.

12:51:53 12 Do you understand that?

12:51:53 13 DEFENDANT WEATHERSPOON: Yes, sir.

12:51:55 14 THE COURT: And you're waiving the right to give
12:51:55 15 testimony on your own behalf at trial and subpoena witnesses
12:51:59 16 to compel them to appear on your behalf.

12:52:02 17 Do you understand that?

12:52:03 18 DEFENDANT WEATHERSPOON: Yes, sir.

12:52:04 19 THE COURT: I don't think any motions have been
12:52:13 20 filed have they in connection with the Count two.

12:52:16 21 THE CLERK: Just to sever.

12:52:19 22 THE COURT: Other than that, and that was
12:52:20 23 granted.

12:52:21 24 MR. MUELLER: Yes, judge.

12:52:23 25 THE COURT: But you won't be able to raise any

12:52:25 1 motions in connection to Count two at any later date when I
12:52:29 2 take your plea now.

12:52:30 3 Do you understand that?

12:52:30 4 DEFENDANT WEATHERSPOON: Yes.

12:52:31 5 THE COURT: You're certainly entitled to, in
12:52:36 6 connection with the first trial that we just had, you've
12:52:39 7 reserved your rights there because that's not tied into this
12:52:42 8 plea at all. And since this is a straightup plea, you're not
12:52:49 9 receiving any advantages from the plea, other than the fact
12:52:54 10 that you get a two-level reduction for the plea.

12:52:56 11 Do you understand that.

12:52:58 12 DEFENDANT WEATHERSPOON: Yes.

12:52:58 13 THE COURT: Okay. And you also reserve any
12:53:02 14 rights that you may have otherwise in this case, and the other
12:53:05 15 case, but you would have those rights in the other case
12:53:08 16 anyway.

12:53:08 17 Do you understand that?

12:53:09 18 DEFENDANT WEATHERSPOON: Yes.

12:53:10 19 THE COURT: Okay. Are you certain then, in
12:53:13 20 your own mind, that you now want to plead guilty to this
12:53:16 21 charge?

12:53:17 22 DEFENDANT WEATHERSPOON: Yes.

12:53:17 23 THE COURT: Okay.

12:53:18 24 Now, can you just tell me, in your own words, what
12:53:21 25 you did that causes you to plead guilty to this charge? Kind

12:53:27 1 of give me the date and what you had on that date?

12:53:30 2 DEFENDANT WEATHERSPOON: December 23rd, 2016, I
12:53:40 3 was caught in possession of a firearm.

12:53:42 4 THE COURT: Speak up a little bit.

12:53:44 5 DEFENDANT WEATHERSPOON: I said December 23rd,
12:53:47 6 2016, I was in possession of a firearm.

12:53:49 7 THE COURT: Did you know that it was a firearm?

12:53:51 8 DEFENDANT WEATHERSPOON: Yes.

12:53:55 9 THE COURT: All right. And did you know that
12:53:58 10 it was unlawful for you to have that firearm, having been
12:54:02 11 previously convicted of a felony?

12:54:04 12 DEFENDANT WEATHERSPOON: Yes, sir.

12:54:05 13 THE COURT: All right.

12:54:06 14 And do you acknowledge that the government could
12:54:09 15 prove in this case that that firearm was shipped from one
12:54:13 16 state to another?

12:54:14 17 DEFENDANT WEATHERSPOON: Yes.

12:54:14 18 THE COURT: And at the time you possessed the
12:54:17 19 firearm, did you, in fact, have a prior felony conviction?

12:54:21 20 DEFENDANT WEATHERSPOON: Yes.

12:54:21 21 THE COURT: Okay. All right. And you did
12:54:24 22 possess the firearm physically, is that correct?

12:54:27 23 DEFENDANT WEATHERSPOON: (No response.)

12:54:30 24 MR. MUELLER: It would be constructive
12:54:31 25 possession, Your Honor. It was found in car that he had the

12:54:34 1 keys to.

12:54:35 2 THE COURT: Okay. But you had control to it, is
12:54:37 3 that correct? You had access to it?

12:54:39 4 DEFENDANT WEATHERSPOON: Yes, because I had the
12:54:41 5 keys.

12:54:41 6 THE COURT: And you knew that it was there, is
12:54:43 7 that correct? In other words, you knowingly possessed it
12:54:48 8 constructively, is that correct?

12:54:50 9 DEFENDANT WEATHERSPOON: Yes.

12:54:50 10 THE COURT: Okay.

12:54:52 11 Now, again, you understand I'm going to accept your
12:54:55 12 plea and I probably won't let you withdraw it later on.

12:54:58 13 Do you understand that?

12:54:59 14 DEFENDANT WEATHERSPOON: Yes.

12:54:59 15 THE COURT: And you're sure, then, you want to
12:55:01 16 plead guilty?

12:55:03 17 DEFENDANT WEATHERSPOON: Yes.

12:55:04 18 THE COURT: I'll accept the defendant's plea
12:55:06 19 of guilty as having been entered freely and voluntarily, with
12:55:09 20 a full understanding of his rights.

12:55:11 21 The matter will be continued for the preparation of
12:55:15 22 a Presentence Report and I'll continue this for imposition of
12:55:18 23 judgment and sentence until the same date that I had continued
12:55:21 24 the other case.

12:55:22 25 THE CLERK: September 19th, 2017, at 9:15.

12:55:27 1 THE COURT: Yes, counsel.

12:55:28 2 MR. LOPEZ: Your Honor, we would ask the Court
12:55:30 3 to canvass the defendant on two additional facts.

12:55:32 4 THE COURT: That's fine.

12:55:32 5 MR. LOPEZ: First, that this possession occurred
12:55:34 6 within the State and Federal District of Nevada.

12:55:37 7 THE COURT: Was that in Las Vegas, Nevada? Did
12:55:40 8 you possess the gun here in Las Vegas, Nevada?

12:55:42 9 DEFENDANT WEATHERSPOON: Yes.

12:55:42 10 THE COURT: Yes.

12:55:43 11 MR. LOPEZ: And then the specific gun bore
12:55:46 12 serial number XUC-279.

12:55:49 13 THE COURT: Do you believe the government can
12:55:50 14 show that the gun had that serial number?

12:55:53 15 DEFENDANT WEATHERSPOON: Yes.

12:55:54 16 THE COURT: All right.

12:55:54 17 THE CLERK: And judge, the defendant, in his
12:55:57 18 statement indicated the 23rd. The Indictment is December 22,
12:56:00 19 that he possessed it. He said December 23rd.

12:56:03 20 THE COURT: Okay. The Indictment says
12:56:05 21 December 22nd. Do you believe that that's the date?

12:56:08 22 DEFENDANT WEATHERSPOON: Yeah --

12:56:09 23 MR. MUELLER: The police report says
12:56:11 24 December 22nd at 23:27 hours, so it was so late --

12:56:15 25 THE COURT: You accept that as the date?

12:56:17 1 DEFENDANT WEATHERSPOON: Yes.

12:56:17 2 THE COURT: Is that correct?

12:56:19 3 I will accept the plea as having been entered freely
12:56:22 4 and voluntarily, with a full understanding of your rights and
12:56:25 5 we'll set it for disposition. We'll make --

12:56:30 6 THE CLERK: Vacate the jury?

12:56:31 7 THE COURT: Yes. And we'll advise them of that
12:56:33 8 downstairs..

12:56:35 9 Hang on just a second. I'm going to go down there
12:56:38 10 and thank them.

12:56:39 11 All right. I think that's all I have. Thank you
12:56:39 12 very much.

12:56:42 13 Anything else to go over?

12:56:43 14 MR. LOPEZ: You already mentioned the defendant
12:56:45 15 would be remanded at this point?

12:56:47 16 THE COURT: Yes. The defendant will remain in
12:56:48 17 custody until sentencing, or until further order of the
12:56:52 18 Court.

12:56:52 19 How many prior felonies are in this --

12:56:55 20 MR. MUELLER: As far as I know, just the
12:56:57 21 one.

12:56:57 22 THE COURT: I thought there was two.

12:56:58 23 MR. LOPEZ: There's two.

12:56:59 24 MR. BURNS: Two.

12:57:00 25 THE COURT: I believe there are two. That's

12:57:02 1 what I read someplace.

12:57:04 2 Okay. Thank you.

3

4 (Court Adjourned.)

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11 I certify that the foregoing is a correct
12 transcript from the record of proceedings
in the above-entitled matter.

13 \s\ Kathryn M. French

February 19, 2018

14

15 KATHRYN M. FRENCH, RPR, CCR

DATE

16 Official Reporter

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21

22

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24

25

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MAY 16 2017	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY:	DEPUTY

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TAJH DION WEATHERSPOON,

Defendant.

2:16-cr-377-HDM-CWH

**MEMORANDUM IN SUPPORT OF
GUILTY PLEA WITHOUT
PLEA AGREEMENT**

There is no plea agreement in this case. Government counsel has been notified that the Defendant intends to change his plea of not guilty to guilty without the benefit of a plea agreement. The Defendant has indicated that he wants to plead guilty. The Defendant is charged by a Superseding Criminal Indictment with a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon in Possession of a Firearm (Count Two). There is no forfeiture allegation.

**I.
PENALTY**

A. Statutory

18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon in Possession of a Firearm - provides for a maximum penalty of imprisonment of not more than ten (10) years, and pursuant to 18 U.S.C. § 3571(b)(3), a fine of not more than \$250,000, or both fine and imprisonment. **Additionally, the**

1 **Court may order the sentence imposed on Count Two to be served consecutively to the sentence**
2 **imposed on Count One, for a statutory maximum penalty of twenty (20) years of imprisonment.**

3 **B. Advisory Sentencing Guidelines**

4 The sentence imposed will be under 18 U.S.C. § 3553(a). In determining the sentence the
5 Court must consider the United States Sentencing Guidelines. However, those Guidelines are only
6 advisory and are just one factor for the Court to consider in arriving at a fair, just and reasonable
7 sentence. The length and terms of that sentence depend upon the nature and number of previous
8 criminal convictions which are used to determine the advisory offense level and criminal history
9 category under the Sentencing Guidelines. After the Court makes this decision, it then may impose a
10 sentence within the applicable Guideline range or any sentence the Court deems reasonable and
11 sufficient but not greater than necessary to comply with the purposes of § 3553(a).

12 A federal prison sentence can no longer be shortened by early release on parole, because parole
13 has been abolished. However, under U.S.S.G. § 5D1.1, a term of Supervised Release following any
14 period of imprisonment is required when the term of imprisonment is more than a year. Under 18
15 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
16 of Supervised Release of at least one (1) year but not more than three (3) years must be ordered per
17 count.

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

23 Both 18 U.S.C. § 3663 and U.S.S.G. § 5E1.1 permit restitution as deemed appropriate by the
24 Court.

1 A mandatory special assessment under 18 U.S.C. § 3013 and U.S.S.G. § 5E1.3 of \$100.00 per
2 count must be imposed for the offense.

3 **II.**
4 **ELEMENTS OF THE OFFENSE**

5 Before a verdict of guilty may be reached, the Government would have to prove the essential
6 elements of the offense of Felon in Possession of a Firearm beyond a reasonable doubt as follows:

7 First: the Defendant knowingly possessed a firearm,

8 Second: the firearm had been shipped or transported from one state to another; and

9 Third: at the time the Defendant possessed the firearm, the Defendant had been
10 convicted of a crime punishable by imprisonment for a term exceeding one
11 year.

12 See NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, Instruction No. 8.65 (2010).

13 **III.**
14 **FACTS TO SUPPORT A PLEA OF GUILTY**

15 The Government submits the following facts to support the Defendant's guilty plea:

16 On December 22, 2016, the Defendant knowingly possessed a Glock 21 handgun bearing serial
17 number XUC279. At the time the Defendant was in possession of the aforementioned firearm, he had
18 been previously convicted of a crime punishable by a term of imprisonment exceeding one year. The
19 firearm had also been shipped and transported in interstate commerce. All of the foregoing occurred

20 . . .

21 . . .

22 . . .

23 . . .

24 . . .

1 in the State and Federal District of Nevada.

2 DATED this 16th day of May, 2017.

3 Respectfully submitted,

4 STEVEN W. MYHRE
Acting United States Attorney

5 

6 RICHARD ANTHONY LOPEZ
7 PATRICK BURNS
8 Assistant United States Attorneys

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,) 2:16-cr-00377-HDM-CWH
)
Plaintiff,)
)
v.) VERDICT
)
TAJH DION WEATHERSPOON,)
)
Defendant.)

We, the jury in the above entitled case, upon our oaths, do
say:

That we find the defendant, **TAJH DION WEATHERSPOON**,
GUILTY of the offense charged in Count One in the
(Not Guilty-Guilty)
Superseding Indictment herein.

DATED this 16th day of May, 2017.

/s/
FOREPERSON

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. 2-16-cr-0377-HDM-CWH
 6 :
 7 Plaintiff, :
 8 : May 16, 2017
 9 -vs- :
 10 : United States District Court
 11 TAJH DION WEATHERSPOON, : 333 Las Vegas Boulevard
 12 : Las Vegas, Nevada
 13 Defendant. :
 14 : **JURY TRIAL DAY 2**
 15 :
 16 _____

17
 18 **TRANSCRIPT of JURY TRIAL PROCEEDINGS**

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

20 FOR THE GOVERNMENT: Anthony Lopez
 21 Patrick Burns
 22 Assistant United States Attorney
 23 Las Vegas, Nevada

24 FOR THE DEFENDANT: Craig Mueller
 25 Attorney at Law
 Las Vegas, Nevada

Proceedings recorded by mechanical stenography produced by
 computer-aided transcript

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

* * *

08:39:02 1 it's necessary for your deliberations. And then I would
08:39:06 2 scrutinize it, call you back in here, and decide what I would
08:39:09 3 do in terms of any rereading of testimony for you. Please
08:39:11 4 search your memories first before you make that type of
08:39:14 5 request. And I don't know that you would be in a position
08:39:16 6 where you would have to do that but, certainly, search your
08:39:20 7 own memories first before you make that request.

08:39:22 8 Now, I do have a series of instructions here and
08:39:25 9 they're typed up. I'll have to read them to you. I'll
08:39:28 10 attempt to do it slowly so you can follow along. But, again,
08:39:32 11 keep into mind that you will have this in the jury room for
08:39:35 12 further consideration if you need it.

08:39:35 13 **COURT INSTRUCTS THE JURY**

08:39:40 14 THE COURT: Members of the jury, now that you've
08:39:41 15 heard all the evidence, it's my duty to instruct you on the
08:39:44 16 law that applies to this case. As I've indicated, a copy will
08:39:48 17 be provided in the jury room for you.

08:39:50 18 It is your duty to weigh and to evaluate all the
08:39:53 19 evidence received in the case and, in that process, to decide
08:39:57 20 the facts. It is also your duty to apply the law as I give it
08:40:02 21 to you, to the facts as you find them, whether you agree with
08:40:06 22 the law or not. In other words, you're bound by the law.

08:40:08 23 You must decide the case solely on the evidence
08:40:10 24 and the law, and must not be influenced by any personal likes
08:40:14 25 or dislikes, any opinions, prejudices, or sympathy. You will

08:40:19 1 recall that you took an oath at the outset of the case to do
08:40:22 2 so.

08:40:23 3 You must follow all of the instructions and not
08:40:26 4 single out some and ignore others. They're all important.
08:40:29 5 Please do not read into the instructions, or into anything I
08:40:32 6 may have said or done, any suggestion as to what verdict you
08:40:36 7 should return in this case. That is a matter entirely up to
08:40:39 8 you.

08:40:39 9 A defendant in a criminal case has a constitutional
08:40:43 10 right not to testify. You may not draw any inference, of any
08:40:48 11 kind, from the fact that the defendant did not testify.

08:40:51 12 Now, proof beyond a reasonable doubt is proof
08:40:55 13 that leaves you firmly convinced the defendant is guilty. It
08:40:58 14 is not required that the government prove guilt beyond all
08:41:02 15 possible doubt. A reasonable doubt is a doubt based upon
08:41:06 16 reason and common sense, and is not based purely on
08:41:08 17 speculation. It may arise from the careful and impartial
08:41:13 18 consideration of all the evidence, or from lack of evidence.
08:41:16 19 If after a careful and impartial consideration of all the
08:41:20 20 evidence, you are not convinced beyond a reasonable doubt
08:41:24 21 that the defendant is guilty, it is your duty to find the
08:41:28 22 defendant not guilty.

08:41:29 23 On the other hand, if after careful and impartial
08:41:32 24 consideration of all the evidence, you are convinced beyond
08:41:36 25 a reasonable doubt that the defendant is guilty, it is your

08:41:38 1 duty to find the defendant guilty.

08:41:41 2 The evidence you are to consider in deciding
08:41:44 3 what the facts are consists of the sworn testimony of the
08:41:47 4 witnesses, the exhibits that have been received in evidence,
08:41:50 5 and any facts to which the parties have agreed or stipulated.
08:41:54 6 And you recall there -- that did occur in this case.

08:41:57 7 In reaching your verdict, you may consider only the
08:42:00 8 testimony and exhibits received in evidence. The following
08:42:03 9 things are not evidence and you may not consider them in
08:42:06 10 deciding what the facts are:

08:42:09 11 Questions, statements, objections and arguments by
08:42:12 12 the lawyers are not evidence. The lawyers are not witnesses.
08:42:16 13 Although you must consider a lawyer's question to understand
08:42:20 14 the answer of the witness, the lawyer's question is not
08:42:23 15 evidence;

08:42:23 16 Similarly, what the lawyers have said in their
08:42:27 17 opening statements, what they'll say in a few moments in their
08:42:30 18 closing arguments and, at other times, is intended to help you
08:42:34 19 interpret the evidence, but those statements are not evidence.
08:42:37 20 If the facts as you remember them differ from the way the
08:42:41 21 lawyers state them, your memory will control;

08:42:44 22 Any testimony that I've excluded or stricken or
08:42:47 23 instructed you to disregard is not evidence. And you recall I
08:42:50 24 did that on occasion in this case;

08:42:53 25 In addition, some evidence was received only for a

08:42:56 1 limited purpose. And I have earlier instructed you on the
08:43:01 2 limited purpose for which the evidence was received here and
08:43:04 3 I'll instruct you later in these instructions on that. When
08:43:08 4 I've instructed you to consider certain evidence in a limited
08:43:11 5 way, you must do so;

08:43:12 6 Anything you may have seen or heard when the Court
08:43:15 7 was not in session is not evidence. You're to decide the case
08:43:19 8 solely on the evidence received during trial.

08:43:21 9 Now, you've heard testimony from persons who,
08:43:25 10 because of education or experience, were permitted to
08:43:28 11 state opinions and the reasons for their opinions. Opinion
08:43:31 12 testimony should be judged just like any other testimony.
08:43:34 13 You may accept it or reject it. Give it as much weight as
08:43:38 14 you think it deserves considering the witness' education and
08:43:42 15 experience, the reasons given for the opinion, and all the
08:43:45 16 other evidence in the case.

08:43:46 17 Now, there are two types of evidence. Evidence may
08:43:51 18 be direct or circumstantial. And you may have heard those
08:43:53 19 terms. Direct evidence is direct proof of a fact, such as
08:43:57 20 testimony by a witness about what that witness personally saw
08:44:00 21 or heard or did. Circumstantial evidence is what we call
08:44:04 22 indirect evidence; that is, it is proof of one or more facts
08:44:09 23 from which you can find that another fact exists. You are
08:44:14 24 to consider both direct and circumstantial evidence. Either
08:44:18 25 may be used to prove any fact. The law makes no distinction

08:44:22 1 between the weight to be given to either direct or
08:44:24 2 circumstantial evidence. It is for you to decide how much
08:44:28 3 weight to give to any of the evidence.

08:44:30 4 Now the parties have agreed to certain facts that
08:44:33 5 have been stated to you. You should therefore treat those
08:44:36 6 facts as having been proved. So when there was a stipulation
08:44:39 7 earlier in the trial about certain facts as proven, then
08:44:43 8 it's unnecessary to prove it otherwise. You accept the
08:44:47 9 stipulation.

08:44:47 10 In deciding the facts in this case, you have to
08:44:50 11 decide which testimony to believe and which testimony not to
08:44:53 12 believe. You may believe everything a witness says, or part
08:44:56 13 of it or none of it. In considering the testimony of any
08:45:00 14 witness, you may take into account the following, and it's
08:45:03 15 not an exhaustive list:

08:45:05 16 The witness' opportunity and ability to see or hear
08:45:09 17 or know the things testified to;

08:45:11 18 The witness' memory;

08:45:13 19 The witness' manner while testifying;

08:45:15 20 The witness' interest in the outcome of the case,
08:45:18 21 if any;

08:45:19 22 The witness' bias or prejudice, if any;

08:45:22 23 Whether other evidence contradicted the witness'
08:45:25 24 testimony;

08:45:25 25 The reasonableness of the witness' testimony in

08:45:29 1 light of all the evidence; and

08:45:31 2 Any other factors that bear on believability.

08:45:35 3 The weight of the evidence is not necessarily
08:45:37 4 dependent on the number of witnesses testifying. What is
08:45:40 5 important is how believable the witnesses were and how much
08:45:44 6 weight you think their testimony deserves.

08:45:47 7 You are here only to determine whether the defendant
08:45:50 8 is guilty or not guilty of the charge in the Superseding
08:45:53 9 Indictment. The defendant is not on trial for any conduct
08:45:56 10 or offense not charged in the Superseding Indictment. And
08:46:00 11 the Superseding Indictment itself is not evidence.

08:46:03 12 The defendant has entered a plea of not guilty to
08:46:06 13 the charge. The defendant is presumed to be innocent unless
08:46:09 14 and until the government proves the defendant guilty beyond a
08:46:13 15 reasonable doubt. In addition, the defendant does not have to
08:46:16 16 testify, as I've indicated before, or present any evidence to
08:46:20 17 prove innocence. The government has the burden of proving
08:46:23 18 every element of the charge beyond a reasonable doubt.

08:46:26 19 Now let me go into the charge and the elements of
08:46:30 20 the charge.

08:46:30 21 The defendant is charged in Count One in the
08:46:33 22 Superseding Indictment with being in possession of a firearm
08:46:38 23 when he had previously been convicted of a crime punishable by
08:46:42 24 imprisonment for a term exceeding one year, all in violation
08:46:46 25 of Title 18 of the United States Code, Section 922(g)(1) and

08:46:50 1 924(a)(2). In order for the defendant to be found guilty of
08:46:55 2 that charge, the government must prove each of the following
08:46:58 3 elements beyond a reasonable doubt:

08:47:01 4 First, on or about June 15th, 2016, the defendant
08:47:08 5 knowingly possessed a Glock 19 handgun bearing serial number
08:47:13 6 UBG-233;

08:47:16 7 Second, the firearm had been shipped or transported
08:47:20 8 from one state to another; and

08:47:23 9 Third, at the time the defendant possessed the
08:47:26 10 firearm, he had been previously convicted of a crime
08:47:29 11 punishable by imprisonment for a term exceeding one year.

08:47:35 12 Now let me describe some of the things in the
08:47:38 13 Indictment.

08:47:39 14 The Superseding Indictment charges the offense
08:47:42 15 alleged was committed on or about a certain date. Although it
08:47:46 16 is necessary for the government to prove beyond a reasonable
08:47:48 17 doubt that the offense was committed on a date reasonably near
08:47:51 18 the date alleged in the Indictment, it is not necessary for
08:47:54 19 the government to prove the offense was committed precisely on
08:47:58 20 the date charged.

08:47:59 21 You have heard evidence that the defendant has
08:48:02 22 previously been convicted of a crime. You may consider
08:48:05 23 that evidence only as it relates to an element of the
08:48:08 24 offense of being in possession of a firearm when defendant
08:48:12 25 had previously been convicted of a crime punishable by

08:48:15 1 imprisonment for a term exceeding one year, as charged in
08:48:18 2 the Superseding Indictment. You may not consider a prior
08:48:22 3 conviction for any other purpose.

08:48:24 4 A person has possession of something if the person
08:48:31 5 knows of its presence and has physical control of it, or knows
08:48:36 6 of its presence and has the power and intention to control it.
08:48:41 7 More than one person can be in possession of something if
08:48:44 8 each knows of its presence and has the power and intention to
08:48:48 9 control it.

08:48:52 10 Now, I had just use the word "knowingly." I'm going
08:48:58 11 to define that for you.

08:48:59 12 An act is done knowingly if the defendant is aware
08:49:02 13 of the act and does not act through ignorance, mistake, or
08:49:06 14 accident. The government is not required to prove that the
08:49:08 15 defendant knew that his acts or omissions were unlawful.

08:49:12 16 You may consider evidence of the defendant's words,
08:49:14 17 acts, or omissions, along with all other evidence in deciding
08:49:18 18 whether defendant acted knowingly.

08:49:23 19 You have heard evidence that the defendant may
08:49:25 20 have committed other wrongs or acts not charged in the
08:49:29 21 Indictment. You may consider this evidence only for its
08:49:34 22 bearing, if any, on the question of the defendant's knowledge
08:49:38 23 or absence of mistake and for no other purpose. You may not
08:49:42 24 consider this evidence as evidence of guilt of the crime for
08:49:45 25 which the defendant is now on trial.

08:49:48 1 The punishment provided by law for the offense is
08:49:52 2 for the Court to decide. You may not consider punishment in
08:49:56 3 deciding whether the government has proven its case against
08:49:59 4 the defendant beyond a reasonable doubt.

08:50:03 5 Now I advised you at the outset of the trial, and I
08:50:06 6 advise you again, that you're not to discuss this case with
08:50:09 7 anyone, or permit anyone to discuss it with you, or in your
08:50:12 8 presence, other than you will discuss it among your fellow
08:50:15 9 jurors when you retire for deliberation.

08:50:18 10 I know all of you, apparently, have cell phones or
08:50:22 11 iPhones or iPads, internet, other communication devices.
08:50:27 12 The prohibition against discussing the case certainly extends
08:50:30 13 to e-mails, text messaging, discussions on any Blog or
08:50:34 14 website, as well as any networking sites, including FaceBook,
08:50:38 15 MySpace, YouTube, and Twitter. You may use your phone if you
08:50:43 16 feel it's absolutely necessary if you take a recess from your
08:50:46 17 deliberations. You would have to go out in the hallway. We
08:50:50 18 will keep your phones in a secure place with the bailiff
08:50:54 19 outside the room during your deliberations.

08:50:57 20 Now when you begin your deliberations, you'll elect
08:51:02 21 one member of your jury as foreperson of the jury. That
08:51:06 22 person will preside over your deliberations and speak for
08:51:09 23 you here in court. You'll then discuss the case among
08:51:11 24 yourselves to reach an agreement if you can do so. Your
08:51:15 25 verdict, whether it's guilty or not guilty, must be unanimous;

08:51:19 1 that is, all 12 of you must agree before you can return a
08:51:23 2 verdict in this case.

08:51:23 3 Each of you must decide the case for yourself, but
08:51:27 4 you should do so only after you've considered all of the
08:51:30 5 evidence, discussed it fully with the other jurors, and
08:51:34 6 listened to the views of your fellow jurors. Do not be
08:51:38 7 afraid to change your opinion if the discussion persuades you
08:51:42 8 that you should do so. But, do not come to a decision simply
08:51:46 9 because other jurors think it is right. It is important that
08:51:49 10 you attempt to reach a unanimous verdict, but, of course,
08:51:53 11 only if each of you can do so after having made your own
08:51:56 12 conscientious decision. Do not change an honest belief by the
08:52:01 13 weight and effect of the evidence simply to reach a verdict.
08:52:04 14 Your verdict must be based solely on the evidence and on the
08:52:07 15 law as I've given it to you in the instructions here.

08:52:10 16 Nothing that I have said or done is intended to
08:52:13 17 suggest what that verdict should be. As I've indicated
08:52:16 18 before, that's entirely up to you.

08:52:18 19 Now, I have prepared a verdict form. After you have
08:52:22 20 reached unanimous agreement on a verdict, if you can do so,
08:52:27 21 your foreperson will fill in the form that's given to you,
08:52:29 22 sign it, date it, and advise the marshal or bailiff outside
08:52:33 23 your door that you're ready to return to the courtroom.

08:52:36 24 If it becomes necessary during your deliberations
08:52:39 25 to communicate with me, you may send a note through the

08:52:43 1 bailiff, signed by your foreperson, or by one or other members
08:52:46 2 of the jury. No member of the jury should ever attempt to
08:52:50 3 communicate with me, except in a signed writing and I will
08:52:53 4 communicate with any member of the jury on anything concerning
08:52:55 5 the case only in writing or here in open court.

08:52:58 6 If you send out a question, I'll consult with the
08:53:02 7 lawyers before answering it and that could take some time.
08:53:05 8 You may continue your deliberations while waiting for the
08:53:08 9 answer to your question.

08:53:09 10 Remember that you're never to tell anyone, including
08:53:12 11 me, how the jury stands numerically, or otherwise, on the
08:53:17 12 question of the guilt of the defendant until after you have
08:53:19 13 reached unanimous verdict or you've been discharged.

08:53:23 14 What that means is that at some point, you can knock
08:53:26 15 on the door and indicate that you've reached a verdict. Your
08:53:29 16 foreperson would have fill out the verdict form, put it back
08:53:32 17 in the envelope and sealed it, and indicate you're ready to
08:53:35 18 come back into the courtroom.

08:53:37 19 If the jury is deadlocked and cannot reach a
08:53:42 20 verdict, you could send a note out to the Court. Just fold
08:53:46 21 it over. I'll take a look at it and others will not. And you
08:53:49 22 can indicate on there that the jury is deadlocked, if that's
08:53:52 23 the position that you ultimately take. But, you're never
08:53:56 24 to advise me the numerical division of the jury if you're
08:54:01 25 deadlocked. In other words, you can't tell me we're divided

08:54:03 1 such and such. You would just simply say the jury is
08:54:06 2 deadlocked and we can't reach a decision and then you could
08:54:09 3 send that note out. Of course I'm telling you all of this
08:54:12 4 not having any idea what you're ultimately going to do, but
08:54:16 5 I want you to understand the avenues that are available to
08:54:19 6 you.

08:54:21 7 The verdict form is a very short verdict form. It
08:54:25 8 will be in an envelope. You can take it out. If all 12 of
08:54:28 9 you agree, then you'll fill in the form. It simply says, "We
08:54:32 10 the jury in the above-entitled case, upon our oaths do say,
08:54:36 11 that we find the defendant..." and we have his name, Tajh
08:54:39 12 Weatherspoon, and then there's a blank; either not guilty or
08:54:43 13 guilty depending upon your unanimous verdict, of the offense
08:54:46 14 charged in Count One in the Superseding Indictment herein.

08:54:50 15 Then date it. And you'll put whatever date
08:54:53 16 it is that you reach your decision, of May 2017, and then
08:54:56 17 foreperson.

08:54:58 18 Now, I did take the liberty of putting May in there,
08:55:03 19 assuming you wouldn't still be deliberating in June, but I did
08:55:06 20 leave a blank as to the date that you return a verdict.

08:55:09 21 So that concludes my instructions. As I say, I'll
08:55:13 22 provide a copy to you for your assistance in the jury room and
08:55:16 23 then you'll have the verdict form in there and you'll have all
08:55:18 24 the exhibits that we can send in to you. If you need anything
08:55:22 25 else, you can send a note and I'll try to respond as quickly

08:55:26 1 as possible.

08:55:27 2 Because the government has the burden of proof in
08:55:29 3 this case, the government counsel goes first with their final
08:55:32 4 argument. Then the defense will make their final argument.
08:55:35 5 And then because of the burden of proof that is on the
08:55:37 6 government, they'll have the final rebuttal argument and
08:55:39 7 then you will retire for deliberations.

08:55:42 8 If we're ready to proceed, I think -- Mr. Burns were
08:55:45 9 you going to make the initial closing argument?

08:55:47 10 MR. BURNS: Yes, Your Honor.

08:55:49 11 THE COURT: All right. You may go ahead.

08:55:50 12 MR. BURNS: Court's brief indulgence while I
08:55:54 13 move this cart.

08:55:55 14 THE COURT: Certainly.

08:56:58 15 It was working just a minute or two ago. We try to
08:57:02 16 make sure everything is working ahead of time. Which exhibit
08:57:37 17 are you trying to play here?

08:57:39 18 MR. BURNS: Your Honor, this is a presentation,
08:57:41 19 so --

08:57:41 20 THE COURT: Oh, it's a whole presentation?

08:57:43 21 MR. BURNS: Yes, Your Honor. PowerPoint.

08:57:45 22 THE COURT: Oh.

08:57:45 23 MR. BURNS: And the --

08:57:47 24 THE COURT: Well, I hate to delay things, but if
08:57:49 25 it's your whole final argument here --

* * *

09:48:25 1 on June 15th.

09:48:26 2 So on June 15th, 2016, the defendant possessed this
09:48:31 3 Glock. Look at his demeanor, look at his DNA, and return a
09:48:37 4 verdict finding him guilty.

09:48:40 5 THE COURT: All right. Thank you, Mr. Lopez.

09:48:42 6 That concludes the arguments. I'm going to ask the
09:48:49 7 bailiff to come forward to take charge of the jury.

09:49:07 8 (Bailiff sworn.)

09:49:18 9 THE COURT: All right. Before I have the jury
09:49:19 10 retire for deliberations, you'll have, as I say, a copy of
09:49:24 11 my instructions, along with all of the exhibits, except
09:49:26 12 the exhibits that I've designated. And if you feel it's
09:49:30 13 absolutely necessary to see those again, you can make the
09:49:33 14 request and come back in.

09:49:34 15 You recall at the outset of the trial I indicated
09:49:37 16 that we would have alternates. An alternate, as I indicated
09:49:40 17 before, is a person that hears all of the evidence, but for
09:49:45 18 reasons that we do not have the absence of any regular member
09:49:50 19 of the panel, then the alternate cannot go into the jury room
09:49:54 20 and deliberate.

09:49:55 21 We had two alternates. The first alternate, as
09:49:58 22 it turns out, is the person we excused because she had
09:50:02 23 commitments in connection with picking up her child in the
09:50:05 24 afternoon, so that meant we had just one alternate left. The
09:50:08 25 alternate selected by virtue of the draw -- if you are in the

09:50:12 1 last portion of the draw, then you're in the alternate panel
09:50:15 2 and, unfortunately Ms. Gibson, you are the remaining alternate
09:50:19 3 we had. What that means is that you can't go into the jury
09:50:23 4 room and deliberate, but we have to keep under the control of
09:50:26 5 the court because if a juror could not continue, then I would
09:50:30 6 have you come back to go into the jury deliberations and the
09:50:34 7 jury would have to start anew.

09:50:37 8 It's an incredibly valuable position because if we
09:50:41 9 had lost another juror, then we wouldn't have had to declare a
09:50:45 10 mistrial and you would have replaced that juror. So I'm going
09:50:49 11 to have you remain here when the jury retires and then I'll
09:50:51 12 give you further instruction in a few minutes.

09:50:54 13 Do you have any personal belongings in the jury
09:50:56 14 room?

09:50:56 15 ALTERNATE JUROR: No.

09:50:57 16 THE COURT: All right. So if you just remain
09:50:59 17 here then, the other jurors may retire.

09:51:01 18 You may take your notes with you. Again, I don't
09:51:03 19 have a transcript of the proceedings. If you do need any
09:51:06 20 further advice from the Court, you can send a note out.
09:51:09 21 Continue your deliberations, but I would try to get back to
09:51:12 22 you as quickly as possible.

09:51:13 23 Have they made selections for lunch yet?

09:51:17 24 THE BAILIFF: Not yet, Your Honor.

09:51:19 25 THE COURT: As soon as go out then, before you

09:51:21 1 do anything else, we'll send in a menu so that you can select
09:51:26 2 lunch. It will be brought up to you, probably around, I would
09:51:29 3 guess 11:00 or 11:30 this morning. And if your deliberations
09:51:32 4 are such that you come back before that, you can take the
09:51:36 5 lunch with you. But, in any event, the lunch will be brought
09:51:40 6 up as soon as we can bring it up for you. And I'll have you
09:51:43 7 fill those slips out as soon as you go into the jury room, and
09:51:43 8 then you'll start your deliberations.

09:51:45 9 Again, if you would leave your cell phones outside
09:51:47 10 with our bailiff, then if you do take a recess, you can use
09:51:51 11 your cell phone, but not in the jury room.

09:51:53 12 Thank you very much. We'll be in recess subject to
09:51:56 13 call of the jury.

09:51:57 14 (Jury begins deliberations 9:50 a.m.)

09:52:23 15 THE COURT: All right. You may all be seated.

09:52:25 16 Again, Ms. Gibson, I'm sorry to tell you that you're
09:52:28 17 an alternate. You've been very attentive and we appreciate
09:52:31 18 it. You'll remain main under the restrictions -- let me hang
09:52:34 19 on until we're all done with the discussion here.

09:52:36 20 Okay. Thanks.

09:52:38 21 You'll remain under the control of the court. That
09:52:41 22 means that you can either remain here, if you want to, or you
09:52:45 23 you're free to go. But, please leave a number -- do you have
09:52:50 24 a cell phone number?

09:52:51 25 THE CLERK: I have that number.

09:52:52 1 THE COURT: We have your cell phone number. We
09:52:54 2 would reach you and have you come back in the event we have a
09:52:57 3 juror that can't continue, and then you'll replace that juror.

09:53:00 4 In any event, if that doesn't happen, and the jury
09:53:05 5 reaches a verdict, we're certainly going to get in touch with
09:53:08 6 you and tell you that you're dismissed and discharged and have
09:53:11 7 no further obligation in connection with the case. At that
09:53:17 8 point, you're free to talk about the case. But until that
09:53:20 9 time, you can't discuss this case with anybody because you're
09:53:23 10 still a part of the jury, in the sense that you're involved in
09:53:26 11 this.

09:53:26 12 Do you understand that?

09:53:28 13 ALTERNATE JUROR: Yes.

09:53:28 14 THE COURT: So, you're free either to remain
09:53:31 15 here. You could go downstairs or in the hallway, whatever,
09:53:34 16 and we would call you when the jury comes back if you're here
09:53:36 17 in the building. But if you advise us that you're going to be
09:53:39 18 leaving, then we'll just call you if we need to have you come
09:53:42 19 back or to tell you what the verdict is.

09:53:45 20 So, again, on behalf of everybody in our court
09:53:48 21 system, our judges, and on behalf of the parties here, and
09:53:52 22 counsel, and our staff, we thank you for your services.
09:53:56 23 You've been very attentive and we deeply appreciate the
09:54:00 24 commitment of time you put into this case.

09:54:03 25 I've enjoyed meeting you very much. Make sure then

09:54:09 1 that Miss Rich has your number -- and I think you do. What
09:54:16 2 decision you make, whether to remain here or not, that's up to
09:54:20 3 you and we'll get in touch with you.

09:54:21 4 Thank you.

09:54:22 5 Counsel, We'll be in recess.

09:54:24 6 We have another matter coming up, so if I could see
09:54:27 7 you at side bar on that just for a moment.

11:38:03 8 (Recess taken.)

11:38:03 9 (Jury verdict 11:35 a.m.)

11:46:32 10 ((Outside the presence of the jury.))

11:49:08 11 THE COURT: We'll go on the record.

11:49:10 12 The jury sent a note out saying we reached a
11:49:13 13 verdict, so I'm going to bring them in.

11:50:54 14 (In the presence of the Jury.)

11:50:54 15 THE COURT: You may all be seated.

11:50:56 16 Counsel, will you stipulate that all the jurors
11:51:03 17 are present?

11:51:04 18 MR. LOPEZ: Yes, Your Honor.

11:51:05 19 MR. MUELLER: Yes, judge.

11:51:06 20 THE COURT: All right. All the jurors are
11:51:08 21 present.

11:51:08 22 I received a note indicating, members of the jury,
11:51:12 23 that you had reached a verdict in this case and it's signed by
11:51:16 24 you, Ms. Fullstone.

11:51:18 25 Are you the foreperson of the jury?

11:51:20 1 JURY FOREPERSON: I am, Your Honor.

11:51:21 2 THE COURT: Without stating what verdict the
11:51:23 3 jury has reached, has the jury reached unanimous verdict?

11:51:26 4 JURY FOREPERSON: Yes, it has, Your Honor.

11:51:27 5 THE COURT: And did you sign and date it?

11:51:29 6 JURY FOREPERSON: Yes, I did.

11:51:29 7 THE COURT: Is it in the envelope then?

11:51:31 8 JURY FOREPERSON: Yes.

11:51:32 9 THE COURT: All right. Thank you.

11:51:33 10 If you'll just hand the envelope to the bailiff.

11:51:36 11 Thank you.

11:52:01 12 Miss Clerk, if you'll read the verdict, please.

11:52:04 13 THE CLERK: Yes, judge.

11:52:05 14 We the jury in the above-entitled case, upon
11:52:08 15 our oaths do say, that we find the defendant, Tajh Dion
11:52:13 16 Weatherspoon, guilty of the offense charged in Count One in
11:52:15 17 the Superseding Indictment herein.

11:52:17 18 Dated this 16th day of May, 2017.

11:52:20 19 Signed foreperson.

11:52:21 20 THE COURT: Members of the jury, is this your
11:52:23 21 verdict, so say you one, so say you all? If it is, please
11:52:27 22 state yes.

11:52:28 23 (All jurors respond yes.)

11:52:30 24 THE COURT: Do you wish to have the jury polled?

11:52:31 25 MR. MUELLER: I do, judge.

11:52:32 1 THE COURT: I'm going to ask each of you
11:52:33 2 individually, by number, and we'll start in the back to the
11:52:36 3 left with juror number one, if you voted guilty so that I can
11:52:40 4 determine if, in fact, this is a unanimous verdict. If you
11:52:44 5 did vote guilty, simply state yes when we call your number.
11:52:48 6 If you did not, say no.

11:52:49 7 Do you all understand the instruction?

11:52:52 8 (Jurors nod in the affirmative.)

11:52:53 9 THE COURT: Juror One?

11:52:53 10 JUROR ONE: Yes.

11:52:55 11 THE COURT: Juror Two?

11:52:56 12 JUROR TWO: Yes.

11:52:57 13 THE COURT: Juror Three?

11:52:57 14 JUROR THREE: Yes.

11:52:59 15 THE COURT: Juror Four?

11:52:59 16 JUROR FOUR: Yes.

11:53:00 17 THE COURT: Juror Five?

11:53:01 18 JUROR FIVE: Yes.

11:53:03 19 THE COURT: And it's a different number on ours,
11:53:06 20 but it would go with the new order that we have because we did
11:53:10 21 release the one juror, so we're up here then.

11:53:12 22 Juror Number Seven?

11:53:15 23 JUROR SEVEN: Yes.

11:53:16 24 THE COURT: You're actually eight, but we're
11:53:18 25 going to call it seven now.

11:53:19 1 JUROR SEVEN: Oh. Yes.

11:53:21 2 THE COURT: Juror Number Eight?

11:53:22 3 JUROR EIGHT: Yes.

11:53:23 4 THE COURT: Juror Nine?

11:53:23 5 JUROR NINE: Yes.

11:53:24 6 THE COURT: Juror Ten.

11:53:25 7 JUROR TEN: Yes.

11:53:26 8 THE COURT: Juror Number Eleven?

11:53:27 9 JUROR ELEVEN: Yes.

11:53:27 10 THE COURT: And Juror Number Twelve?

11:53:29 11 JUROR TWELVE: Yes.

11:53:30 12 THE COURT: It is a unanimous verdict.

11:53:32 13 Miss Clerk, you'll record the verdict of jury in the

11:53:35 14 Minutes of the Court.

11:53:37 15 The Court will impose judgment and sentence. And

11:53:42 16 the matter is referred to the Department of Probation for a

11:53:45 17 Presentence Report. I'll continue this matter for imposition

11:53:48 18 of judgment and sentence until what date?

11:53:51 19 THE CLERK: Until Tuesday, September 19th, 2017,

11:53:54 20 at 9:15 a.m.

11:53:56 21 THE COURT: Is that all right with the

11:53:57 22 government?

11:53:57 23 MR. LOPEZ: Yes, Your Honor.

11:53:58 24 THE COURT: And, at this point, with the

11:54:00 25 defense?

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,	)	SUPERSEDING CRIMINAL INDICTMENT
	)	
Plaintiff,	)	CASE NO.: 2:16-cr-00377-HDM-CWH
	)	
vs.	)	VIOLATIONS:
	)	Felon in Possession of a Firearm
TAJH DION WEATHERSPOON,	)	(18 U.S.C. §§ 922(g)(1) and 924(a)(2))
	)	
Defendant.	)	

THE GRAND JURY CHARGES THAT:

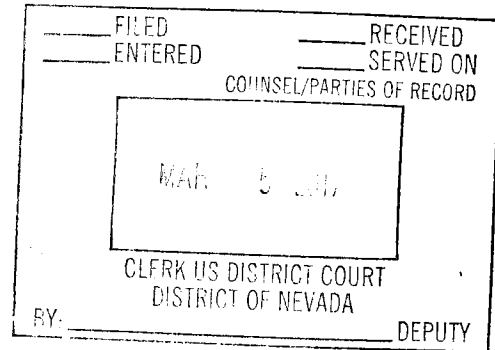
COUNT ONE

Felon in Possession of a Firearm

On or about June 15, 2016, in the State and Federal District of Nevada,

TAJH DION WEATHERSPOON

having been convicted of a crime punishable by imprisonment for a term exceeding one year, in the State of Nevada, to wit: Attempt Burglary, in the Eighth Judicial District Court, Clark County, on or about January 14, 2009, in Case No. C244699; Possession of Firearm by Ex-Felon, in the Eighth Judicial District Court, Clark County, on or about December 17, 2012, in Case No.



C284179-1; did knowingly possess a firearm, to wit: a Glock 19 handgun bearing serial number UBG233, 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 a Firearm

On or about December 22, 2016, in the State and Federal District of Nevada,

TAJH DION WEATHERSPOON

having been convicted of a crime punishable by imprisonment for a term exceeding one year, in the State of Nevada, to wit: Attempt Burglary, in the Eighth Judicial District Court, Clark County, on or about January 14, 2009, in Case No. C244699; Possession of Firearm by Ex-Felon, in the Eighth Judicial District Court, Clark County, on or about December 17, 2012, in Case No. C284179-1; did knowingly possess a firearm, to wit: a Glock 21 handgun bearing serial number XUC279, 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).

DATED: this 15th day of March, 2017.

A TRUE BILL:

/S/

FOREPERSON OF THE GRAND JURY

STEVEN W. MYHRE
Acting United States Attorney



PATRICK BURNS
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 31 2022

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER WILDER,

Defendant-Appellant.

No. 20-17230

D.C. Nos. 2:20-cv-01117-JCM

2:17-cr-00254-JCM-GWF-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 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.



KeyCite Blue Flag – Appeal Notification

Appeal Filed by USA v. CHRISTOPHER WILDER, 9th Cir., November 16, 2020

2020 WL 5517661

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff(s),

v.

Christopher WILDER, Defendant(s).

Case No. 2:17-CR-254 JCM (GWF)

|

Signed 09/14/2020

Attorneys and Law Firms

Christopher Wilder, pro se.

ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

*1 Presently before the court is petitioner Christopher Wilder's motion to vacate, amend, or correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 42). The government filed a response, (ECF No. 44), to which petitioner replied, (ECF No. 45).

I. Background

Prior to his current term of incarceration, petitioner served several felony sentences: In 1988, he was convicted of felony burglary. (ECF Nos. 1, 34 (citing pre-sentence report)). In 1991, he was again convicted of felony burglary. (*Id.*). In 1994, petitioner was convicted of felon in possession of a firearm, and in 2001, petitioner was yet again convicted for burglary. (*Id.*). In 2004, petitioner was convicted of possession of a credit or debit card without the cardholder's consent. (*Id.*). For the foregoing crimes, he served multiple distinct sentences of incarceration, each in excess of one year. (*Id.*).

In July 2017, petitioner was discovered to have broken into a house with a firearm, striking an occupant with the butt of the handgun. (*Id.*). On April 16, 2018, petitioner pled guilty to felon in possession of a firearm. (ECF No. 28). The court

sentenced him to 66 months' imprisonment to run concurrent with his state sentences and three years of supervised release. (ECF No. 40). Judgment was entered on September 27, 2018. (*Id.*). Petitioner did not appeal.

On June 18, 2020, petitioner filed his instant § 2255 motion in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019) ("*Rehaif*"). (ECF No. 42).

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. 42). 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. 42). 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 June 18, 2020. The government concedes that *Rehaif* applies retroactively and that this motion is timely. (ECF No. 44).

Petitioner argues that this court lacked subject-matter jurisdiction due to the indictment’s failure to state *Rehaif*’s mens rea element. (ECF No. 42). 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. 44). “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. 42); 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. 42). 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. 42).

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 multiple felony sentences, including for a prior charge of felon in possession of a firearm, 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. 42, 45). “[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 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. 42) 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 *Wilder v. United States*, case number 2:20-cv-01117-JCM.

All Citations

Slip Copy, 2020 WL 5517661

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UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

CHRISTOPHER WILDER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-CR-0254-JCM-GWF

USM Number: 39467-048

RAQUEL LAZO, ACPD

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) (1) AND (2) 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:

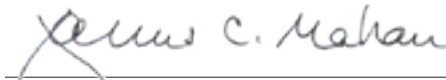
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC§922(g)(1) & 924(a)(2)	Felon in Possession of Firearm	7/21/2017	1 & 2

The defendant is sentenced as provided in pages 2 through 1 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.

9/27/2018

Date of Imposition of Judgment



Signature of Judge

JAMES C. MAHAN, U.S. DISTRICT JUDGE

Name and Title of Judge

October 11, 2018

Date

DEFENDANT: CHRISTOPHER WILDER
CASE NUMBER: 2:17-CR-0254-JCM-GWF

IMPRISONMENT

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

(66) MONTHS PER COUNT TO RUN CONCURRENT WITH CASE NUMBERS: **04CR0476 AND C-17-325655-1**

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

1. Facility with mental health treatment and residential drug program.
2. Terminal Island, California.
3. Any facility with a mental health treatment and residential drug 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: CHRISTOPHER WILDER
CASE NUMBER: 2:17-CR-0254-JCM-GWF

SUPERVISED RELEASE

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

(3) years per count to run concurrent.

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: CHRISTOPHER WILDER
CASE NUMBER: 2:17-CR-0254-JCM-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 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: CHRISTOPHER WILDER
CASE NUMBER: 2:17-CR-0254-JCM-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.).
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 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 Aryan Warriors 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.

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: CHRISTOPHER WILDER
CASE NUMBER: 2:17-CR-0254-JCM-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	\$ 200.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ 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: CHRISTOPHER WILDER
CASE NUMBER: 2:17-CR-0254-JCM-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 \$ 200.00 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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FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
APR 16 2018	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER WILDER,

Defendant.

2:17-cr-254-JCM-GWF

**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 CHRISTOPHER WILDER; and the Defendant's attorney, Rachel Korenblat, 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 CHRISTOPHER WILDER (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 charge as set forth in the Criminal Indictment:

6 Counts One and Two – Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1)
7 and 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, the
11 Defendant is giving up:

- 12 1. The right to proceed to trial by jury on all charges, or to a trial by a judge if the
13 Defendant and the United States both agree;
- 14 2. The right to confront the witnesses against the Defendant at such a trial, and to
15 cross-examine them;
- 16 3. The right to remain silent at such a trial, with assurance that his silence could
17 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 proceedings.

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

24 D. Additional Charges. The United States agrees not to bring any additional charges

1 against the Defendant arising out of the investigation in the District of Nevada that culminated in this
 2 Plea Agreement and based on conduct known to the United States except that the United States
 3 reserves the right to prosecute the Defendant for any crime of violence as defined by 18 U.S.C. § 16.

4 **III. ELEMENTS OF THE OFFENSE**

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

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

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

11 **IV. FACTS SUPPORTING GUILTY PLEA**

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

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

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

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

22 On July 21, 2017, police officers were dispatched to 6350 Enchanting Court in reference to a
 23 call that stated an unknown adult who had unlawfully entered into the residence armed with a firearm.
 24 The person calling 911 hung up and then called back stating the suspect, later identified as

CHRISTOPHER WILDER, had a "sawed off shotgun." During the course of an domestic-related altercation between WILDER and the lawful occupants of the residence, WILDER gained possession of a Harrington and Richardson 12-gauge shotgun bearing serial number 115635 (which had a barrel less than 18 inches, making it a firearm described in 26 U.S.C. § 5845(a)).

Upon officers' arrival, all the occupants were called out of the residence and placed in front of the patrol vehicle. As officers cleared the residence, an officer picked up a kitchen garbage can to block the opened doggie door, where a larger dog was in the backyard barking at officers inside the residence. The officer looked inside the garbage can and observed a Sig Sauer P226 9-millimeter handgun bearing serial number U577272 ~~inside of a holster~~, which WILDER had discarded after the police arrived at the scene. *RK PMS CW*

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

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

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.

. . .

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

2 A. Discretionary Nature of Sentencing Guidelines. The Defendant acknowledges that the
3 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
4 mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term
5 of imprisonment permitted by statute.
6

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

11 1. [Felon in Possession of a Firearm]

12	Base Offense Level [USSG § 2K2.1(a)(4)(B)]:	20
13	Enhancements:	
	[Poss. Conn. w/ Felony / USSG § 2K2.1(b)(6)(B)]:	+4
14	Reductions:	
	[Acceptance of Responsibility / USSG § 3E1.1(a)]:	-2
15	[Timeliness of Plea / USSG § 3E1.1(b)]:	-1

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

1 (g) commits or attempts to commit any crime; (h) fails to appear in court; or (i) violates the conditions
2 of pretrial release.

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

9 These Sentencing Guidelines provisions, if applied, will result in a total offense level of 21.

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

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

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

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

22 The Defendant acknowledges that the United States Probation Office may calculate the
23 Sentencing Guidelines differently and may rely on additional information it obtains through its
24 investigation. The Defendant also acknowledges that the Court may rely on this and other additional

information as it calculates the Sentencing Guidelines range and makes other sentencing determinations, and the Court's reliance on such information shall not be grounds for the Defendant 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

1 could result in a loss of the downward adjustment for acceptance of responsibility. The Government
2 will also recommend that the sentence imposed in this case be ordered to run concurrently with the
3 Defendant's state cases, and the sentence imposed upon revocation of the Defendant's term of
4 supervised release in case number 2:04-cr-476-KJD-VCF (provided that sentence in that case has been
5 imposed prior to the sentence in this case), unless the Defendant commits any act that could result in
6 a loss of the downward adjustment for acceptance of responsibility. The Defendant acknowledges
7 that the Court does not have to follow either recommendation. Notwithstanding its agreement to
8 recommend a sentence within the Sentencing Guidelines range, the United States reserves its right to
9 defend any lawfully imposed sentence on appeal or in any post-conviction litigation.

10 The Defendant will not request a sentence below the Sentencing Guidelines range as calculated
11 by the Court, and will not seek a downward adjustment pursuant to 18 U.S.C. § 3553 or USSG §
12 4A1.3(b)(1) from any sentence the Court may impose.

13 Notwithstanding any other provision of this plea agreement, the parties will jointly recommend
14 that the Defendant receive credit for time served dating back to the date of his arraignment in this case,
15 which is August 21, 2017, unless the Defendant commits any act that could result in a loss of the
16 downward adjustment for acceptance of responsibility.

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

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

24 . . .

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

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

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

12 The Defendant understands that he alone decides whether to plead guilty or go to trial, and

13 acknowledges that he has decided to enter his guilty plea knowing of the charges brought against him,

14 his possible defenses, and the benefits and possible detriments of proceeding to trial. The Defendant

15 also acknowledges that he decided to plead guilty voluntarily and that no one coerced or threatened

16 him to enter into this Plea Agreement.

17 B. Waiver of Appeal and Post-Conviction Proceedings. The Defendant knowingly and

18 expressly waives: (a) the right to appeal any sentence imposed within or below the applicable

19 Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which

20 the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) the right to

21 appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

22 The Defendant also knowingly and expressly waives all collateral challenges, including any

23 claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court

24

1 adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of
2 counsel.

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

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

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

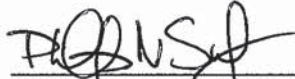
17 **XI. ADDITIONAL ACKNOWLEDGMENTS**

18 This Plea Agreement resulted from an arms-length negotiation in which both parties bargained
19 for and received valuable benefits in exchange for valuable concessions. It constitutes the entire
20 agreement negotiated and agreed to by the parties. No promises, agreements or conditions other than
21 those set forth in this agreement have been made or implied by the Defendant, the Defendant's
22 attorney, or the United States, and no additional promises, agreements or conditions shall have any
23 force or effect unless set forth in writing and signed by all parties or confirmed on the record before
24 . . .

1 the Court.

2 DAYLE ELIESON,
3 United States Attorney

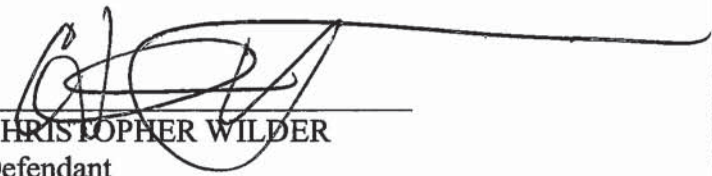
4 DATE 4-16-18

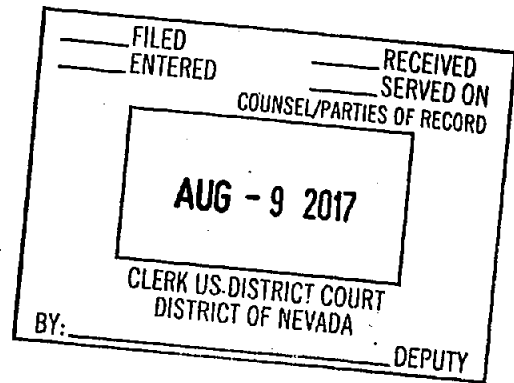
5 
6 PHILLIP N. SMITH, JR.
7 Assistant United States Attorney

8 DATE 7-16-18

9 
10 RACHEL KORENBLAT
11 Assistant Federal Public Defender

12 DATE 4-16-18

13 
14 CHRISTOPHER WILDER
15 Defendant



STEVEN W. MYHRE
Acting United States Attorney
Nevada State Bar Number 9635
PHILLIP N. SMITH, JR.
Nevada State Bar Number 10233
Assistant United States Attorney
501 Las Vegas Blvd. South, Suite 1100
Las Vegas, Nevada 89101
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FAX: (702) 388-5087
phillip.smith@usdoj.gov
Attorney for the Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA,	)	CRIMINAL INDICTMENT
	)	
PLAINTIFF,	)	2:17-CR- <u>254</u>
	)	
vs.	)	VIOLATION:
	)	
CHRISTOPHER WILDER,	)	18 U.S.C. §§ 922(g)(1) and 924(a)(2) – Felon
	)	in Possession of a Firearm.
DEFENDANT.	)	

THE GRAND JURY CHARGES THAT:

COUNT ONE

Felon in Possession of a Firearm

On or about July 21, 2017, in the State and Federal District of Nevada,

CHRISTOPHER WILDER,

defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of Nevada, to wit: Burglary, in the Eighth Judicial District Court for Clark County, on or about September 29, 1988, in Case No. C84626; Burglary, in the Eighth Judicial District Court for Clark County, on or about September 17, 1991, in Case No. C99841; Attempt Burglary, in the Eighth Judicial District Court for Clark

County, on or about September 19, 1991, in Case No. C101546; Possession of Stolen Property, in the Eighth Judicial District Court for Clark County, on or about September 8, 1992, in Case No. C107438; Ex-Felon in Possession of a Firearm, in the Eighth Judicial District Court for Clark County, on or about June 2, 1994, in Case No. C118634; Possession of Credit or Debit Card Without Cardholder's Consent, in the Eighth Judicial District Court for Clark County, on or about November 9, 1994, in Case No. C203875; and Felon in Possession of a Firearm, in the United States District Court for the District of Nevada, on or about December 15, 2005, in Case No. 2:04-CR-476-RLH-LRL; and in the State of Illinois, to wit: Residential Burglary, in the Circuit Court of Winnebago County, on or about September 18, 2001, in Case No. 01CF1514, did knowingly possess a firearm, to wit: a Sig Sauer P226 9-millimeter handgun bearing serial number U577272, 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 a Firearm

On or about July 21, 2017, in the State and Federal District of Nevada,

CHRISTOPHER WILDER,

defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of Nevada, to wit: Burglary, in the Eighth Judicial District Court for Clark County, on or about September 29, 1988, in Case No. C84626; Burglary, in the Eighth Judicial District Court for Clark County, on or about September 17, 1991, in Case No. C99841; Attempt Burglary, in the Eighth Judicial District Court for Clark

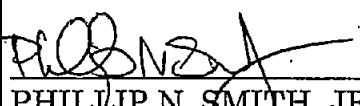
County, on or about September 19, 1991, in Case No. C101546; Possession of Stolen Property, in the Eighth Judicial District Court for Clark County, on or about September 8, 1992, in Case No. C107438; Ex-Felon in Possession of a Firearm, in the Eighth Judicial District Court for Clark County, on or about June 2, 1994, in Case No. C118634; Possession of Credit or Debit Card Without Cardholder's Consent, in the Eighth Judicial District Court for Clark County, on or about November 9, 1994, in Case No. C203875; and Felon in Possession of a Firearm, in the United States District Court for the District of Nevada, on or about December 15, 2005, in Case No. 2:04-CR-476-RLH-LRL; and in the State of Illinois, to wit: Residential Burglary, in the Circuit Court of Winnebago County, on or about September 18, 2001, in Case No. 01CF1514, did knowingly possess a firearm, to wit: a Harrington and Richardson 12-gauge shotgun bearing serial number 115635, 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).

DATED: this 9th day of August, 2017.

A TRUE BILL:

/S/
FOREPERSON OF THE GRAND JURY

STEVEN W. MYHRE
Acting United States Attorney


PHILLIP N. SMITH, JR.
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.

RONALD WILLIAMS III,

Defendant-Appellant.

No. 21-15173

D.C. Nos. 3:20-cv-00358-MMD
3:16-cr-00086-MMD-WGC-1

District of Nevada,
Reno

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

The stay entered on March 15, 2021 (Docket Entry No. 3) 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. RONALD WILLIAMS, III, 9th Cir., January 29, 2021

2020 WL 7059582

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,

v.

Ronald WILLIAMS III, Petitioner/Defendant.

Case Nos. 3:16-cr-00086-MMD-WGC-1

|

Signed 12/02/2020

Attorneys and Law FirmsMegan Rachow, AUSA, U.S. Attorney's Office, Reno, NV,
for Respondent/Plaintiff.**ORDER**MIRANDA M. DU, CHIEF UNITED STATES DISTRICT
JUDGE**I. SUMMARY**

*1 Williams 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 Nos. 25, 27) and on November 7, 2017, the Court sentenced him to 70 months imprisonment (ECF No. 29). Before the Court is Williams' motion to vacate, set aside, or correct his conviction and sentence under 28 U.S.C. § 2255(a). (ECF No. 32 (the "Motion").)¹ Williams 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 Williams' 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 December 14, 2016, a grand jury indicted Petitioner Ronald Williams on two counts 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 Two, Felon in Possession of a Firearm, the indictment alleges the following:

On or about November 23, 2016, in the State and District of Nevada, Ronald Williams III, defendant herein, having been convicted of crimes punishable by imprisonment for a term exceeding one year ... did knowingly possess a Norinco rifle ... a Norinco rifle ... a Smith & Wesson rifle ... a Smith & Wesson rifle ... a Heckler & Koch rifle ... said possession being in and affecting commerce; all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

(*Id.*) Williams plead guilty to Count Two of the indictment and Count One was dismissed. (ECF Nos. 25, 27.) On November 7, 2017, the Court sentenced Williams to 70 months imprisonment and three years supervised release. (ECF No. 29.) Judgment was entered on November 13, 2017. (ECF No. 30.) Williams did not appeal his sentence. He is scheduled to be released on November 12, 2021. (ECF No. 32 at 5.) On June 16, 2020, he filed the Motion. (ECF No. 32.)

III. LEGAL STANDARD

As noted, Williams 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).² 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 Williams 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. 32.) As to the constitutionality of the conviction, Williams 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, Williams 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, Williams maintains these errors are structural, requiring the Court vacate his conviction and release him. (*Id.*)

The government responds that Williams' claims are waived by his unconditional guilty plea, and procedurally barred because they were not raised on direct appeal. (ECF No. 34.)

As further explained below, the Court addresses each issue Williams raises and finds as follows. First, Williams' petition is timely. Second, *Rehaif* applies retroactively. Third, the government is not required to demonstrate Williams knew he was barred from possessing a firearm. Fourth, the Court had subject matter jurisdiction at the time it imposed his sentence. Fifth, Williams' claims are procedurally barred because while he can demonstrate cause, he has failed to demonstrate prejudice and there is no structural error. Finally, Williams waived his right to bring a challenge by pleading guilty. In short, the Motion is ultimately denied because Williams 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.³ See 28 U.S.C. § 2255. Williams claims that his Motion is timely because it was filed within one year of *Rehaif* being decided. (ECF No. 32 at 10.) Under this standard, the Motion is timely. *Rehaif* was decided June 21, 2019, and thus Williams had until June 20, 2020 to file for relief. The Motion was filed June 16, 2020. (ECF No. 32.) Thus, it was filed within one year of the Court's decision in *Rehaif*. Moreover, the government does not contest timeliness.

B. Retroactivity

Williams next argues that the new rule established in *Rehaif* applies retroactively to his case. (*Id.* at 10-11.) As the government does not dispute retroactivity,⁴ the Court assumes without deciding that *Rehaif* applies retroactively to Williams' § 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 Williams 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. 32 at 7-9.) The Court finds that the government was only required to prove that Williams knew of his prohibited status, not that Williams 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, Williams 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. (ECF No. 32 at 15-16.) 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 Williams' claims are procedurally defaulted. (ECF No. 34 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).

Williams does not contest that he did not raise the claim in the Motion during his direct appeal, but Williams 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. 32 at 13, 16-21.) Alternatively, Williams argues that he can overcome procedural default because he

has sufficiently demonstrated cause and prejudice. (ECF No. 38 at 7-10.) The Court finds that Williams 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 Williams 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.

Williams 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 38 at 17-21.) The government relies on the Ninth Circuit's decision in *U.S. v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019), to argue that, given his criminal history, no reasonable possibility exists that Williams did not know he had been convicted of a crime for which he could be sentenced to more than a year imprisonment. (ECF No. 34 at 17-19.)

*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 there was no error in not instructing the jury to find knowledge of prohibited status. *Id.* And although, as Williams points out, the plain error standard does not apply here,⁵ *Benamor* is instructive. There, the Ninth Circuit relied on the stipulation but focused primarily on 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.⁶

Here, the Court similarly finds it implausible that Williams was unaware of his status, as formerly convicted of a crime punishable by imprisonment for a term exceeding one year, given his criminal history. By the time Williams allegedly possessed the firearm, he had previously served more than a year in prison for a prior conviction for felon in possession of a firearm. (ECF No. 34 at 18; see Presentence Investigation Report at ¶ 37 (Williams was sentenced to 12 to 48 months imprisonment on August 2013 conviction for Ex-Felon in Possession of a Firearm).)

*5 Thus, as other courts have concluded,⁷ Williams is unable to demonstrate prejudice given his criminal record. The Court finds that Williams did not suffer prejudice. Accordingly, Williams cannot overcome procedural default.

3. Structural Error

Alternatively, Williams argues that the constitutional errors are structural, requiring only a showing of cause and not prejudice. The Court finds no structural error fatally infected Williams' indictment. See *U.S. v. Feehan-Jones*, Case No. 3:15-cr-00011-MMD-VPC-1 (D. Nev. Dec. 2, 2020).

F. Claims Waived by Unconditional Guilty Plea

Finally, the government argues that by pleading guilty unconditionally, Williams 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. 34 at 14.) The Court finds Williams' 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 Williams 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 Williams' motion to vacate, set aside, or correct his conviction and sentence (ECF No. 32) is denied.

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

All Citations

Slip Copy, 2020 WL 7059582

Footnotes

- 1 The government opposes the Motion. (ECF No. 34.) Williams filed a reply. (ECF No. 38.)
- 2 *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).)
- 3 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.
- 4 The government only cursorily addresses retroactivity and at no point refutes Williams' argument that *Rehaif* applies retroactively. (ECF No. 34 at 6 (“Just as Williams argues with respect to the retroactivity analysis, see ECF No. 32, at 11, the government believes that *Bailey v. United States*, 516 U.S. 137 (1995) provides an ‘excellent parallel’ for the procedural default analysis.”).)
- 5 “This is the wrong standard. Tellingly, the government cites no case applying the plain error standard to habeas petitions. This is because ‘use of the ‘plain error’ standard to review [a] § 2255 motion [is] contrary to long-established law.’ ” (ECF No. 38 at 19 (citing *Frady*, 456 U.S. at 167).)
- 6 *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).

- 7 As discussed above in footnote 6, 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).

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

RONALD WILLIAMS III

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:16-CR-86-MMD-WGC

USM Number: 53813-048

Christopher Frey

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 2 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:

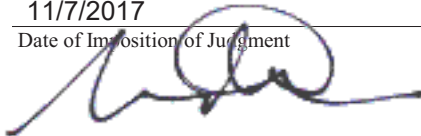
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC §922(g)(1) and §924(a)(2)	Felon in Possession of a Firearm	11/23/2016	2

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) 1 ☒ 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.

11/7/2017

Date of Imposition of Judgment



Signature of Judge

MIRANDA M. DU, U.S. DISTRICT JUDGE

Name and Title of Judge

11/13/2017

Date

DEFENDANT: RONALD WILLIAMS III
CASE NUMBER: 3:16-CR-86-MMD-WGC

IMPRISONMENT

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

70 months

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

that the defendant be designated to serve his sentence at FCI Sherwood and that he be allowed to participate in vocational training and RDAP if appropriate.

☒ 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: RONALD WILLIAMS III
CASE NUMBER: 3:16-CR-86-MMD-WGC

SUPERVISED RELEASE

Upon 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 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, 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)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments

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: RONALD WILLIAMS III
CASE NUMBER: 3:16-CR-86-MMD-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 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: RONALD WILLIAMS III
CASE NUMBER: 3:16-CR-86-MMD-WGC

SPECIAL CONDITIONS OF SUPERVISION

1. 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 upon your ability to pay, as directed by the probation officer.
2. You must complete 100 hours of community service during the term of supervised release. 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.
3. 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.
4. 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 program based on your ability to pay. You must not attempt to obstruct or tamper with the testing methods.

DEFENDANT: RONALD WILLIAMS III
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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: RONALD WILLIAMS III
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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.

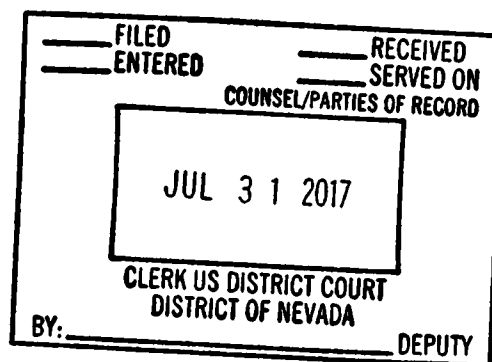
☐ Joint and Several

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONALD WILLIAMS III,

Defendant.

Case No. 3:16-cr-00086-MMD-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 RONALD WILLIAMS III 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 RONALD WILLIAMS III, 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 2: 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 2: 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 Detectives with the Regional Crime Suppression Unit (RCSU) set up a controlled buy of
8 firearms from Ronald Williams III utilizing a confidential informant (CI). Williams texted the
9 CI from phone number 775-219-4810 a pictures of firearms that he was willing to sell. On
10 November 22, 2016, Williams, utilizing phone number 775-219-4810 sent the CI a text messages
11 containing photos of five firearms. On November 23, 2016, detectives set up a controlled firearms
12 purchase operation with the CI and Williams. Williams and the CI corresponded via text message
13 to arrange a purchase of the five firearms for \$5,000.00. Williams agreed to meet with the CI at
14 the Seasons Inn located at 495 West Street, Reno, Nevada. At approximately 7:25pm, a balck
15 Chevy Impala with California plates arrived at the Seasons Inn. The CI sent Williams a text
16 message asking him to back the vehicle next to the CI's vehicle. Once the Chevy Impala backed
17 into the parking spot next to the CI's vehicle, detectives initiated a traffic stop. Williams was
18 sitting in the backseat of the vehicle and was taken into custody. The driver of the vehicle gave
19 detectives permission to search the vehicle. In the trunk of the Chevy, detectives located 5 rifles
20 with 30 round magazines. The firearms were fully identified as follows: a Norinco rifle, Model
21 NHM90, 7.62 x 39mm caliber bearing serial number MS021776; a Norinco rifle, Type 56 SKS,
22 7.62 x 39mm caliber bearing serial number 23007148; a Smith & Wesson rifle, Model M&P15-
23 22, .22 caliber, bearing serial number DZP1024, a Smith & Wesson rifle, Model M&P15-22, .22
24 caliber, bearing serial number DWC2804; and a Heckler & Koch rifle, Model 94, 9mm caliber

1 bearing serial number 3400. The firearms appeared to be the same firearms that Williams had
2 texted pictures of to the CI. When detectives ran the serial number of the Smith & Wesson rifle,
3 Model M&P15-22, .22 caliber, bearing serial number DWC2804, they discovered that the firearm
4 had been reported stolen out of Fallon, Nevada.

5 Williams invoked his right to counsel and his phone was seized as evidence. Detectives
6 verified the phone number of Williams' phone as being 775-219-4810.

7 ATF conducted a nexus investigation regarding the five firearms recovered from the
8 Chevy and the Llama .45 caliber handgun purchased on November 14, 2106 and determined that
9 none of the firearms had been manufactured in Nevada, and as such, must have traveled in
10 interstate commerce.

11 A review of court records determined that Williams had been previously convicted of the
12 felony crimes of Robbery and Ex-Felon in Possession of a Firearm in the Second Judicial District
13 court of the State of Nevada in 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 ("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 2: Felon in Possession of a Firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2)

Base Offense Level USSG § 2K2.1(a)(3)(i):	22*
Number of Firearms USSG § 2K2.1(b)(1)(A):	2
Stolen Firearms USSG § 2K2.1(b)(4)(A):	2
Trafficking in Firearms USSG § 2K2.1(b)(5)	4
Reductions:	
Minor participant USSG §3B1.2(b)	-2
Acceptance of Responsibility USSG § 3E1.1:	<u>-3</u>

Adjusted Offense Level: 25

*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).

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 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

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

7 Under USSG § 3E1.1(b), the United States will move for an additional one-level
8 downward adjustment for acceptance of responsibility before sentencing because the defendant
9 communicated his decision to plead guilty in a timely manner that enabled the United States to
10 avoid preparing for trial and to efficiently allocate its resources.

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

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

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

23 The defendant acknowledges that the United States Probation Office may calculate the
24 Sentencing Guidelines differently and may rely on additional information it obtains through its

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

5 **VII. APPLICATION OF SENTENCING STATUTES**

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

9 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
10 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
11 sentence and any statutory minimum sentence limit the Court's discretion in determining the
12 defendant's sentence.

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

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

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

24 ///

VIII. POSITIONS REGARDING SENTENCE

The parties will recommend a sentence at the low end of the guideline range as calculated by this plea agreement. The defendant acknowledges that the Court does not have to follow that recommendation. Notwithstanding its agreement to recommend a low end guideline sentence, the United States reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction 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 Norinco rifle, Model NHM90, 7.62 x 39mm caliber bearing serial number MS021776; a Norinco rifle, Type 56 SKS, 7.62 x 39mm caliber bearing serial number 23007148; and a Heckler & Koch rifle, Model 94, 9mm caliber bearing serial number 3400.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;

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

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

5 H. Waives the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7 and
6 32.2, the constitutional requirements, and the constitutional due process requirements of any
7 proceedings concerning the property;

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

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

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

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

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

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

22 **XI. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

23 Before or after sentencing, upon request by the Court, the United States, or the Probation
24 Office, the defendant will provide accurate and complete financial information, submit sworn

1 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
 2 defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
 3 release funds and property under his control in order to pay any fine, forfeiture, or restitution
 4 ordered by the Court.

5 **XII. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

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

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

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

21 B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly
 22 and expressly waives: (a) the right to appeal any sentence imposed within or below the applicable
 23 Sentencing Guideline range as contemplated by the plea agreement; (b) the right to appeal the
 24 manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742;

1 and (c) the right to appeal any other aspect of the conviction or sentence and any order of
2 restitution or forfeiture.

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

7 The defendant reserves only the right to appeal any portion of the sentence that is an
8 upward departure from the Sentencing Guidelines range as contemplated by the parties in this
9 plea agreement.

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

12 **XIII. ADDITIONAL ACKNOWLEDGMENTS**

13 This Plea Agreement resulted from an arms-length negotiation in which both parties
14 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
15 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
16 conditions other than those set forth in this agreement have been made or implied by the
17 defendant, the defendant's attorney, or the United States, and no additional promises, agreements

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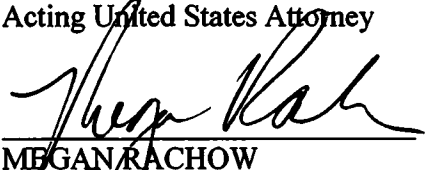
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1 or conditions shall have any force or effect unless set forth in writing and signed by all parties or
2 confirmed on the record before the Court.

3 STEVEN W. MYHRE
Acting United States Attorney

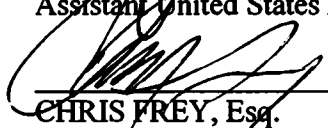
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5 DATE

7/31/17

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MEGAN RACHOW
Assistant United States Attorney

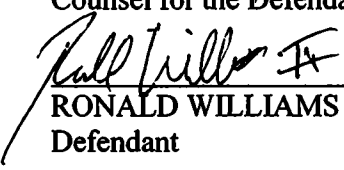
7 DATE

7/31/17

8 
CHRIS FREY, Esq.
Counsel for the Defendant

9 DATE

7/31/17

10 
RONALD WILLIAMS III
Defendant

DANIEL G. BOGDEN
United States Attorney
MEGAN RACHOW
Nevada State Bar #8231
Assistant United States Attorney
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☒ FILED	☐ RECEIVED
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COUNSEL/PARTIES OF RECORD	
DEC 14 2016	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

3:16-cr-00086-MMD-WGC

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONALD WILLIAMS III,

Defendant.

INDICTMENT FOR VIOLATIONS OF:

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

THE GRAND JURY CHARGES THAT:

Count One

(Felon in Possession of a Firearm)

On or about November 14, 2016, in the State and District of Nevada, RONALD WILLIAMS III, 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: Robbery, on or about May 3, 2007, and Ex-Felon in Possession of a Firearm, on or about September 19, 2013; did knowingly possess a Llama .45 caliber pistol bearing serial number B79123; said possession being in and affecting commerce; all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

Count Two

(Felon in Possession of Firearms)

On or about November 23, 2016, in the State and District of Nevada, RONALD WILLIAMS III, 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: Robbery, on or about May 3, 2007, and Ex-Felon in Possession of a Firearm, on or about September 19, 2013; did knowingly possess a Norinco rifle, Model NHM90, 7.62 x 39mm caliber bearing serial number MS021776; a Norinco rifle, Type 56 SKS, 7.62 x 39mm caliber bearing serial number 23007148; a Smith & Wesson rifle, Model M&P15-22, .22 caliber, bearing serial number DZP1024; a Smith & Wesson rifle, Model M&P15-22, .22 caliber, bearing serial number DWC2804; and a Heckler & Koch rifle, Model 94, 9mm caliber bearing serial number 3400; 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 allegation of Count Two 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 Two of this Criminal Indictment, RONALD WILLIAMS III, 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 Norinco rifle, Model NHM90, 7.62 x 39mm caliber bearing serial number MS021776;

b. a Norinco rifle, Type 56 SKS, 7.62 x 39mm caliber bearing serial number 23007148;

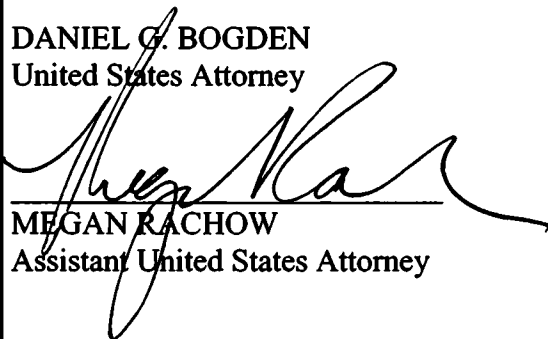
- 1 c. a Smith & Wesson rifle, Model M&P15-22, .22 caliber, bearing serial number
2 DZP1024;
3 d. a Heckler & Koch rifle, Model 94, 9mm caliber bearing serial number 3400; and
4 e. any and all ammunition ("property").

5 All pursuant to Title 18, United States Code, Section 922(g)(5)(A); Title 18, United States Code,
6 Section 924(d)(1); and Title 28, United States Code, Section 2461(c).

7 A TRUE BILL:

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9 
FOREPERSON OF THE GRAND JURY

10 DANIEL G. BOGDEN
11 United States Attorney

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13 MEGAN RACHOW
14 Assistant United States Attorney
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