No. _____

IN THE
Supreme Court of the United States

BERNARD KENTRELL BREELAND, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX OF APPENDICES

Appendix Page:

APPENDIX A:

OPINION, *UNITED STATES V. BREELAND*, NO. 23-4689 (4TH CIR. AUG. 14, 2025)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4689

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BERNARD KENTRELL BREELAND, JR., a/k/a Neezy Main,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:22-cr-00220-JFA-1)

Argued: March 18, 2025 Decided: August 14, 2025

Before NIEMEYER and RICHARDSON, Circuit Judges and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: John LaFitte Warren, III, LAW OFFICE OF BILL NETTLES, Columbia, South Carolina, for Appellant. Andrea Gwen Hoffman, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Appellee. **ON BRIEF:** Adair F. Boroughs, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Bernard Kentrell Breeland, Jr., of possessing ammunition after having been convicted of a felony, 18 U.S.C. § 922(g)(1), following a shooting that occurred in 2020. The district court sentenced Breeland to 120 months' imprisonment. Breeland now appeals, arguing the district court made evidentiary errors which entitle him to a new trial and that the sentence it imposed was procedurally unreasonable. Because we conclude the district court did not abuse its discretion, we affirm its judgment.

I.

A federal grand jury returned an indictment alleging Breeland knowingly possessed .45 caliber ammunition after having been convicted of a felony in March 2022. *See* 18 U.S.C. § 922(g)(1). The indictment was based upon an incident that occurred in February 2020. Breeland was accused of being the individual seen on surveillance camera shooting Iman Wilson multiple times with a pistol in a parking lot in Columbia, South Carolina in February 2020. On the surveillance video, the shooter approached Wilson and apparently shot him at least once while they were both standing. At that point, Wilson fell to the ground. The shooter continued to fire at Wilson from close range, and several muzzle flashes are visible. Wilson survived the shooting with injuries, but he later died in an unrelated incident.

In August 2022, Breeland filed a motion to dismiss the indictment, arguing § 922(g)(1) was unlawful after the Supreme Court rendered its decision in *New York State*

Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022). The district court denied the motion, and the case proceeded to trial.

A.

Breeland challenges several evidentiary rulings made before and during his trial, so we begin with a summary of relevant proceedings in the district court. Breeland moved before trial to exclude lay identification testimony by Columbia Police Department (CPD) Investigators Nicholas Fortner and Ryan McIntyre. Each testified that they recognized Breeland as the individual shooting Wilson in the surveillance video. He argued the testimony was improper lay identification testimony because: (1) McIntyre's identification was based on prior contacts with Breeland in his police work; and (2) Fortner's identification was based on the surveillance video of the shooting and photographs of Breeland in an interview room at CPD.

After hearing the proffered testimony outside the presence of the jury, the district court admitted the testimony with respect to both investigators. However, it also instructed McIntyre not to identify himself as a law enforcement officer or reference his work on a gang task force upon Breeland's request.

The gun used in Wilson's shooting was not recovered, and Breeland's pretrial brief forecasted his intent to introduce evidence of an alternative perpetrator. Breeland based this alternative perpetrator theory on several documents produced by the Lexington County Sherriff's Department (LCSD). Those documents were: two LCSD booking reports of individuals arrested in another case, an associated report for a handgun seized in connection

with those arrests, a South Carolina Integrated Ballistics Identification System (IBIS) report on that handgun, and a National Integrated Ballistic Information (NIBIN) report. The NIBIN report flagged that the firearm seized in this later arrest and the weapon used in the Wilson shooting several months earlier were potentially related, but emphasized that no microscopic comparison between ammunition and the gun had been performed.

B.

The jury was empaneled shortly after the pretrial hearing and trial commenced. McIntyre and Fortner each testified about their respective identifications of Breeland during the government's case-in-chief. Portions of McIntyre's testimony concerned his previous interactions with Breeland but were sanitized of references to police work. On redirect examination, the government asked him if he "record[ed] the conversations" with Breeland or if he was "familiar with any nicknames" that Breeland had. J.A. 296. Breeland then moved for a mistrial and argued this testimony had violated the court's instruction to not imply McIntyre's role as a law enforcement officer. The district court denied the motion, concluding that merely asking whether a conversation was recorded or about a defendant's nickname did not suggest a law enforcement affiliation.

Fortner, whose law enforcement position was disclosed to the jury, also testified. Based on his personal identification of Breeland at CPD, videos from the shooting, and an image of Breeland in an interview room at CPD, he identified Breeland as the shooter in the surveillance video.

Breeland sought to cross examine Kevin Schmidt, a CPD crime scene investigator who responded to the Wilson shooting, about the NIBIN report. Schmidt acknowledged familiarity with NIBIN, stating it was "the database where they basically test fire firearms, take the shell casings, and store it in a database, basically like fingerprints but for shell casings." J.A. 227–28. Breeland's counsel then presented the NIBIN report to Schmidt, who stated he had not seen the report before, but he did recognize the CPD case number for the Wilson shooting. The court sustained the government's objection to questions about the substance of the report on authenticity grounds, stating it would "feel much more comfortable" admitting the records the next day of trial when a records custodian would be present for authentication. J.A. 232.

Breeland also filed an offer of proof arguing the documents supporting his third-party perpetrator theory were admissible. Specifically, Breeland argued that the documents — which were, recall, reports relating to the recovery of a similar or the same firearm used to shoot Wilson and the booking reports of the individuals from whom that firearm was recovered — were self-authenticating under Federal Rule of Evidence 902(5) ("A book, pamphlet, or other publication purporting to be issued by a public authority.). Breeland also raised Rule 902(1) as grounds for admission, which provides that documents bearing the seal of a government entity and "a signature purporting to be an execution or attestation" are self-authenticating. The district court rejected Breeland's Rule 902(5) argument on the basis that the documents at issue were not the sort of "book, pamphlet, or other publication" for public consumption contemplated by the rule. Shortly before the government rested, the court also rejected Breeland's Rule 902(1) argument because the

supposed "seal" on the relevant documents was "just a normal letterhead," and it concluded the rule was intended to apply to a stamp or otherwise "distinctive logo of sorts." J.A. 335–37.

The government concluded its case-in-chief shortly thereafter. Before Breeland presented evidence, the government moved to exclude the documents Breeland sought to introduce for his third-party perpetrator defense. The thrust of the government's argument here was that the documents may confuse the jury and that Breeland was attempting to improperly introduce expert evidence through the NIBIN report. The court recessed without ruling on this issue. But before it ruled, Breeland withdrew the evidence. Breeland thereafter did not put on a defense. Jury instructions were read, followed by the parties' respective closing arguments. The jury returned a guilty verdict later that day.

C.

Breeland moved for a judgment of acquittal or, in the alternative, for a new trial. *See* Fed. R. Crim. P. 29, 33. Relevant to this appeal, he argued that the fact that the LCSD and NIBIN documents were not admitted during the government's case prejudiced him to the extent a new trial was warranted. The district court denied that motion in a written order, noting the soundness of its evidentiary rulings, its conclusion that Breeland mooted the evidentiary issue by withdrawing the exhibits, and that, in the larger context of Breeland's case, any error was harmless.

The government prepared a presentence report (PSR) prior to Breeland's sentencing. It recommended the application of a cross reference under U.S.S.G. §

2A2.1(a)(2. The government stated that this cross reference should apply — resulting in a two-level offense increase — because Breeland's conduct amounted to attempted murder. Breeland objected to the cross reference and argued that the government could not prove that he possessed specific intent to kill Wilson.

The district court adopted the PSR without modification. The court calculated a final offense level of 29 and a guideline range of 108 to 120 months. The court imposed a sentence of 120 months' imprisonment followed by supervised release of at least one year.

Breeland timely appeals, arguing that evidentiary errors warrant a new trial and that the district court imposed a substantively unreasonable sentence. He also challenges the constitutionality of the statute proscribing the possession of ammunition by a person who has been convicted of a felony under the Second Amendment.

II.

Breeland begins by arguing the statute upon which he was convicted, 18 U.S.C. § 922(g)(1), is facially unconstitutional under *Bruen*. However, a panel of this Court has held that Section 922(g)(1) remains facially constitutional post-*Bruen*. *United States v. Canada*, 123 F.4th 159, 161–62 (4th Cir. 2024). And we are bound by that decision. *See United States v. Hunt*, 123 F.4th 697, 702 (4th Cir. 2024) ("one panel cannot overrule another") (quoting *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc)). Breeland's facial challenge to Section 922(g) therefore fails.

III.

We will take up Breeland's arguments relating to evidentiary issues and related matters next. He contends first that the district court abused its discretion by permitting Investigators Fortner and McIntyre to offer testimony identifying him in the surveillance video, that the court should have ordered a mistrial based upon certain testimony from McIntyre, and that the court improperly instructed the jury on the identification issue. He next argues that the court's rulings with respect to the LCSD and NIBIN documents were abuses of discretion affecting his Sixth Amendment confrontation right. We affirm the district court's judgment.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *See United States v. Roe*, 606 F.3d 180, 185 (4th Cir. 2010). A court abuses that discretion only when it acts "arbitrarily or irrationally." *Id.* (quoting *United States v. Moore*, 27 F.3d 969, 974 (4th Cir. 1994)). "Evidentiary rulings based on erroneous legal conclusions are 'by definition an abuse of discretion.'" *Id.* (quoting *United States v. Turner*, 198 F.3d 425, 430 (4th Cir. 1999)).

A.

Breeland's arguments about Fortner's and McIntyre's testimony pertain to the admission of lay witness testimony. A lay witness may testify "in the form of an opinion" that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific,

technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

"[I]f a witness's firsthand observations are 'common enough' and require applying only a 'limited amount of expertise,' they may fairly come in under Rule 701 as lay testimony." *United States v. Smith*, 962 F.3d 755, 767 (4th Cir. 2020) (quoting *United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006)). "On the other hand, opinions resulting 'from a process of reasoning which can be mastered only by specialists in the field' must be admitted through Rule 702." *Id.* (quoting *United States v. Howell*, 472 F. App'x 245, 246 (4th Cir. 2012)).

Our review of the McIntyre and Fortner testimony makes clear that the admission of this testimony was sound. True, as Breeland points out, neither investigator was present at the site of the shooting to witness it. But their testimony concerned their lay opinions as to Breeland being the individual seen in the video based upon their prior interactions with him. That is the kind of testimony that is "rationally based on the witness's perception," and is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701; *cf. United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (finding abuse of discretion because officer testified about his "credentials and training, *not his observations*" of wiretapped phone calls) (emphasis in original)). On this record, the admission of Fortner and McIntyre's testimony was not an abuse of discretion.[1]

[1] Breeland also states in a single paragraph that the evidence should have been excluded under Federal Rule of Evidence 403, but a party waives an argument if it fails to develop (Continued)

Nor did the district court err in denying Breeland's request for a mistrial during McIntyre's testimony. The district court instructed the government and McIntyre, an Investigator affiliated with a CPD gang task force, to not reference his law enforcement work during his testimony so as to limit prejudice to Breeland on that basis. And Breeland does not argue that McIntyre was explicitly identified as a law enforcement officer at any time. However, he focuses on the government's questions about whether McIntyre recorded any conversations with Breeland or was familiar with any of Breeland's nicknames. Breeland in turn argues that this questioning "suggested that [McIntyre] sometimes engages in the type of actions law enforcement officers perform . . . and had the type of specialized information that law enforcement officers have." Opening Br. 52.

The district court did not abuse its discretion in denying Breeland's request to declare a mistrial. We disturb the district court's denial of a motion for a mistrial only "under the most extraordinary of circumstances," and Breeland does not come close to demonstrating that prerequisite. *United States v. Dorlouis*, 107 F.3d 248, 257 (4th Cir. 1997). The supposedly prejudicial testimony, both standing alone and in the context of the government's questioning, do not suggest that McIntyre was affiliated with law enforcement. The complained-of testimony also clearly does not suggest any affiliation with the gang task force. We therefore conclude the government complied with the court's

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it and takes only a "passing shot" at the issue. *United States v. Cabrera-Rivas*, 142 F.4th 199, 219 (4th Cir. 2025).

instructions regarding McIntyre's testimony, and the denial of Breeland's motion for a mistrial was not an abuse of discretion.

Lastly, Breeland challenges jury instructions related to the identification testimony. The court — over Breeland's objection, but with some modifications he had requested — instructed jurors on eyewitness testimony. For example, the court instructed that "if [the juror] believe[s] that the witness was truthful, [the juror] must still decide how accurate that identification was." J.A. 381–82. Jurors were also instructed to consider the "circumstances surrounding the later identification," the length of time the witness had to observe the person, and whether the witness had observed the person previously. *Id.*

"We review the decision to give or not give a jury instruction, and the content of an instruction, for abuse of discretion." *Burgess v. Goldstein*, 997 F.3d 541, 557 (4th Cir. 2021). "When jury instructions are challenged on appeal, the key is 'whether, taken as a whole, the instruction fairly states the controlling law.'" *Id.* (quoting *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 2021)).

Breeland concedes that these instructions constitute "an accurate recitation of how eyewitness testimony should be evaluated, but he nonetheless argues the instructions were "inappropriate in light of the testimony at trial" because the identification was beyond the scope of the evidence. Opening Br. 55. We agree that the instructions "fairly state[d] the controlling law." *Burgess*, 997 F.3d at 557 (quoting *Cobb*, 905 F.2d at 789). Further, we disagree with Breeland's contention that the instruction was germane only to matters "without the scope of the evidence." Opening Br. 55 (quoting *United States v. Linn*, 438 F.2d 456, 460 (10th Cir. 1971)). A key issue in this case was the identity of the individual

seen on surveillance camera footage shooting Wilson and fleeing the scene. In seeking to prove beyond a reasonable doubt that individual was Breeland, the government introduced evidence from witnesses that had previously interacted with Breeland regarding their lay opinion that it was in fact Breeland in the video. The instructions were both legally correct and factually relevant to matters for the jury to decide. Therefore, Breeland's challenge to the jury instructions fails because the district court did not abuse its discretion.

B.

Next, we address Breeland's arguments respecting the district court's exclusion of the NIBIN report and related LCSD documents during the government's presentation of evidence. Breeland attempted to introduce these documents during the government's case-in-chief to present an alternative perpetrator theory. Specifically, Breeland sought to introduce the evidence while cross-examining CPD crime scene investigator Schmidt, with the ultimate purpose of arguing "that the government's investigation was incomplete and that law enforcement ignored readily available investigative leads about the Handgun and alternative perpetrators." Opening Br. 44.

The district court considered extensive argument about these documents but eventually concluded that they were not authenticated under Federal Rule of Evidence 901 (requiring a proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is") nor self-authenticating under Rule 902(5) as an official publication. It also rejected that letterhead bearing the South Carolina Law Enforcement Division or LCSD logos were the kinds of official "seals" that would permit finding a

document was self-authenticating under Rule 902(1). The evidence was, in the end, not admitted during the government's case. But the district court affirmatively stated that, if a records custodian could testify to the documents' authenticity, it would find the documents authenticated and Breeland would be permitted to present them in his defense. Breeland, in turn, indicated that he would seek to admit the documents at that time; the government objected on the basis that the evidence could confuse the jury. The parties presented arguments on the government's objection, and the court recessed to consider the matter.

But before the court ruled, Breeland withdrew the evidence. *See* J.A. 360–61. The court confirmed that he was "withdrawing this evidence we've just been talking about," and Breeland's counsel responded "Correct." J.A. 361. Breeland did not put on any evidence in his defense.

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). And "[a] party who identifies an issue, and then explicitly withdraws it, has waived the issue." *United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014) (quoting *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002)); *see also Wood v. Milyard*, 566 U.S. 463, 474 (2012) (issue waived where party acknowledged it, but "deliberately steered the District Court away from the question"). The government contends that this issue has been waived, and we agree.

True, the evidence was not admitted during the government's case, but at the same time, the court had indicated to the parties that it would permit Breeland to offer those documents in his defense, so long as an LCSD records custodian was available. And it

appears from the record that an LCSD records custodian was on the way to the courthouse, or at the very least, had confirmed his availability on the second day of trial when the matter was discussed before the court. But before he arrived, Breeland "explicitly with[drew] it." *Robinson*, 744 F.3d at 298 (quoting *Rodriguez*, 311 F.3d at 437).

Breeland resists this conclusion and references the Sixth Amendment confrontation right and cross-examination's promise as "the principal means by which the believability of a witness and the truth of his testimony are tested." Opening Br. 45 (quoting *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974)). But the action of the district court Breeland now challenges on appeal is not a limitation of, say, the scope of cross examination. Instead, this argument concerns the exclusion of evidence, and the Confrontation Clause does not "confer the right to cross-examine 'in whatever way, and to whatever extent, the defense might wish.'" *United States v. Ayala*, 601 F.3d 256, 273 (4th Cir. 2010) (quoting *Delaware v. Fensterer*, 47 U.S. 15, 20 (1985) (per curiam)). Breeland offered the evidence, and then affirmatively withdrew it. We therefore conclude the matter of the admission of NIBIN and LCSD documents has been waived.

IV.

Finally, we examine Breeland's arguments that the district court rendered a procedurally unreasonable sentence because it applied a cross-reference under U.S.S.G. § 2A2.1(a)(2) for attempted murder. He contends application of the cross-reference was unlawful because the court looked to the wrong evidentiary standard and that the facts did

not support a finding that Breeland possessed specific intent to kill Wilson. We conclude the sentence the district court rendered is procedurally reasonable.

We review sentences for procedural unreasonableness "under a deferential abuse-of-discretion standard." *United States v. Torres-Reyes*, 952 F.3d 147, 151 (4th Cir. 2020) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). "To determine whether a sentence is procedurally reasonable, 'this Court considers whether the district court properly calculated the defendant's advisory guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) factors, and sufficiently explained the selected sentence.'" *Id.* (quoting *United States v. Ross*, 912 F.3d 740, 744 (4th Cir. 2019)). In this case, we are specifically tasked with "determining whether a district court properly applied the advisory Guidelines," in which case "we review the district court's legal conclusions de novo and its factual findings for clear error." *United States v. Ashford*, 718 F.3d 377, 380 (4th Cir. 2013) (quoting *United States v. Layton*, 654 F.3d 330, 334 (4th Cir. 2009)).

Section 2K2.1(c) of the U.S. Sentencing Guidelines permits the application of a cross reference to a defendant's sentence if that defendant "used or possessed any firearm or ammunition cited in the offense of conviction." That provision in turn refers to U.S.S.G. § 2X1.1, which directs the district court to calculate the relevant offense level based upon the substantive criminal offense in such circumstances. And Section 2A2.2 provides the sentencing guidelines for the underlying substantive offense the government argued in the PSR should apply: attempted murder. So, the government argued before sentencing, the court should impose a sentence using attempted murder as a cross reference because

Breeland's act of shooting Wilson amounted to attempted murder. "To prove attempted murder, the Government must show that the defendant both had 'culpable intent to commit the crime' and 'took a substantial step towards completion of the crime that strongly corroborate[s] that intent.'" *United States v. Ellis*, 130 F.4th 442, 449 (4th Cir. 2025) (quoting *United States v. Engle*, 676 F.3d 405, 420 (4th Cir. 2012)). The district court did not err by finding Breeland had attempted to kill Wilson by a preponderance of the evidence.[2]

At sentencing, the district court explained why it was applying the cross reference: it found that Breeland was "clearly the aggressor," that he shot Wilson "at point-blank range" in the torso, and "then after he fell down and was obviously incapacitated," "the shots continued." J.A. 616–17. The district court went onto explain that specific intent to kill — an element of attempted murder — "could be shown circumstantially" under the facts of this case. *Id.*

Breeland argues the district court erred because it focused "exclusively" on the number of shots he fired, and the record therefore did not support a finding of specific intent. Opening Br. 65. But the court, as just explained, found more than just the number of shots supported its ruling: specifically, it emphasized that Breeland appeared to be the

[2] Breeland also argues that this Court should instead hold the government to a clear and convincing evidentiary standard on the application of a cross-reference. We have rejected this argument previously, and Breeland does not persuade us to revisit our well-reasoned precedent. *See United States v. Grubbs*, 585 F.3d 793, 803 (4th Cir. 2009) ("Preponderance of the evidence is the appropriate standard of proof for sentencing purposes."); *see also United States v. Medley*, 34 F.4th 326, 335–36 (4th Cir. 2022) (recognizing preponderance standard as proper when making relevant sentence-enhancement findings).

aggressor, and that he first shot Wilson at close range and continued to do so after Wilson had fallen to the ground.

Not long ago, we affirmed the application of an attempted murder cross-reference in the case of a defendant who "pulled out a gun, cocked it back, pointed it at [the victim] and fired from close proximity." *Ellis*, 130 F.4th at 449–50 ("It is, after all, only natural to infer that when someone shoots at another person, the shooter intends to kill.") (quoting *State v. Williams*, 876 S.E.2d 324, 327 (S.C. Ct. App. 2022)). The district court did not err by applying the attempted murder cross reference when fashioning Breeland's sentence. As this is the only sentencing argument raised by Breeland on appeal, we therefore conclude the district court rendered a procedurally reasonable sentence.

V.

We conclude that the district court did not err by declining to dismiss Breeland's indictment, did not abuse its discretion in ruling on evidentiary and other related issues at trial, and did not render a procedurally unreasonable sentence. Accordingly, its judgment is

AFFIRMED.

APPENDIX B:

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, *UNITED STATES V. BREELAND*, NO. 3:22-CR-00220-JFA (D.S.C. SEPT. 8, 2023)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA vs. BERNARD BREELAND,	C/A No. 3:22-CR-220 **ORDER**

This matter is currently before the court on Defendant Bernard Breeland's ("Defendant") Motion for Judgment of Acquittal or, in the alternative, for a New Trial. (ECF No. 144).

I. FACTUAL HISTORY

This case arises from a shooting incident that occurred on February 4, 2020 at an apartment complex in Columbia, South Carolina. The Columbia Police Department ("CPD") investigated the incident and determined that Defendant was the shooter, and the victim was Inman Wilson. CPD officers recovered nine spent .45 caliber shell casings and one live .380 bullet in the parking lot of the apartment complex, however, no firearm was recovered.

On March 15, 2022, a federal Grand Jury returned an Indictment alleging Defendant "knowingly possessed a firearm and ammunition in and affecting commerce, to wit, a .45 caliber ammunition, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year and knowing that he had been convicted of

such a crime" in violation of 18 U.S.C. § 922(g)(1). (ECF No. 3). At the time of the shooting, Defendant had a prior conviction under 18 U.S.C. § 1962 for his participation in a racketeering conspiracy. *See United States v. Bernard Breeland*, Case No. 3:12-CR-00513. On March 16, 2022, Defendant was arrested, and two days later he pleaded "not guilty" before a federal magistrate judge. (ECF Nos. 9, 11, & 13).

On September 6, 2022, Defendant changed his plea to guilty to the charge in the Indictment. (ECF No. 44). Then, on September 25, 2022, Defendant filed a *pro se* Motion to Withdraw his Guilty Plea. (ECF No. 47). Defendant contended he was coerced into pleading guilty based on erroneous information he received from his initial CJA counsel. *See id.* On November 1, 2022, this Court held a hearing during which it relieved Defendant's initial CJA counsel, and the following day, it appointed Defendant's trial counsel, Mr. John Warren, Esq. (ECF No. 52 & 54).

On February 1, 2023, Defendant's trial counsel filed a Motion to Withdraw his Guilty Plea (ECF No. 67), and this Court held a hearing on the motion on February 13, 2023. (ECF No. 68). This Court orally granted the Motion during the hearing and entered a written Order the following day. (ECF No. 73).

On April 26, 2023, this Court held a pretrial hearing on Defendant's pending Motions which included a Motion to Suppress statements he made during a custodial interrogation. (ECF No. 88). This Court heard oral argument on the issue and took the matter under advisement. After further reviewing the parties' briefs and the video recording of the interrogation, this Court issued a written Order granting Defendant's Motion to

suppress the statements he made during an interrogation with Columbia Police Department regarding the incident. (ECF No. 122). Thereafter, this case proceeded to trial.

Trial began on May 3, 2023. Prior to the beginning of trial, this Court addressed two important issues raised in Defendant's pretrial brief which are particularly relevant to the instant motion. First, Defendant raised the issue of whether spent shell casings can be considered "ammunition" under federal law. *See* 18 U.S.C. § 921 (a)(17)(A) ("The term 'ammunition' means ammunition or cartridge cases, primers, bullets, or propellent powder designed for us in any firearm."). Defendant argues that spent shell casings are not "ammunition" because they are not "designed for use in any firearm" as they have already been used in a firearm. This Court declined to interpret the relevant statute for this purpose, and instead, it charged the jury on the statutory definition of ammunition. Second, Defendant raised the issue of "third party guilt" which became relevant due to a National Integrated Ballistic Information Network ("NIBIN") Report produced in discovery by the Government. This Report indicated that the handgun used in the shooting at the apartment complex was recovered by Lexington County Sheriff's Department ("LCSD") during a drug arrest on December 3, 2020. Defendant argued one of the individuals arrested by LCSD looked like the individual in the apartment complex's security footage of the shooting incident. This Court heard oral arguments on the issue of hearsay regarding this Report and other documents produced by LCSD in response to Defendant's pretrial subpoena. Ultimately, this Court ruled these documents would be admissible pursuant to Federal Rule of Evidence 803(8)(A)(iii), however, Defendant was still responsible for

laying the proper foundation. The foundation to properly authenticate these documents became an issue later in trial.

At the conclusion of the Government's evidence, Defendant moved for a judgment of acquittal based on the insufficiency of evidence and the argument that spent shell casings are not "ammunition" under federal law. This Court orally denied the motion. Then, the Court heard arguments on whether the NIBIN Report and other related LCSD documents would be admissible in Defendant's case in chief. This Court arranged for LCSD's general counsel to be present at trial to testify as a records custodian of these records if Defendant chose to put up evidence during his case. Additionally, Defendant subpoenaed a LCSD investigator to testify to these records. However, ultimately, Defendant decided not to put up evidence during his case in chief, and he rested.

After three days of trial, the jury returned a guilty verdict. Now, Defendant brings the instant Motion for Judgment of Acquittal, or in the alternative, a New Trial.

II. LEGAL STANDARD

a. Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29

Rule 29(c) of the Federal Rules of Criminal Procedure provides that a defendant may move for a judgment of acquittal within 14 days following a jury verdict. In addressing a Rule 29(c) motion, the trial court is required to sustain a guilty verdict if, "viewing the evidence in the light most favorable to the prosecution, the verdict is supported by substantial evidence." *United States v. Smith*, 451 F.3d 209, 216 (4th Cir. 2006). Substantial evidence is defined as "evidence that a reasonable finder of fact could accept

as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*

b. Motion for a New Trial pursuant to Fed. R. Crim. P. 33

Rule 33 of the Federal Rules of Criminal Procedure provides that a trial court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. A motion for a new trial under Rule 33 must be filed within 14 days of the verdict, except for a claim of newly discovered evidence. In addressing a Rule 33 motion "the district court is not constrained by the requirement that it view the evidence in a light most favorable to the government" and "may evaluate the credibility of witnesses." *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). A trial court, however, "should exercise its discretion to award a new trial sparingly," and should grant a new trial "only when the evidence weighs heavily against the verdict." *United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003). Furthermore, it is well settled that Rule 33 allows for the grant of a new trial where "substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010).

III. DISCUSSION

This Court will address each Motion and Defendant's respective arguments in turn.

a. Motion for Judgment of Acquittal

Defendant argues the government presented insufficient evidence to establish his guilt of the offense charged in the Indictment, and as such, this Court should grant the instant Motion. This Court disagrees.

To be convicted of 18 U.S.C. 922(g)(1), the government must prove that a defendant was a convicted felon; he knowingly possessed ammunition; the ammunition traveled in interstate commerce; and the defendant knew of his status as a felon. *See United States v. Royal*, 731 F.3d 333, 337 (4th Cir. 2013); *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019).

Viewing the evidence in the light most favorable to the government, this Court finds the government presented sufficient evidence to support the jury's guilty verdict. First, the government presented surveillance footage of the apartment complex on the day of the shooting from two different vantage points. The first vantage point showed Defendant dressed in distinct clothing (red sweater with white stars) conversing with other unidentified individuals in the parking lot of the complex. The second vantage point showed Defendant in the same distinct clothing shooting at the victim multiple times. The recordings were clear such that the jury was able to compare the individual in the recording with the Defendant sitting in the courtroom to see that they were the same person. Further, the Government presented testimony from investigators with CPD who also identified Defendant as the shooter in the surveillance footage. In the event the identification testimony was insufficient, the Government also presented testimony and evidence that Defendant was monitored by a GPS device at the time of the shooting. The data from this device corroborated the surveillance footage as it placed him in the apartment complex at the time of the shooting.

Further, the Government presented testimony that nine spent shell casings were recovered from the scene. Defendant argues spent shell casings should not support

Defendant's conviction because they cannot be considered "ammunition" for the purposes of § 921(a)(17)(A). Persuasively, Defendant asserts spent shell casings are freely sold and used in jewelry, bottle openers, and home decor which make it less likely that Congress intended for ammunition to include shell casings which have already been used in a firearm. An interpretation of the statute in this way may be necessary in an instance in which Defendant was simply found with spent shell casings on his person. But here, Defendant was captured on video shooting the victim. The ammunition used during the shooting most definitely comports with the statutory definition of ammunition.

Defendant asserts the government's only evidence is this low-quality video and that it presented no evidence that linked these shell casings to the Defendant. Defendant suggests CPD's investigation was flawed because they failed to perform a fingerprint analysis on the shell casings. Although the investigators testified such an analysis would have been impossible, this Court also finds that this suggestion of reasonable doubt fails because of the surveillance footage and GPS evidence tying Defendant to the scene of the crime.

Additionally, an ATF expert testified to the interstate nexus requirement of the charge as he confirmed that these shell casings were not manufactured in South Carolina, and currently, there is no manufacturer of primer and propellant powder in South Carolina. Thus, the shell casings had to have crossed state lines. Finally, the Government and Defendant stipulated as to his status as a felon and Defendant's knowledge of his status.

Thus, viewing the evidence in the light most favorable to the Government, this Court finds the Government presented substantial evidence to support the jury's guilty verdict.

This Court denies Defendant's Motion for Judgment of Acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure is denied.

b. Motion for a New Trial

Defendant moves for a new trial on two bases. First, he argues the Government improperly impeded the introduction of the NIBIN Report by objecting to its authenticity at trial which resulted in its exclusion. Second, he argues this Court erred by excluding the LCSD documents on the grounds that they had not been properly authenticated.

Beginning with the NIBIN Report, Defendant argues the exclusion of this Report deprived him of the opportunity to meaningfully confront and cross examine the Government's witnesses. He asserts the Report was authentic for three independent reasons: (1) judicial admission and estoppel; (2) Federal Rule of Evidence 901(b)(4); and (3) Self Authentication under Federal Rule of Evidence 902(5). This Court evaluates each reason in turn.

In his first purported basis for authentication of the NIBIN Report, Defendant asserts the NIBIN Report should have been found to be authentic because the Government produced it in discovery which establishes a document's authenticity when offered by the party opponent or Defendant in this case. *See* 31 Fed. Prac. & Proc. Evid. § 7105 (2d ed.) ("Authentication also can be accomplished through judicial admissions such as….production of items in response to a subpoena or other discovery request."); *See Maljack Prods., Inc. v. GoodTimes Home Video Corp.,* 81 F.3d 881, 889 n. 12 (9th Cir. 1996) (documents produced by a party in discovery were deemed authentic when offered by the party-opponent). The premise is a practical one as it acts to prevent a party from

having it both ways—a party cannot produce documents in response to a discovery request and then later, disclaim the authenticity of those records when this same party seeks to challenge their admissibility. For example, in *Butcher v. Bailey*, the Sixth Circuit upheld this premise against a party who produced documents in response to a request for "personal records." *Butcher v. Bailey*, 753 F.3d 465, 469 (6th Cir. 1985).

However, the circumstances of the production of the NIBIN Report in the instant case are markedly different. The Government produced the NIBIN Report in good faith in response to a broad discovery request for any information or documents which may constitute *Brady* material. *See Brady v. Maryland,* 373 U.S. 83,83 S.Ct. 1194 (1963). Significantly, the United States Attorney's Office did not create the Report as it received the Report from a third-party agency, the South Carolina Law Enforcement Division ("SLED"). Accordingly, the Government would be incompetent to authenticate the Report because it has no knowledge of the process for its creation and could not vouch for its accuracy. Unlike the personal records example illustrated above, the Government's production of this Report expresses nothing more than its belief that it was discoverable under the Federal Rules of Evidence and *Brady*. Although the Report was discoverable, it does not follow that it was authenticated or admissible at trial. In fact, it is axiomatic that documents produced in discovery are not free from challenges at trial including those based on authenticity. As the party offering this evidence, Defendant had the burden of showing it was authentic and he failed to do so. He may not now use the Government's duty to disclose known evidence as a blank check for authenticity. Research has revealed no bright line rule indicating that once produced, authenticity can no longer be challenged and the

cases cited by Defendant in support for this premise contain inapposite facts than those at play in this case.

Thus, Defendant's first purported basis for authenticity fails.

Secondly, Defendant argues the NIBIN Report was properly authenticated under Rule 901(b)(4) of the Federal Rules of Evidence during trial. Through cross examination of CPD CSI Kevin Schmidt, Defendant asserts he established that the Report contained a reference to the case number for the instant case. And as a law enforcement document, Defendant argues the Report has "distinctive characteristics" such as case numbers which can be used to authenticate a document under Rule 901(b)(4). Federal Rule of Evidence 901 states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." One way in which this requirement may be met is by presenting distinctive characteristics of the evidence, for example "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances." Fed. R. Evid. 901(b)(4).

While this Court does not necessarily disagree that the Report contains unique or distinctive characteristics, Defendant was unable to establish as much at trial. The commentary to Rule 901(b)(4) observes "[t]he characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety," including authenticating an exhibit by showing that it came from a "particular person by virtue of its disclosing knowledge of facts known peculiarly to him," or authenticating "by

content and circumstances indicating it was in reply to a duly authenticated" document. Fed. R. Evid. 901(b)(4) advisory committee's note.

Here, Defendant was unable to establish the Government's witnesses had unique knowledge of the NIBIN Report such that they could testify to unique facts or information contained within the Report for purposes of authentication. In fact, the Government's witnesses testified they had no knowledge of this Report which was created by LCSD. *See United States v. Siddiqui,* 235 F.3d 1318, 1322–23 (11th Cir.2000) (allowing the authentication of an e-mail entirely by circumstantial evidence, including the presence of the defendant's work e-mail address, content of which the defendant was familiar with, use of the defendant's nickname, and testimony by witnesses that the defendant spoke to them about the subjects contained in the e-mail); *Safavian,* 435 F.Supp.2d at 40 (same result regarding e-mail); *In re F.P.,* 878 A.2d at 94 (noting that authentication could be accomplished by direct evidence, circumstantial evidence, or both, but ultimately holding that transcripts of instant messaging conversation circumstantially were authenticated based on presence of defendant's screen name, use of defendant's first name, and content of threatening message, which other witnesses had corroborated); *Perfect 10, Inc. v. Cybernet Ventures, Inc.,* 213 F.Supp.2d 1146, 1153–54 (C.D.Cal.2002) (admitting website postings as evidence due to circumstantial indicia of authenticity, including dates and presence of identifying web addresses). Defendant was only able to establish the case number associated with the instant case was referenced in the Report and based on the case examples, this characteristic alone is insufficient to satisfy the standard for authenticity. Thus, Defendant's second purported basis for authenticity fails.

Finally, Defendant asserts the Report was self-authenticating under Rule 902(5) of the Federal Rules of Evidence. Although produced by the Government in discovery, it was also included in the documents Defendant received from the LCSD in response to a subpoena. These documents, including the Report, are also the subject of this Motion as Defendant argues this Court erred by excluding them at trial. Thus, this Court will this argument as it pertains to the entirety of the documents including the Report.

Federal Rule of Evidence 902 governs evidence that is self-authenticating. It applies to public documents and "require[s] no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902. Specifically, under Federal Rule of Evidence 902(5) a "book, pamphlet, or other publication[s] purporting to be issued by a public authority" are self-authenticating.

To begin, this Court was not and is not convinced that the LCSD documents should be considered "other publication[s] purporting to be issued by a public authority." While there is no doubt that the LCSD is a public authority, the documents at issue were never published for public consumption. The LCSD documents contain: (1) SLED IBIS Entry Form for the LCSD; (2) NIBIN Report; (3) LCSD Case Supplemental Report; (4) December 3, 2020, Booking Report for Dayon Perkins; (5) A December 3, 2020, Booking Report for Dashon Summons. Based on their titles alone, it is clear that these are not publications issued by the LCSD. Defendant's argument that these documents are "other publications" simply because they were created or used by the LCSD, a public authority, is not persuasive. For example, the NIBIN Report immediately fails to satisfy Rule 902(5)

because it is an internal Report that was created for the purposed of notifying the Columbia Police Department of an investigative lead based on similar evidence.

Dubbed the "common sense provision," it makes sense that most often Rule 902(5) is applied to printouts of websites and not documents created by a local sheriff's department. *See also Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. May 4, 2007) ("[g]iven the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides very useful method of authenticating these publications…"). Official publications are self-authenticating because they "seldom contain serious mistakes in the reproduction of official pronouncements or other matters of sufficient interest to warrant official publication. Another is that official publications are likely to be readily identifiable by simple inspection, and that forgery or misrepresentation is unlikely…" 5 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 9:34, at 588 & n.2 (3d ed. 2007). Based on this explanation, these documents are not official publications, and fail to satisfy Rule 902(5).

But Defendant's argument is a bit more nuanced as he does not focus on these individual documents, and instead, he focuses this Court's attention on the cover letter that accompanies them.[1] To be clear, this Court recognizes that when a document is self-authenticating it does not usually require any further extrinsic evidence. However, here, the individual documents themselves are not self-authenticating under Rule 902(5) and as

[1] At trial, this Court stated it did not believe these documents to be "official publications," and thus, Defendant's counsel pivoted to arguing they were self-authenticating under Rule 902(5) due to the cover letter from the LCSD which accompanied the documents. Defendant makes the same argument in the instant brief.

such, this Court considers whether this cover letter was sufficient under Rule 902(1). Under Rule 902(1), certain documents are considered self-authenticated when they are signed and under the seal of a designated entity such as the United States, any state, district, commonwealth, or territory.

While the Rules of authentication do not contain certain factors this Court must consider when determining the genuineness of a document, case law has indicated that a seal, wet signature, or some indicia of official origin provide sufficient evidence to allow documents to qualify as self-authenticating under the Rule. *See* Fed. Prac. & Proc. § 7139 ("First, the genuineness of an official publication is usually obvious on its face, which commonly bears an official mark or attribution of some type…"). When considering whether the subject cover letter was sufficient to authenticate the entirety of the LCSD documents (including the Report) under Rule 902(1), this Court referred counsel for the parties to *United States v. Gonzalez-Gonzalez*, 2023 WL 230144 (11th Cir. 2023). Although unpublished, in *Gonzalez*, the Eleventh Circuit affirmed the district court's exclusion of a letter during trial for lack of authentication. Specifically, the Eleventh Circuit stated:

> Here, Noe did not prepare the letter and was unfamiliar with it, so he was not in a position to authenticate the letter. *See* FED. R. EVID. 901(b)(1). Moreover, the letter was not self-authenticating simply because it was on letterhead bearing an image of the logo of the U.S. Attorney for the Western District of Texas since the letterhead is not a "seal" within the meaning of Rule 902(1), *cf. United States v. Hampton*, 464 F.3d 687, 689 (7th Cir. 2006) ("[S]eals are used to attest the authenticity of the document on which the seal is stamped, and no seal was stamped on the copies. The copies were copies of sealed documents rather than sealed documents themselves. The rationale of Rule 902(1) ... is that a seal is difficult to forge. But that is not true of a copy of a seal."), and the seal was not attested to in the letter or

> otherwise certified by a custodian of records, *cf. United States v. Weiland*, 420 F.3d 1062, 1073 (9th Cir. 2005) ("[T]he records were certified as correct by Greene, who also stated that he was the legal custodian of the records and that he had compared the certified copies to their originals.").

Id. at 8. This Court found this case persuasive because Defendant also lacked a witness who was familiar with these LCSD documents to authenticate them. On cross examination, the government's witnesses were unable to identify the documents and although given the opportunity to call a records custodian, Defendant declined. Thus, the cover letter was the only means of establishing these documents' authenticity. The letter appeared to be a xeroxed copy on LCSD letterhead, and importantly, it did not contain an original signature or raised seal. Although this Court recognized as it does now that the LCSD letterhead is a distinctive logo, it still finds it to be insufficient evidence for self-authentication under Rule 902(1). *See U.S. v. Vance*, 216 Fed. Appx. 360, 2 (4th Cir. 2007) ("The district court did not abuse its discretion in admitting the affidavit" when it was "properly notarized [ ], the document was signed by the deputy clerk of court for Lincoln County, and it bore the raised seal of the circuit court of Lincoln County." It qualified as a self-authenticating public document under seal pursuant to Federal Rule of Evidence 902(1)"). After having the opportunity to review the briefs on this issue outside the heat of trial, this Court still finds its ruling to still be correct and thus, Defendant's argument fails.

However, at trial this issue was mooted when this Court provided Defendant with a reasonable alternative—the testimony of LCSD's General Counsel. This Court assured Defendant that upon the testimony of a records custodian as to the documents' authenticity, it would allow them into evidence. Thus, this Court personally arranged for the General

Counsel of LCSD to appear at the Courthouse to testify to the authenticity of these documents. But, after the Government rested and Defendant had the opportunity to put up evidence, he chose not to. Defendant waived his right to call any witnesses or put up any evidence, including the LCSD documents. Now, Defendant comes before this Court arguing this Court erred by excluding the documents on the basis they were not self-authenticating under Rule 902(5) or 902(1) when this Court intended to admit them after the testimony of a records custodian. Defendant's counsel advised the court it was for strategic reasons, and this Court proceeded to post trial motions and closing arguments. Defendant had a free opportunity to authenticate this evidence in accordance with the Federal Rules of Evidence and he deliberately chose not to do so. The fact that the evidence was not authenticated in the manner Defendant preferred does not equate to an error by this Court or grounds for a new trial.

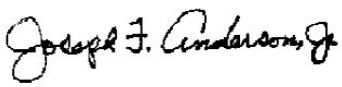
Thus, even assuming this Court erred by excluding this evidence under Rule 902(5), any such error would be considered harmless. *See United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010) (explaining evidentiary rulings are subject to harmless error review). After reviewing all that happened over the course of the trial and considering the weight of the evidence presented against Defendant, this Court can say with fair assurance that the judgment in this case was not substantially swayed by the error, if any, which occurred by the exclusion of the LCSD documents. *Id.* In other words, the LCSD documents would not have made a difference due to the weight of the Government's evidence against the Defendant which included surveillance footage of the shooting incident.

For the foregoing reasons, Defendant's Motion for a New Trial is denied.

IV. CONCLUSION

Therefore, this Court denies Defendant's Motion for Judgment of Acquittal, or in the alternative, a New Trial. (ECF No. 144).

IT IS SO ORDERED.



September 8, 2023
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

APPENDIX C:

EXCERPT OF TRANSCRIPT – DISTRICT COURT'S RULING ON PETITIONER'S MOTION TO DISMISS, *UNITED STATES V. BREELAND*, NO. 3:22-CR-00220-JFA (SEPT. 6, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Docket No. 3:22-220
	)	
vs.	)	Columbia, SC
	)	
	)	
BERNARD KENTRELL BREELAND, JR,	)	
	)	
Defendant.	)	
_____	)	DATE: September 6, 2022

BEFORE THE HONORABLE JOSEPH F. ANDERSON, JR
UNITED STATES DISTRICT JUDGE, PRESIDING
PLEA HEARING

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THE COURT: Mr. Fyall, please call the first case this morning.

MR. FYALL: Thank you, Your Honor. It's United States of America v. Bernard Kentrell Breeland, Jr., Criminal No. 3:22-220. He is present in the courtroom with his attorney, Ms. Franklin-Best. And this is a change of plea hearing. The defendant is set to plead guilty to Count 1 of the indictment. And the Government is ready to proceed.

THE COURT: All right. And we still had this pending motion to dismiss the indictment. Ms. Best, I don't think I agree with you, but I don't fault you for raising the issue and preserving it for appeal.

MS. FRANKLIN-BEST: Thank you, Your Honor. That's right. I realize this is --

THE COURT: We don't have a response from the Government at all, do we?

THE COURT DEPUTY: Yes, sir.

THE COURT: Oh, we do? I'm sorry. Well, I read the brief and I don't think there's authority under current Supreme Court law to invalidate the felon in possession of a firearm statute on Second Amendment grounds. So I respectfully disagree and would deny the motion for that reason. But you are fully protected on appeal. Very good.

MS. FRANKLIN-BEST: Thank you, Your Honor.

THE COURT: All right. We don't have a plea