No. 18-10498

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID PAUL MARTINEZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 5:17-CR-00257 LHK

DAVID L. ANDERSON
United States Attorney

MERRY JEAN CHAN
Chief, Appellate Section, Criminal Division

JONAS LERMAN
Assistant United States Attorney

450 Golden Gate Ave., 11th Floor
San Francisco, CA 94102
(415) 436-7241

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

September 25, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

No. 18-10498

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID PAUL MARTINEZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

David Martinez appeals the district court's denial of his motion to suppress four guns, nine high-capacity magazines, and a stockpile of ammunition that he illegally possessed in his SUV and home. This Court should affirm.

Under the Fourth Amendment's automobile exception, police had probable cause to search Martinez's SUV during a lawful traffic stop. The stolen handgun that police found next to the driver's seat, along with Martinez's criminal history and other evidence, created probable cause to search Martinez's apartment under a state search warrant. Both these searches satisfied the Fourth Amendment. But even if they did not, the exclusionary rule would not apply. Finally, Martinez's convictions under 18 U.S.C. § 922(g)(9)—at a stipulated-facts bench trial he requested—are unaffected by *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court (Hon. Lucy H. Koh) had jurisdiction under 18 U.S.C. § 3231 and entered judgment on December 12, 2018. ER69.[1] Martinez timely noticed his appeal. ER68. This Court has jurisdiction under 28 U.S.C. § 1291. Martinez is on bail pending appeal. Dkt. 9.

ISSUES PRESENTED

1. Whether the district court correctly denied Martinez's motion to suppress the stolen gun and ammunition seized from his SUV in a lawful traffic stop.

2. Whether the district court correctly denied Martinez's motion to suppress guns, ammunition, and contraband seized at his home under a state search warrant.

3. If a Fourth Amendment violation occurred, whether the exclusionary rule applies.

4. On plain-error review, whether *Rehaif v. United States*, 139 S. Ct. 2191 (2019), entitles Martinez to remand for retrial.

[1] "ER" refers to Martinez's excerpts of record; "AOB" to his replacement opening brief; "SER" to his supplemental excerpts; "CR" to the district court record; and "PSR" to the Presentence Investigation Report (filed under seal).

STATEMENT OF THE CASE

A. The traffic stop

On the afternoon of January 23, 2017, San Benito County Deputy Sheriff Matthew Creager was monitoring traffic on California's Highway 156 when he saw a white GMC Yukon SUV with darkly tinted front side windows that appeared to violate California Vehicle Code § 26708(a)(1). Deputy Creager also noticed the SUV had a paper rear license plate, in apparent violation of California Vehicle Code § 5200(a). ER1–2, 149, 187. He knew from experience and training "that persons trying to conceal expired registration or stolen vehicles will often use paper plates to do so." ER149, 187.

Deputy Creager stopped the SUV, and a second deputy quickly arrived for backup. Deputy Creager walked up to the SUV's driver side while his partner approached the passenger side. ER2, 149, 162, 187. The SUV's windows were so dark that Deputy Creager could not see into the vehicle—a "huge officer safety risk." ER2, 149, 187.

As Deputy Creager approached, the driver rolled down the window and identified himself as Martinez. "Deputy Creager immediately 'smell[ed] a strong odor of marijuana emanating from the passenger compartment of the vehicle.'" ER2, 149, 187. Martinez and Deputy Creager recognized each other from a "prior contact" in another city. ER2, 149, 162, 187. Deputy Creager asked Martinez for

his driver's license, registration, and proof of insurance, mentioned the "paper plates" and darkened windows, and asked how long he had owned the SUV. ER149, 162, 187. Martinez could not produce a driver's license—only a state ID card—and said the SUV was his girlfriend's. ER162–64, 187.

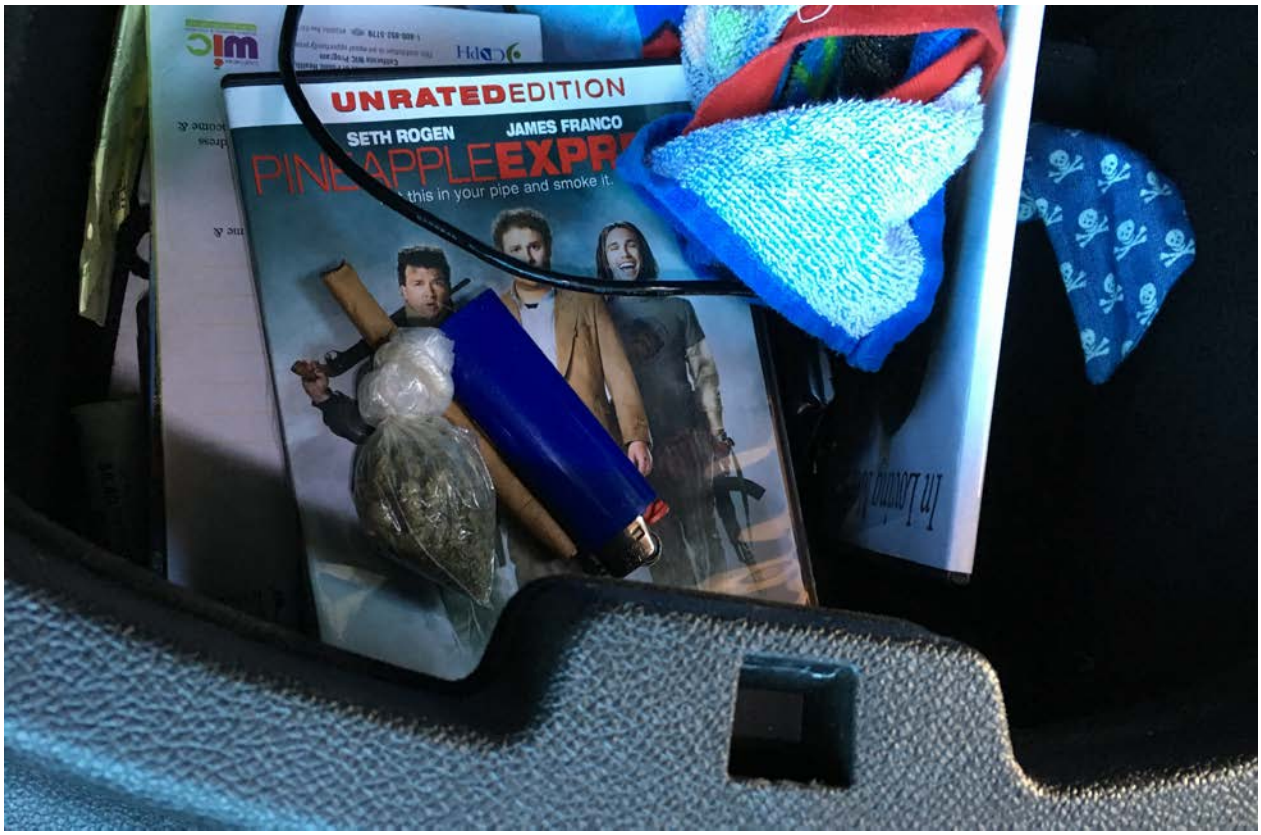
After asking whether Martinez was the only person in the SUV, Deputy Creager asked Martinez to get out and stand in front of Deputy Creager's police cruiser so they could talk. Martinez complied. ER2, 163, 187. Since Martinez's baggy sweatshirt covered his waistband, the backup deputy conducted a quick patdown to ensure that Martinez was unarmed. ER2, 149, 163, 187.

Deputy Creager told Martinez that the card he had produced was a state ID card, not a driver's license. ER164. Martinez claimed that his license was "in the mail." ER164. He also could not produce proof of insurance. ER169.

Deputy Creager asked Martinez "how much bud" was in the SUV. ER2, 164. Martinez responded: "Honestly, I have like a little sack and a little blunt. I haven't even been smoking it either." ER2, 164, 187. After mentioning that the SUV's interior smelled like marijuana, Deputy Creager said he was trying to find out whether there were "pounds" of marijuana or "[a]nything illegal in the car." ER2, 164. Martinez answered, "No, go ahead, no," and gestured toward the SUV. Ex. A at 2:47 (video); ER2, 164, 187. When Deputy Creager said he would check the SUV, Martinez again responded: "Go ahead." ER2, 164, 187. Martinez then

added that "[t]he weed is in the center console" and made a lifting motion with his hand. Ex. A at 2:54; ER2, 149, 164, 187. "Appreciate it, cool," Deputy Creager replied. ER164.

When Deputy Creager looked inside the SUV, he saw marijuana seeds atop the center console. ER2, 149, 188; *see* ER156 (photo of seeds). He opened the center console and found a "blunt," a clear plastic bag of marijuana, a butane lighter, and a DVD of the drug-trafficking comedy *Pineapple Express*:



ER2, 150, 154–55, 188. Later investigation revealed that the marijuana in the bag and the blunt together weighed slightly more than six grams. ER3, 150, 188.

While examining the center console, Deputy Creager noticed that an interior panel was "loose." ER3, 150, 188; ER157 (photo of tray). He knew from experience searching other vehicles with similar loose consoles that people who illegally possess and transport narcotics, guns, and other contraband often hide those items in spaces under loose consoles. ER3, 150, 188. So he "lifted up on the large, plastic, center tray on the center console," which "pulled out easily indicating that it ha[d] been removed before," and he "looked into the void underneath the center console." ER3, 150, 188. There he found a silver Beretta

.40-caliber pistol that contained a loaded high-capacity magazine, plus two additional high-capacity magazines:

ER3, 150, 159, 188.

"During this time period, Deputy Creager also examined the rear paper license plate" and "discovered a permanent license plate underneath the paper plate." ER3, 149–50, 187–88. He ran the plate through a law-enforcement database called Netcom and learned that the vehicle's registration had expired months earlier. ER150, 165, 187. Disguising or concealing an expired license plate is illegal in California. ER150, 188; Cal. Veh. Code § 4462.5.

Soon after discovering the handgun, Deputy Creager and his partner placed Martinez under arrest and handcuffed him. ER3, 150, 169, 188. Deputy Creager completed his search of the SUV "about four and a half minutes after Deputy Creager pulled [it] over," and Martinez "was arrested and handcuffed less than one minute after Deputy Creager concluded his search." ER3 (citing Ex. A at 5:40, 6:25).

The deputies drove Martinez to jail. ER150, 189. During the booking process, jail staff asked Martinez "where he houses when he stays at the county jail." ER5, 186. Martinez responded "that he houses in 'B' pod"—the area for Norteño gang members. ER5, 186.

B. The warranted search of Martinez's apartment

Deputy's Creager's investigation revealed that the handgun from Martinez's SUV was a police officer's service weapon. Someone had stolen it from the former officer's home about a year earlier. ER151–52, 188–90.

Eight days after the traffic stop, Deputy Creager applied to a state judge for a warrant to search Martinez's apartment for other weapons and for "gang indicia" (based on Martinez's "B" pod statement, tattoos, wallet, and clothing). ER3–6, 182–92; *see* Part II, *infra* (pp. 32–42).

Officers executed the search warrant. ER6. At home were Martinez, his partner, and two of their children—one 7 months old, the other 3 years old. PSR ¶ 15; ER111. In a bedroom closet that also "contained children's clothing and an infant swing," officers found three unlocked and unsecured firearms:

- A loaded AR-15 assault rifle with a 30-round magazine.
- Two more 30-round magazines that fit the AR-15.
- A 20-gauge shotgun.
- A .22-caliber rifle with a sawed-off stock and obliterated serial number.

PSR ¶¶ 15, 97; ER6, 87, 89, 111, 194.

In a duffel bag, officers found more than one hundred rounds of ammunition in ten calibers, three more high-capacity magazines (two 30-round and one 60-round), two black ski masks, a butt stock, and a foregrip. ER6, 115–16, 194–95; PSR ¶ 15. Officers also found a "slim jim" burglary tool. ER6, 195; Cal. Penal Code § 466.

The search turned up "sizable quantities of narcotics and related paraphernalia" consistent with trafficking, including pounds of marijuana, a digital scale, and tools for growing marijuana. ER6, 195; PSR ¶ 16.

Finally, officers found clothing and other items that they thought pointed to Norteño gang affiliation. ER6, 58; PSR ¶ 17.

C. Indictment

A federal grand jury in 2017 indicted Martinez on two counts of possessing firearms and ammunition as a domestic-violence misdemeanant, 18 U.S.C. § 922(g)(9). ER241–44. Martinez's criminal history includes a 2012 misdemeanor domestic-violence conviction under California Penal Code § 243(e)(1) for battery on a cohabitating partner. PSR ¶¶ 12, 39; ER4, 28.

D. Suppression motion

Martinez moved to suppress all evidence and his statements from the traffic stop and the apartment search. CR16, 20. The government opposed. CR17, 21. The district court heard argument. ER32–66. Martinez said that no evidentiary hearing was necessary given the "very complete record," although he requested a *Franks* hearing[2] to challenge certain aspects of Deputy Creager's search warrant affidavit. ER61–62.

E. The district court's order

The district court denied Martinez's suppression motion. ER1–31. The court found that the Fourth Amendment's automobile exception authorized "the entirety of" the vehicle search during this lawful traffic stop; Deputy Creager had probable cause "based on the totality of the circumstances," including the "strong odor" of marijuana and Martinez's statements. ER9–14, 24.

---

[2] *Franks v. Delaware*, 438 U.S. 154 (1978).

Turning to the apartment search, the court rejected Martinez's attacks on the state search warrant. ER14–31. First, the warrant gave officers sufficient guidance about what to seize. ER14–19, 20 n.1, 30.[3] Second, Deputy Creager did not intentionally or recklessly include any false or misleading material information in the search warrant affidavit—and Martinez failed to make the substantial preliminary showing required for a *Franks* hearing. ER19–23. Third, the warrant did not depend on any "tainted evidence." ER23–26. Finally, the affidavit "established more than a 'colorable argument for probable cause'" to search Martinez's apartment "for firearms and certain evidence of gang membership," so the officers conducted the search in good faith. ER27–31 (citation omitted).

F. Bench trial and sentence

Martinez waived his right to a jury trial and requested a bench trial on stipulated facts. ER129–32; SER1–12. The district court found an "independent factual basis for each element" and convicted him on both counts. SER10–11; ER69. At sentencing, the court reduced Martinez's offense level under the U.S. Sentencing Guidelines by three levels for his acceptance of responsibility at the bench trial. ER106. The court imposed a below-Guidelines sentence of 39 months' imprisonment. ER70–71, 113.

[3] Martinez abandons this claim in his opening brief, so it is waived. *United States v. Lo*, 839 F.3d 777, 787 n.3 (9th Cir. 2016).

SUMMARY OF ARGUMENT

1. The district court correctly denied Martinez's motion to suppress the stolen handgun and magazines found in his SUV during a lawful traffic stop. The stop lasted less than six minutes; it would have taken just as long without the marijuana questions or search. But even if Deputy Creager extended this stop, reasonable suspicion supported the extension. The totality of circumstances likewise created probable cause to search the SUV under the Fourth Amendment's automobile exception. California legislative changes do not alter this analysis. Because probable cause existed to search one part of the SUV's interior for marijuana, the automobile exception also authorized the deputy to search every part of the interior that could contain marijuana—including under the loose center console where Martinez kept the loaded handgun and high-capacity magazines.

2. The state magistrate who signed the search warrant for Martinez's apartment did not clearly err. Martinez ignores the clear-error standard and the "great deference" that applies to the magistrate's probable-cause determination. Instead, Martinez engages in exactly the type of de novo flyspecking of the search warrant affidavit that precedent forbids. Probable cause supported the warrant.

3. Even if a Fourth Amendment violation occurred, the exclusionary rule would not apply. Deputy Creager acted reasonably under existing law, both during the traffic stop and when applying for this search warrant; suppression would not

deter any police misconduct because there was none. If the search warrant was deficient, it was not so facially defective or barebones as to preclude good-faith reliance. And as the district court found, Martinez fell far short of making a substantial preliminary showing that the search warrant affidavit contained any deliberate or reckless material falsehood, so he had no right to a *Franks* hearing.

4. For the first time on appeal, Martinez complains that the government failed to prove that he knew of his 2012 domestic-violence conviction when he possessed these guns. Martinez waived this claim by admitting his guilt at the stipulated-facts bench trial. If not waived, his new claim fails because he cannot establish the prejudice or injustice that plain-error review demands.

ARGUMENT

I. THE VEHICLE SEARCH SATISFIED THE FOURTH AMENDMENT

A. Standard of review

The Court reviews the denial of a suppression motion de novo and reviews factual findings for clear error. *United States v. Torres*, 828 F.3d 1113, 1118 (9th Cir. 2016); *see Ornelas v. United States*, 517 U.S. 690, 699 (1996). In assessing reasonable suspicion and probable cause, the Court "defer[s] to the inferences drawn by the district court and the officers on the scene." *United States v. Valdes-Vega*, 738 F.3d 1074, 1077 (9th Cir. 2013) (en banc). The Court may affirm the

denial of a suppression motion on any basis supported by the record. *United States v. McClendon*, 713 F.3d 1211, 1218 (9th Cir. 2013).

B. The officers did not extend the traffic stop

An investigatory vehicle stop is lawful when the officer has reasonable suspicion that the vehicle has committed a traffic infraction. *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006). As Martinez concedes, Deputy Creager had valid grounds to stop the SUV. ER6; AOB7 n.3.

Martinez argues (AOB25–29) that Deputy Creager and his partner lacked reasonable suspicion to extend the traffic stop beyond its lawful purpose. But Martinez's claim rests on a false premise: that the deputies extended the stop at all. They did not.

The reasonable duration of a traffic stop depends on the stop's "mission"—to address the traffic violation that triggered the stop and "attend to related safety concerns." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). Officers need no additional reasonable suspicion to conduct tasks consistent with this mission. *Id.* at 1615; *United States v. Evans*, 786 F.3d 779, 786 (9th Cir. 2015). Likewise, an "officer's inquiries into matters unrelated to the justification for the stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Arizona*

v. Johnson, 555 U.S. 323, 333 (2009); *see Rodriguez*, 135 S. Ct. at 1611, 1615; *United States v. Mendez*, 476 F.3d 1077, 1080–81 (9th Cir. 2007).

Here, the stop lasted less than six minutes. ER3. Deputy Creager finished searching Martinez's SUV "about four and a half minutes" after pulling it over, and Martinez "was arrested and handcuffed less than one minute after Deputy Creager concluded his search." *Id.* Martinez does not challenge these findings by the district court. Because no extension of the traffic stop occurred, Martinez's reasonable-suspicion arguments are irrelevant.

First, every question Deputy Creager asked, and every step he and his partner took, furthered the stop's public-safety mission: "ensuring that vehicles on the road are operated safely and responsibly." *Evans*, 786 F.3d at 786. Martinez could not produce a driver's license, proof of insurance, or a valid registration, so he had no right to drive. ER162–64, 187. Plus, Deputy Creager had a duty to investigate the "strong odor" of marijuana that he immediately smelled when Martinez rolled down his window. ER149, 187. It remains illegal in California to operate a car while using or under the influence of marijuana. Cal. Health & Safety Code § 11362.45(a); Cal. Veh. Code § 23152(f).

Second, even if Deputy Creager's marijuana questions did not relate to the stop's mission, he still did not extend the stop. These questions and the search that followed did not extend this under-six-minute stop beyond the time otherwise

needed. If Deputy Creager had ignored the "strong odor" of marijuana, he and his partner still would have needed to investigate and address Martinez's various Vehicle Code violations (discussed below), which would have taken just as long. ER149–50, 163–64, 187–88.

In fact, the deputies would have needed to impound the SUV, since Martinez could not lawfully drive it. Driving on California's highways without a valid driver's license is an arrestable offense. Cal. Veh. Code § 12500(a). Arresting Martinez and impounding his SUV would no doubt have taken longer than six minutes. Because no extension of the stop occurred, this Court need not reach Martinez's reasonable-suspicion arguments.

C. Any extension was supported by reasonable suspicion

Police may extend a traffic stop if reasonable suspicion supports the extension. *Mendez*, 476 F.3d at 1080. "The reasonable-suspicion standard is not a particularly high threshold to reach." *Valdes-Vega*, 738 F.3d at 1078. It "falls considerably short of satisfying a preponderance of the evidence standard," *United States v. Arvizu*, 534 U.S. 266, 274 (2002), and is "'obviously less'" than probable cause, *Navarette v. California*, 572 U.S. 393, 397 (2014) (citation omitted).

Courts evaluating reasonable suspicion "must consider 'the totality of the circumstances—the whole picture.'" *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (citation omitted). Courts must view the facts through the lens of the

officer's training and experience. *Arvizu*, 534 U.S. at 273–74; *United States v. Raygoza-Garcia*, 902 F.3d 994, 1000 (9th Cir. 2018). An officer need not rule out the possibility of innocent conduct, *Arvizu*, 534 U.S. at 277, and even "wholly lawful conduct" can create reasonable suspicion, *Sokolow*, 490 U.S. at 10.

If Deputy Creager and his partner extended this traffic stop beyond its mission, reasonable suspicion supported the extension. The deputies acted reasonably as "new grounds for suspicion of criminal activity continued to unfold." *United States v. Mayo*, 394 F.3d 1271, 1276 (9th Cir. 2005). Throughout this brief stop, the deputies encountered one red flag after another:

- Martinez's tinted windows were so dark that Deputy Creager could not see into the SUV even at close range—a "huge officer safety risk." ER149, 187.
- A paper dealer plate covered the rear license plate—a vehicle code violation and a sign of a potential stolen car. ER2–3, 149, 187–88.
- A "strong odor" of marijuana immediately emanated from the SUV when Martinez opened his window. ER2, 149, 187.
- Martinez and Deputy Creager recognized each other from "a prior contact" in another city. ER2, 149, 162, 187.
- Martinez could not produce a driver's license. ER162–64.
- Martinez could not produce proof of insurance. ER162, 168.
- A records check confirmed that the SUV's registration had expired months earlier. ER3, 187.

- Martinez admitted that he had a "little sack" of marijuana and a "little blunt" in the car—which, despite the "strong odor" of marijuana, he claimed not to have been smoking. ER187.

These facts—viewed holistically and through the lens of Deputy Creager's training and experience—clearly established reasonable suspicion for further investigation.

Martinez's contrary arguments flout precedent. He asks this Court to consider the odor of marijuana in isolation, as an abstract legal question divorced from the totality of these circumstances. His tactic is improper: "Even though a particular observation may have an innocuous explanation when viewed in isolation, or may be less probative than other observations, the reasonable suspicion evaluation 'cannot be done in the abstract by divorcing factors from their context in the stop at issue.'" *United States v. Johnson*, 713 F. App'x 687, 688 (9th Cir. 2018) (quoting *Valdes-Vega*, 738 F.3d at 1078–79).

Thus, while Martinez claims that the odor of marijuana during a California traffic stop today cannot contribute at all to reasonable suspicion, binding precedent "precludes this sort of divide-and-conquer analysis." *Arvizu*, 534 U.S. at 274–75. Precedent likewise "precludes" this Court "from holding that certain factors are presumptively given no weight without considering those factors in the full context of each particular case." *Valdes-Vega*, 738 F.3d at 1078–79.

But even standing alone, the "strong odor" of marijuana created reasonable suspicion and probable cause. State legislation does not change this Fourth

Amendment analysis. In November 2016, California passed the Control, Regulate and Tax Adult Use of Marijuana Act—also known as Proposition 64—which allows adults age 21 and older to possess up to 28.5 grams of marijuana. Cal. Health & Safety Code § 11362.1(a)(1). But under California law, "it remains unlawful to use marijuana while operating a vehicle." *United States v. Pearson*, 17-CR-00051 BRO, 2017 WL 1628397, at *6 (C.D. Cal. Apr. 28, 2017). California also continues to regulate and criminalize marijuana in other ways, as discussed below (pp. 23–27). And in any event, marijuana remains illegal under federal law (pp. 21–23).

Nothing in the Fourth Amendment required Deputy Creager and his partner to ignore the "strong odor" of marijuana or other suspicious circumstances. The Fourth Amendment does not require an officer "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143 (1972). The deputies did not have to accept Martinez's statements about his "little blunt" or "little sack" as true or conclusive. They did not have to assume that Martinez's marijuana weighed 28.5 grams or less. And they did not have to believe Martinez when he claimed not to have "been smoking" his "little blunt" while driving. ER2, 9–14, 164, 187; *see United States v. Gray*, 772 F. App'x 565, 566 (9th Cir. 2019). Nor did they did not have to assume that the SUV contained only the marijuana that Martinez had mentioned. The Fourth Amendment does not

require an officer to rule out the possibility of innocent conduct *before* conducting an investigation. *Arvizu*, 534 U.S. at 277; *United States v. Tiong*, 224 F.3d 1136, 1140 (9th Cir. 2000).

D. Probable cause supported the vehicle search

As the district court found, Deputy Creager's search of the SUV falls squarely within the Fourth Amendment's automobile exception. ER9–14, 24. This exception allows an officer to "conduct a warrantless search of a vehicle if there is probable cause to believe the vehicle contains evidence of a crime." *United States v. Johnson*, 913 F.3d 793, 801 (9th Cir. 2019); *see United States v. Davis*, 530 F.3d 1069, 1084 (9th Cir. 2008).

Probable cause is a flexible, commonsense standard and "'not a high bar.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (citation omitted). It exists if the totality of circumstances suggest a "fair probability" that searching a place will uncover contraband or evidence of a crime. *Florida v. Harris*, 568 U.S. 237, 243–44 (2013). If officers have probable cause to believe a lawfully stopped car contains contraband or evidence, they can conduct a warrantless search of any part of the car and any container where it could be. *California v. Acevedo*, 500 U.S. 565, 570–80 (1991); *United States v. Ross*, 456 U.S. 798, 821–25 (1982).

1. Federal law controls

Martinez claims that after California legalized small amounts of marijuana with Proposition 64, the odor of marijuana—no matter how strong—can no longer contribute at all to probable cause for a vehicle search, as no officer can presume that the marijuana is contraband under state law.

But this Court has "unqualifiedly held" that "'evidence seized in compliance with federal law is admissible without regard to state law,' even when state authorities obtained the evidence without any federal involvement." *United States v. Cormier*, 220 F.3d 1103, 1111 (9th Cir. 2000) (citation omitted). "'[R]equiring federal district courts to look to state law when determining the admissibility of evidence obtained in accordance with federal law would hamper the enforcement of valid federal laws and undermine the policy favoring uniformity of federal evidentiary standards.'" *Id.* (citation omitted).

Whether a search or seizure is reasonable under the Fourth Amendment is a question of federal law and does not depend "on the law of the particular State in which the search occurs." *California v. Greenwood*, 486 U.S. 35 (1988); *see, e.g.*, *Virginia v. Moore*, 553 U.S. 164, 170–76 (2008); *United States v. Brobst*, 558 F.3d 982, 989–90 (9th Cir. 2009); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1174 (9th Cir. 2005). There are two limited exceptions to this rule—for inventory

searches and searches incident to arrest—but neither applies here. *Cormier*, 220 F.3d at 1111; *United States v. Dauenhauer*, 745 F. App'x 41, 42 (9th Cir. 2018).

Martinez relies on *United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942 (9th Cir. 2010), a civil-forfeiture decision. AOB23. There, police officers obtained a state search warrant for a medical marijuana dispensary in Los Angeles but failed to inform the issuing judge of facts suggesting that the dispensary complied with state law, which led to suppression under a *Franks* analysis. 590 F.3d at 948. That case says nothing about a warrantless search under the Fourth Amendment's automobile exception and has no bearing here.

This search satisfied federal constitutional standards. Under the Fourth Amendment's "flexible, all-things-considered approach," *Harris*, 568 U.S. at 244, there was probable cause to believe the SUV could contain contraband or evidence of a crime. Marijuana remains partly criminalized in California but wholly criminalized under federal law. 21 U.S.C. § 844. And the smell of marijuana alone provides probable cause for a vehicle search. *E.g.*, *United States v. Johns*, 469 U.S. 478, 482 (1985); *Johnson*, 913 F.3d at 801; *United States v. Solomon*, 528 F.2d 88, 91–92 (9th Cir. 1975); *United States v. Barron*, 472 F.2d 1215, 1217 (9th Cir. 1973); *United States v. Leazar*, 460 F.2d 982, 984 (9th Cir. 1972); ER8.

Whether Deputy Creager subjectively based his probable-cause assessment on federal law is irrelevant. An officer's "subjective thoughts play no role in the

Fourth Amendment analysis"; that he may have "acted on one rationale would not foreclose the government from justifying the search by proving probable cause." *United States v. Ramirez*, 473 F.3d 1026, 1030–31 (9th Cir. 2007) (cleaned up); *see Johnson*, 913 F.3d at 799. Deputy Creager's subjective legal intentions thus do not affect whether the vehicle search satisfied federal law, or whether evidence is admissible in this federal prosecution. *See Arkansas v. Sullivan*, 532 U.S. 769, 771–72 (2001); *Whren v. United States*, 517 U.S. 806, 813 (1996).

2. California law also created probable cause for the search

Even if Martinez were correct that state law governs here, his claim still fails. Under the totality of circumstances, California law also provided probable cause to search the SUV.

The district court pointed out that California courts have upheld searches based on small amounts of marijuana. ER11. Among other cases, the district court cited *People v. Strasburg*, 148 Cal. App. 4th 1052 (2007), and *People v. Waxler*, 224 Cal. App. 4th 712 (2014). Martinez argues (AOB31) that these decisions are no longer good law in California after Proposition 64. But California courts have rejected his argument. *E.g.*, *People v. Fews*, 27 Cal. App. 5th 553, 561–63 (2018) (finding "no compelling reason to depart from *Strasburg* and *Waxler* after the passage of Proposition 64" and holding that "[t]he continuing regulation of marijuana leads us to believe that *Strasburg* and *Waxler* still permit law

enforcement officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime"). *Strasburg* and *Waxler* remain good law "even after the passage of Proposition 64." *People v. Fuggins*, 2019 WL 1512645, at *2 (Cal. App. 2d 2019).

The *Fews* court emphasized that "marijuana possession and use is still highly circumscribed by law even after the passage of Proposition 64." 27 Cal. App. 5th at 561. *Fews* also held that "[t]he possibility of an innocent explanation for the possession of marijuana 'does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct.'" *Id.* (citation omitted). In *Fews*, the odor of marijuana coming from the SUV, plus the driver's admission that there was marijuana in his cigar, created "a fair probability that a search of the SUV might yield additional contraband or evidence." *Id.* at 563.

Martinez ignores *Fews*. And he fails to acknowledge that "it remains unlawful to use marijuana while operating a vehicle" in California. *Pearson*, 2017 WL 1628397, at *6. Proposition 64 did not affect "[l]aws making it unlawful to drive or operate a vehicle . . . while smoking, ingesting, or impaired by, cannabis or cannabis products, . . . or the penalties prescribed for violating those laws." Cal. Health & Safety Code § 11362.45(a); *see* Cal. Veh. Code § 23152(f). Other activities that remain illegal in California include, for example, possessing more

than an ounce of marijuana, transporting certain quantities, and possessing marijuana with intent to sell. ER12; Cal. Health & Safety Code §§ 11359, 11360, 11360.8, 11362.1(a); *see Prado v. Barr*, 923 F.3d 1203, 1207–08 (9th Cir. 2019).

Martinez does acknowledge (AOB30) that it is an infraction in California to have an open container of marijuana. Cal. Veh. Code § 23222(b); Cal. Health & Safety Code § 11362.3(a)(4); ER11. And under California law, a blunt—a marijuana cigar—is an open container. Cal. Veh. Code § 23222(b); *Fews*, 27 Cal. App. 5th at 563. Yet Martinez argues that the deputies should have assumed that he possessed the blunt inside a container because he "said nothing about how the 'blunt' was packaged" and "the 'blunt itself *could have* been contained in a sealed container." AOB30 (emphasis added).

But again, the Fourth Amendment did not require the deputies to "'rule out the possibility of innocent behavior'" or to believe Martinez's statements before conducting this search. *Lingo v. City of Salem*, 832 F.3d 953, 961 (9th Cir. 2016) (citation omitted). There was at least a "fair probability" that Martinez could have violated California's many marijuana laws. *Harris*, 568 U.S. at 243–44; *Fews*, 27 Cal. App. 5th at 562–64. The deputies properly investigated this probability during the less-than-six-minute stop.

Martinez also claims (AOB29) that even if he had an illegal open container of marijuana in the SUV, that offense could not have contributed to probable cause

for the vehicle search because that state infraction is punishable at most by a $250 fine, not arrest. Martinez's claim is baseless, and the district court rightly rejected it. ER11–12. *See Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (Fourth Amendment permits warrantless arrest even for "a very minor criminal offense," such as a seatbelt violation punishable only by fine); *Sullivan*, 532 U.S. at 771.

Martinez relies on *In re D.W.*, 13 Cal. App. 5th 1249 (2017), but it did not involve the Fourth Amendment's automobile exception. Nor did it consider *Strasburg* and *Waxler*. And it predated *Fews*, which reaffirmed *Strasburg* and *Waxler* after Proposition 64.

The *Fews* court distinguished *In re D.W.* because it "involved a warrantless search of a defendant's person incident to arrest, which requires independent probable cause for the arrest," while a search under the automobile exception "requires probable cause that the vehicle contains contraband or evidence of a crime." *Fews*, 27 Cal. App. 5th at 563. And if "such probable cause exists, a law enforcement officer may search the vehicle 'irrespective of whether possession of up to an ounce of marijuana is an infraction and not an arrestable offense.'" *Id.* at 563–64 (quoting *Waxler*, 224 Cal. App. 4th at 721). "[N]either the California Supreme Court nor the United States Supreme Court has limited the automobile exception to situations where the defendant possesses a 'criminal amount of contraband.'" *Waxler*, 224 Cal. App. 4th at 723 (citation omitted); *see also* ER11;

United States v. Collins, No. 16-CR-244 SI, 2018 WL 306696, at *5 (N.D. Cal. Jan. 5, 2018); *People v. Campos-Barajas*, 2017 WL 2829167, at *4 (Cal. App. 3d June 30, 2017).[4]

3. The automobile exception authorized the entire search

Martinez argues that even if the automobile exception authorized Deputy Creager to search part of the SUV's interior, it did not authorize what Martinez calls "the officer's removal of the interior molding of the vehicle." AOB31.

In fact, Deputy Creager merely "lifted up on the large, plastic, center tray on the center console," which "pulled out easily indicating that it ha[d] been removed before," and he "looked into the void underneath the center console." ER188. There he saw the "silver and black colored handgun" and the magazines. *Id.*

Martinez's scope argument contravenes precedent. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825. "'[N]ice distinctions . . . between glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand.'" *United States v. Korte*, 918 F.3d 750, 755 (9th Cir. 2019) (brackets in original) (quoting *Ross*, 456

[4] Martinez also invokes Massachusetts caselaw (AOB23–24, 28–29), but California courts have declined to follow Massachusetts in this area. *E.g.*, *Campos-Barajas*, 2017 WL 2829167, at *4; *Waxler*, 224 Cal. App. 4th at 723.

U.S. at 821); *see, e.g.*, *United States v. Newman*, 563 F. App'x 539, 541 (9th Cir. 2014) (applying *Ross* to a vehicle search much like this one); *United States v. Harwood*, 998 F.2d 91, 97 (2d Cir. 1993) (permissible to remove loose door panel to search for drugs that could be "stashed anywhere in a vehicle").

Because the search's scope is "not defined by the nature of the container" but "by the object of the search and the places in which there is probable cause to believe that it may be found," *Ross*, 456 U.S. at 823–24, Deputy Creager complied with the Fourth Amendment. He had probable cause to believe the SUV contained marijuana, *see* ER6–14, 24, so the automobile exception authorized him to search anywhere that marijuana and related evidence could be.

E. The district court properly considered Martinez's statements

In assessing reasonable suspicion and probable cause, the district court correctly considered Martinez's statements as part of "the totality of the circumstances." ER9. This Court should do the same. In arguing otherwise (AOB20–21, 26–28), Martinez again disregards precedent.

Routine traffic stops like this one do not require *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *Schneckloth v. Bustamonte*, 412 U.S. 218, 246–48 (1973). "A traffic stop is not custody. A *Terry* stop-and-frisk is not custody." *United States v. Butler*, 249 F.3d 1094, 1098 (9th Cir. 2001) (citations omitted); *see, e.g.*, *United States v. Medina-Villa*, 567 F.3d 507, 520 (9th

Cir. 2009) ("Even though the border patrol agent prevented Medina from leaving the parking lot by blocking his car, approaching it with his gun drawn, and interrogating him about his citizenship and immigration status, . . . Medina was not in custody and was not entitled to *Miranda* warnings.").

Nor does the analysis change because police ask a driver to exit his car. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *see, e.g.*, *United States v. Brooks*, 772 F. App'x 573, 574 (9th Cir. 2019) ("Although the trooper rested his hand on his gun and conducted a *Terry* frisk, that is not enough, by itself, to turn the [33-minute] traffic stop into a custodial interaction."); *United States v. Anthony*, 330 F. App'x 661, 662–63 (9th Cir. 2009) (no custody even though driver was questioned in front seat of police car for 20 minutes); *Davis*, 530 F.3d at 1081–82 (no custody even though officers executing search warrant at property asked driver what he knew about a marijuana grow, asked about his involvement, and told him that he could not leave).

No *Miranda* violation occurred here. Deputy Creager pulled Martinez over, then politely asked him to exit the SUV and stand near the patrol car, where Martinez underwent a brief patdown but was not handcuffed or confined. Deputy Creager asked him a few relevant questions with one other officer present; their guns remained holstered. ER149, 187; Ex. A. The minor limitations on Martinez's freedom of movement that preceded his incriminating statements come

nowhere near the level of restraint associated with a formal arrest, and did not require *Miranda* warnings. In any event, as discussed, the "strong odor" of marijuana alone justified this vehicle search.[5]

Martinez asserts that the district court did not reach this *Miranda* claim. AOB26–28. But the court rejected it by considering his statements as part of the "totality of the circumstances," ER9, and by concluding that "the entirety of" the vehicle search was lawful, ER24. Moreover, this Court can affirm on any basis supported by the record, which Martinez admits is "very complete." ER61. And as discussed below (pp. 41–42), suppression of physical evidence from the vehicle search would be unjustified even if a *Miranda* violation occurred. *See United States v. Patane*, 542 U.S. 630, 633–34 (2004) (plurality opinion); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990); *United States v. Robbins*, No. 16-CR-1997 JM, 2016 WL 6565922, at *4 (S.D. Cal. Nov. 3, 2016).

F. Alternatively, Martinez consented to the vehicle search

"[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth*, 412 U.S. at 222. "The totality of the circumstances

[5] Martinez relies (AOB27) on an unpublished decision by the same judge who presided here: *United States v. Chavez*, No. 15-CR-00285 LHK, 2018 WL 3126444, *7–*8 (N.D. Cal. June 26, 2018). But in denying Martinez's suppression motion, the judge detailed why "*Chavez* is inapposite." ER13–14. Plus, the judge reversed the suppression order in *Chavez* after the government moved for reconsideration. No. 15-CR-285 LHK, 2018 WL 4207350 (N.D. Cal. Sept. 4, 2018).

determine whether consent was 'freely and intelligently given.'" *United States v. Basher*, 629 F.3d 1161, 1168 (9th Cir. 2011) (citation omitted). Consent can be explicit or implicit. *Morgan v. United States*, 323 F.3d 776, 781 (9th Cir. 2003). The government's burden is lighter when the consent is explicit, as here. *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984).

The totality of circumstances here—captured on video and audio (Ex. A)—establish that Martinez voluntarily consented to the search. *See United States v. Russell*, 664 F.3d 1279, 1281–82 (9th Cir. 2012). And since Martinez placed no express limitations on the search's scope, it was objectively reasonable for Deputy Creager to conclude that he had general consent to search the whole interior. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *United States v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994).

Because the district court agreed with the government's probable-cause arguments, it did not need to "address the government's voluntary consent argument." ER7; *see* CR17 at 9–11. If this Court disagrees about probable cause and finds that the exclusionary rule would otherwise apply to the vehicle search, it should remand for the district court to address consent in the first instance.

II. THE STATE SEARCH WARRANT FOR MARTINEZ'S APARTMENT SATISFIED THE FOURTH AMENDMENT

A. Standard of review

The Court reviews the denial of a motion to suppress evidence from a search warrant de novo and reviews the issuing magistrate's probable-cause finding for clear error. *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc). The Court gives "'great deference' to magistrate judges' probable-cause findings." *United States v. Garay*, __ F.3d __, 2019 WL 4419679, at *5 (9th Cir. Sept. 17, 2019) (citation omitted).

A district court's denial of a *Franks* hearing is reviewed de novo, with factual determinations reviewed for clear error. *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002).

B. The search warrant affidavit

In his affidavit, Deputy Creager described his more than six years of experience as a law-enforcement officer. ER185. Among other assignments, he had served on a gang task force, where he "specifically investigate[d] gang and drugs/narcotics related crimes." *Id.* He had participated "in hundreds of cases" involving gangs, drugs, and guns and "testified as a gang expert in the County of Santa Cruz as it pertains to the Norteño criminal street gang." *Id.*

Deputy Creager recounted the details of the traffic stop and the search of Martinez's SUV, including how the deputy found the loaded handgun and magazines in the center console's interior. ER186–89. Deputy Creager described the investigation he conducted to determine that this gun was a police officer's service weapon, stolen in a residential burglary. ER189–90. Deputy Creager attached Martinez's criminal history and noted that his 2012 conviction for misdemeanor domestic violence made it illegal for him to possess firearms. ER189; *see* PSR ¶ 39.

The affidavit also included a section about gang involvement. ER186. Based on his training and experience, Deputy Creager knew that "members of the Norteño criminal street gang often show their allegiance to the gang by displaying the Huelga Bird, the color red, the Roman numeral XIV, the roman numeral IV, the number 4, [and] the number 14." *Id.* They also often wear sports clothing with logos and colors that reflect Norteño affiliation. *Id.*

Deputy Creager did not assert that Martinez is a Norteño. But the deputy highlighted details about Martinez that, in the deputy's view, suggested that Martinez might have Norteño ties. First, Deputy Creager noted that, when arrested during the traffic stop, Martinez was wearing a Cincinnati Reds baseball hat with a red letter C and a red bill. ER186.

Second, Deputy Creager observed that Martinez had "money symbol" tattoos on his left shoulder and right forearms. ER186; *see* ER222, 224 (photos). Deputy Creager explained that "[t]he letter 'S' with lines through it is a sign of disrespect to the Sureño criminal street gang." ER186.

Third, Deputy Creager noted that Martinez "had a brown wallet depicting the letters 'SF' inside his vehicle." *Id.* The deputy explained that "Norteño criminal street gang members often wear clothing, have tattoos[,] or possess items depicting the San Francisco Giants or San Francisco 49ers logos." *Id.* And based on his discussions with "multiple gang members" and his "gang classes and gang trainings," the deputy knew that "the letters 'SF' stand for 'Scrap Free'"—a "derogatory term commonly used by Norteño criminal street gang members to describe members of the rival Sureno criminal street gang." *Id.*

Fourth, Deputy Creager noted that Martinez's "white cell phone had a red protective case" and that "[t]he color red is commonly displayed by" Norteños. *Id.*

Fifth, Deputy Creager described how, after the traffic stop, he brought Martinez to jail and was present at booking when jail staff asked Martinez "where he houses when he stays at the county jail." *Id.* Martinez responded "that he houses in 'B' pod." *Id.* Deputy Creager knew from his "training, knowledge[,] and experience" that the "B" pod "is where Norteño gang members are housed."

Id. Deputy Creager "also confirmed" with jail staff "that 'B' pod was still a pod where Norteños were being housed" on the day of Martinez's booking. *Id.*

Later in the affidavit, Deputy Creager explained that he knew from training and experience that gang members often possess multiple guns and weapons and often use weapons to "attack other gang members or for their protection from" members of rival gangs. ER190. Deputy Creager believed that "further gang indicia and/or possession of illegal firearm(s) and/or firearms related items will be discovered" at Martinez's apartment. *Id.*

C. The state magistrate did not clearly err in finding probable cause

In issuing a search warrant, a magistrate makes a "practical, common-sense decision" about whether, "given all the circumstances set forth in the affidavit," there is a "fair probability" that evidence of a crime will be in the place specified. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause does not require certainty or even a preponderance of the evidence. *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011). It is instead "a fluid concept—turning on the assessment of probabilities in particular factual contexts." *Gates*, 462 U.S. at 232.

Martinez ignores the clear-error standard and the "great deference" that this Court must give the state magistrate's probable-cause finding. *See Garay*, 2019 WL 4419679, at *5; *United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007).

Instead, he engages in exactly the type of de novo review, "flyspecking," and attack-by-isolation tactics that precedent forbids. *Gourde*, 440 F.3d at 1069.

Viewed in isolation and divorced from context, various facts here could have had potentially innocuous explanations. Martinez's "SF" wallet could have signaled that he supports a San Francisco sports team. His Cincinnati Reds ballcap could have signified that this native Californian (PSR ¶¶ 47–59) roots for an Ohio baseball team. His red cell phone case could have suggested that he likes the color red. And his decision to tattoo his left shoulder and his right forearm with dollar symbols could have reflected mere "materialism" (ER199, 224).

But the Court cannot consider each fact in a vacuum. Instead, the Court must view the facts holistically and in context, with deference to the experience and inferences of Deputy Creager and the state magistrate. Martinez displayed multiple potential gang signifiers while driving with a loaded handgun and high-capacity magazines in a hidden compartment beside him. His criminal record prohibited him from possessing firearms. And this was no ordinary firearm, but a police officer's service weapon, stolen in a residential burglary.

This criminal context heightened the likelihood that Martinez's tattoos, clothes, wallet, and cell phone case signified Norteño affiliation. ER186. And potential Norteño affiliation—as Deputy Creager knew from his experience and training—heightened the likelihood that this stolen pistol was not the only firearm

Martinez illegally possessed, and that he might have others at home. ER185–86, 190. "[M]agistrate judges may 'rely on the conclusions of experienced law enforcement officers regarding where evidence of a crime is likely to be found.'" *Garay*, 2019 WL 4419679, at *4 (citation omitted). In fact, "independently of [Deputy Creager's] beliefs," the affidavit provided a sufficient factual basis for probable cause to search the apartment. *Id.* at *5. "Magistrate judges may . . . draw their own reasonable inferences about where evidence might be kept based on the nature of the suspected offense and the nature of the evidence sought." *Id.*

Probable cause is "not a high bar," *Wesby*, 138 S. Ct. at 586, and Deputy Creager's affidavit cleared it. In claiming otherwise, Martinez "seeks to sidestep the 'fair probability' standard and elevate probable cause to a test of near certainty." *Gourde*, 440 F.3d at 1072. And he "confuses the relaxed standard of 'fair probability' with the higher standards imposed at trial." *Id.* at 1073. The "[f]inely-tuned standards" that Martinez advocates "have no place" here. *Gates*, 462 U.S. at 235; *see Gourde*, 440 F.3d at 1073.

But this Court need not "belabor the issue of whether the affidavit stated probable cause." *Crews*, 502 F.3d at 1136. Since there was at least a "colorable argument" that probable cause supported the apartment search, "[t]his ends the inquiry." *Id.*; ER27–31; *see* Part III, *infra* (pp. 49–54).

D. The search warrant did not depend on any "tainted evidence"

Martinez claims that the search warrant affidavit improperly relied on two pieces of what he calls "tainted evidence": (1) the stolen handgun and magazines discovered in his SUV's center console and (2) his statement during the jail booking process about preferring to house in the jail's "B" pod. AOB32–34. The district court rightly rejected both arguments. ER23–26.

First, the court reiterated that "the entirety of" the vehicle search was lawful, so that evidence did not "taint" the search warrant. ER24.

Second, the court rejected Martinez's request to purge from the affidavit his statement during jail booking that he prefers to house in the jail's "B" pod. ER24–26. Martinez claims that because he received no *Miranda* warnings from jail staff before giving this answer, the district court should have ignored it and, by extension, suppressed all evidence seized under the warrant. AOB32–34; ER25.

The district court did not clearly err by finding that Martinez "was asked by jail staff about where he houses in the county jail during booking because such information was useful for 'complet[ing] [Defendant's] booking' in the jail." ER25 (brackets in original) (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990)). Under the booking-questions exception, Martinez was therefore "not required to be Mirandized before being asked about where he houses in the county jail." ER25. Martinez cites no precedent undermining this conclusion.

Martinez relies on *United States v. Williams*, 842 F.3d 1143 (9th Cir. 2016), to argue that the booking-questions exception does not apply because the jail staff's question here was likely to elicit an incriminating response from him. AOB14, 18, 32–33. But as the district court explained, Martinez's "reliance on *Williams* is unavailing." ER25–26. There, police arrested the defendant for murder, took him to jail, and placed him in a cell; a deputy sheriff then removed him from the cell and asked him directly "whether he was a gang member." 842 F.3d at 1145. "In response to the deputy's inquiry whether he was affiliated with [a specific gang]," the defendant admitted that he was. *Id.* at 1145–46.

Martinez ignores the narrowness of *Williams*'s holding: "we hold only that when a defendant charged with murder invokes his *Miranda* rights, the government may not in its case-in-chief admit evidence of the prisoner's unadmonished responses to questions about his gang affiliation." *Id.* at 1150. Martinez did not face murder charges, did not invoke his *Miranda* rights, and did not undergo interrogation by a law-enforcement officer. Jail staff merely asked a routine housing question at intake. ER25. In fact, when Deputy Creager asked if Martinez "wanted to speak with [him] regarding the possession of the firearm" from the SUV, Martinez "thought about it for a few seconds," "then declined to speak with" the deputy. ER69, 189.

Unlike in *Williams*, moreover, the government did not seek to admit Martinez's "B" pod statement in its case-in-chief. 842 F.3d at 1150. On the contrary, the district court convicted Martinez at the bench trial without relying on any challenged statements. SER7–11; ER131.

Also unlike in *Williams*, Martinez "was never directly 'asked whether he was a gang member.'" ER26 (quoting *Williams*, 842 F.3d at 1145). Instead, jail staff asked Martinez "only . . . where he typically houses in the county jail." ER26. As Martinez argued below—and as the defense investigator and the defense expert both confirmed—where a defendant "houses in the county jail does not necessarily 'constitute evidence of gang affiliation.'" ER26 (quoting CR16 at 14) (brackets omitted); *see* ER200–01 (defense expert's report); ER229 (defense investigator's affidavit).

Although Martinez's answer to this booking question ended up being relevant to the probable-cause analysis of the search warrant, Martinez cites no authority that required *Miranda* warnings before jail staff asked this question. Indeed, given that Martinez was not a felon and claims not to be a gang member, the staff would have had no reason to expect that he would give an incriminating answer when asked about his jail housing preferences. The district court thus correctly found that "although housing location within the county jail may correlate with gang membership," "jail pod placement is far from dispositive of

one's gang membership or affiliation"—as Martinez's own filings confirmed[6]—and this jail-housing question did not require *Miranda* warnings. ER26.

Martinez argues (AOB34) that the district court's *Miranda* analysis was "internally inconsistent" with its probable-cause analysis of the search warrant affidavit. Martinez cites no authority for his theory because none exists. The *Miranda* analysis and the Fourth Amendment analysis are distinct. After all, even "observations of outwardly innocent behavior . . . can give rise to probable cause." *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995).

But even if a *Miranda* violation occurred here, suppression of the physical fruits from the search warrant would be unjustified. Failure to give *Miranda* warnings does not require "suppression of the physical fruits of the suspect's unwarned but voluntary statements." *Patane*, 542 U.S. at 633–34; *see Oregon v. Elstad*, 470 U.S. 298, 307 (1985). As this Court recognized in *Williams*, 842 F.3d at 1150, the remedy for a *Miranda* violation is to prevent the government from using the unwarned statement as substantive evidence at trial. *Patane*, 542 U.S. at

[6] Martinez claims (AOB33) that the defense expert's report "was not before the magistrate when Deputy Creager obtained the warrant" and therefore "cannot be considered in assessing whether the affidavit [*sic*] was incriminating on its face." Martinez cites no authority supporting his argument. Whether this booking question required *Miranda* warnings was a legal issue for the district court to decide. The district court was free—just as this Court is free—to consider the full record, including the materials that Martinez attached to his suppression motion. *See United States v. Zapien*, 861 F.3d 971, 974–76 (9th Cir. 2017).

641–42. Thus, a voluntary statement given by the defendant in violation of *Miranda* can still help establish probable cause in a search warrant affidavit. *United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987); *see United States v. Guillen*, 657 F. App'x 690, 692 (9th Cir. 2016) (citing *Patterson*).

Although Martinez makes conclusory assertions that his statements during the traffic stop were "not voluntary," AOB28, he does not make the same claim about his "B" pod statement. Nor did he not request an evidentiary hearing. On the contrary, he told the district court that no evidentiary hearing was necessary, as the record is "very complete." ER61–62. The record establishes that Martinez's "B" pod statement during the jail booking and his statements in the traffic stop were voluntary: they did not result from "interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice." *Miranda*, 384 U.S. at 464–65. Thus, the physical fruits are not suppressible.

E. Martinez failed to carry his burden for a *Franks* hearing

"Given the assumption of validity underlying a supporting affidavit, a party moving for a *Franks* hearing must submit 'allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.'" *Chavez-Miranda*, 306 F.3d at 979 (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)). The movant must also "show that any omitted

information is material." *Id.* On both elements, the movant "bears the burden of proof and must make a substantial showing." *Id.* Martinez failed to carry his burden on either element.

1. No deliberate or reckless falsehood

Martinez claims that Deputy Creager's search warrant affidavit misidentified Martinez's dollar-sign tattoos as anti-Sureño tattoos, mentioned certain gang signifiers that Martinez did not display, and related certain true statements about the jail's "B" pod. AOB37–38; *see* ER186. As the district court rightly found, Martinez made no substantial preliminary showing of any deliberate or reckless material falsehood in the search warrant affidavit. ER19–23.

First, because there is "a presumption of validity" for information in a search warrant affidavit, a defendant must support allegations of a *Franks* violation with "an offer of proof" such as "[a]ffidavits or sworn or otherwise reliable statements of witnesses." *Franks*, 438 U.S. at 171. A "lack of an affidavit or sworn statement offering proof" of a deliberate falsehood or reckless disregard for the truth "is enough to defeat [a] demand for" a *Franks* hearing. *United States v. Ruddell*, 71 F.3d 331, 334 (9th Cir. 1995).

Martinez failed to satisfy these threshold requirements. In challenging Deputy Creager's sworn search warrant affidavit, Martinez relied mainly on an unsworn "report" by a defense expert named Joshua Mason. ER196–209. A felon

and former gang member who spent a decade in prison for attempted murder, Mason is currently a college student. ER198, 202. His credentials consist of an associate's degree and a paralegal certificate. ER202.[7]

Second, Mason's unsworn subjective disagreement with Deputy Creager's assessment of Martinez's dollar-sign tattoos did not amount to a substantial showing of reckless or deliberate falsity. ER19–23. Mason's report did not show that anything in Deputy Creager's affidavit was even inaccurate. In fact, Mason himself admitted that Deputy Creager "is correct when he states that . . . . [t]he letter S with lines through it is a sign of disrespect to the Sureño criminal street gang." ER199. Mason likewise admitted that Deputy Creager was correct that Norteños often display the color red, the letters "SF," and the logos of San Francisco sports teams. ER200; *see* ER23.

But "[m]ore importantly, and in any event," as the district court found, Mason's unsworn subjective opinions fell "well short of making a 'substantial preliminary showing' that Deputy Creager's statement about Martinez's 'money symbol' tattoos amounted to an '*intentionally* or *recklessly* false statement.'" ER23 (quoting *United States v. Stanert*, 762 F.2d 780 (9th Cir. 1985)) (brackets omitted). Thus, "even assuming that Deputy Creager's statement about

[7] The same judge who presided here found in another case that Mason "has no expertise as to the Salinas-based Norteño street cliques." *United States v. Skates*, No. 15-CR-285 LHK, 2019 WL 634649, at *9 (N.D. Cal. Feb. 14, 2019).

Defendant's 'money symbol' tattoos was incorrect," the court found that Mason's report "provides little evidence that the false statement was anything more than a good faith mistake." ER23 (citing *Ruddell*, 71 F.3d at 334).[8]

Third, Deputy Creager's affidavit mentioned as background certain Norteño identifiers that Martinez himself did not display. ER20–21; *see* AOB37. But Deputy Creager's affidavit never suggested that Martinez displayed these symbols. ER186. As the district court found, "the fact that [Martinez] lacked these features does not mean that Deputy Creager's inclusion of a description of these features in his affidavit was misleading." ER20. And there is "nothing wrong" with "an expert demonstrating his knowledge of a subject before delving into the specifics of a given case." *Id.* (quotation marks omitted). Plus, "immediately after the affidavit's general description of Norteño characteristics, Deputy Creager provided a clear list of the specific facts applicable to" Martinez. ER20.[9]

[8] Martinez faults the court for mentioning "good faith" without an evidentiary hearing. AOB40–41. But it was Martinez's burden to make a substantial showing of deliberate or reckless falsehood; he failed. The court properly applied the "presumption of validity" that precedent requires. *Franks*, 438 U.S. at 171.

[9] The court also observed that including this background information in the affidavit "might have been necessary for purposes of ensuring that certain provisions of the search warrant" were specific enough to provide the officers executing the warrant guidance in identifying what gang-related evidence to seize. ER20 n.1.

As the district court found, it was these facts—tied specifically to Martinez—that reasonably suggested possible "association with the Norteño criminal street gang." ER20 (quotation marks omitted). And given this "clear list of specific facts applicable to Defendant himself," along with Martinez's failure to "point to anything that suggests that Deputy Creager included these statements with an *intent* to mislead or a reckless disregard for a truth," Martinez failed to make the substantial preliminary showing required for a *Franks* hearing. ER20–21. Again, Martinez cites no authority that undermines the court's careful analysis.

Finally, Deputy Creager's "B" pod statements were accurate. ER21–22, 186. In fact, Martinez's defense investigator, counsel, and former-gang-member expert all conceded that Norteños do indeed house in that jail's "B" pod. ER229 (defense investigator's affidavit); CR16 at 23 (motion); ER200–01 (defense expert's report). As the district court found, "Deputy Creager's statement regarding Norteños being housed in 'B' pod did not imply that *only* Norteños are housed in 'B' pod." ER21 (cleaned up). Nothing in Deputy Creager's affidavit was "even suggestive of" the notion "that 'B' pod was *exclusively* comprised of Norteños." ER22. The court thus found that Martinez "has failed to make any 'preliminary showing'—let alone a 'substantial preliminary showing'—that Deputy Creager falsely implied in his affidavit that *only* Norteños were housed" in

the jail's "B" pod. ER22 (citing *Stanert*, 762 F.2d at 780). The court did not err, clearly or otherwise.

Compare the offer of proof in *United States v. Johns*, 851 F.2d 1131 (9th Cir. 1988), a case Martinez relies on heavily. AOB34–36, 39–41. There, the defendants' offer of proof supporting their request for a *Franks* hearing included "expert witnesses who *swore* the officer's affidavit was *necessarily false* because *it is scientifically impossible* to smell what the officers claimed to have smelled given the contents of the storage space searched under the warrant." 851 F.2d at 1134 (emphasis added). Martinez offered nothing comparable.

2. No materiality

Martinez makes the conclusory assertion that the challenged portions of the search warrant affidavit were "indisputably material," and he claims the government never "suggested otherwise" below. AOB37. That is false. The government argued that Martinez "cannot show that the warrant would not have been granted were it not for the statements about which he complains." CR17 at 16; *see id.* at 14–15 (citing both *Franks* prongs and arguing that Martinez "has failed to make a substantial showing under either"). While the district court did not address materiality, it did not need to, since it found no deliberate or reckless falsehood. This Court can affirm on any basis. *McClendon*, 713 F.3d at 1218.

The challenged information was not material to this warrant. The strongest evidence in support of the probable-cause showing was Deputy Creager's discovery of a stolen loaded handgun and three high-capacity magazines in the SUV Martinez was driving, plus Martinez's status as a prohibited person. Those facts—coupled with unchallenged indicators of potential gang membership—more than sufficed to establish a "fair probability" that Martinez might have more illegal guns at home. *Gates*, 462 U.S. at 238.

3. Martinez cites no authority to the contrary

For his *Franks* claim, Martinez relies on caselaw involving deceptive search warrant affidavits that bear no resemblance to this one. AOB37–42.

The affiant in *United States v. Chesher*, 678 F.2d 1353, 1361 (9th Cir. 1982), for example, represented that the defendant was a current Hell's Angels member, even though evidence readily available to the affiant proved that this was false.

Likewise, the affiant in *Stanert* misled the magistrate in clear and material ways: by stating that the defendant had been arrested but failing to disclose that no conviction had resulted, and by stating that the affiant had investigated a drug-lab explosion at the defendant's residence but failing to inform the magistrate that the defendant "purchased and moved onto the property *after* the explosion." 762 F.2d at 781–82.

And in *United States v. Perkins*, 850 F.3d 1109, 1117–19 (9th Cir. 2017), a child-pornography case, the Court found a "clear, intentional pattern" of deception: the affiant withheld the images from the magistrate, failed to disclose that Canadian law enforcement had concluded that the images were not child pornography, and failed to disclose that Canada had dropped its charges. Here, the affidavit contains no similar misrepresentations or material omissions.

III. THE EXCLUSIONARY RULE DOES NOT APPLY IN ANY EVENT

A. Standard of review

"Whether the exclusionary rule applies to a given case is reviewed de novo, while the underlying factual findings are reviewed for clear error." *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc).

B. The exclusionary rule does not apply to the vehicle search

Fourth Amendment violations do not automatically trigger suppression of evidence. Suppression is not a personal right or a form of redress. *Davis v. United States*, 564 U.S. 229, 236–37 (2011). The exclusionary rule's "sole purpose" is to deter future Fourth Amendment violations. *Id.* "'If . . . the exclusionary rule does not result in appreciable deterrence' of police misconduct, 'then, clearly, its use in the instant situation is unwarranted.'" *United States v. Elmore*, 917 F.3d 1068, 1076 (9th Cir. 2019) (citation omitted). The exclusionary rule applies only if the

benefits of deterrence outweigh suppression's social costs. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

This balancing analysis forecloses suppression here. If Deputy Creager erred by concluding that probable cause supported the vehicle search, then he is hardly alone: a federal district judge likewise found the "entirety of" this search constitutional. ER24. Deputy Creager cannot be blamed for interpreting the Fourth Amendment the same way as an Article III judge. Indeed, if this Court rules that the vehicle search was unlawful, the Court will be making new law and departing from precedent. And in attacking this precedent, Martinez purports to raise an issue of "first impression." AOB22. Deputy Creager cannot have been expected to apply a Fourth Amendment rule that did not yet exist. Police are not legal clairvoyants.

Suppression would not deter police misconduct because there was none. But suppression would exact a heavy social cost: allowing a convicted domestic abuser who illegally possessed deadly weapons to "go free." *Herring v. United States*, 555 U.S. 135, 141 (2009). If this Court accepts Martinez's tainted-fruit theory, suppressing the SUV evidence would also require suppressing the arsenal of weapons that Martinez kept at home, unlocked in a bedroom closet "that contained children's clothing and an infant swing." PSR ¶ 15; ER87, 194. Since these costs far outweigh any deterrent benefit, the exclusionary rule does not apply.

C. The exclusionary rule does not apply to the apartment search

As the district court rightly found, even if the search warrant affidavit was imperfect, the good-faith exception to the exclusionary rule precludes suppression. ER27–31; *see United States v. Leon*, 468 U.S. 897, 922–24 (1984).

Under *Leon*, evidence is admissible if police obtained it in "objectively reasonable reliance" on a search warrant, even if a reviewing court later invalidates the warrant. 468 U.S. at 922. To establish reasonable reliance, the warrant must present "a colorable argument for probable cause." *Krupa*, 658 F.3d at 1179 (citation omitted). "When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Leon*, 468 U.S. at 924.

The *Leon* good-faith exception does not apply in four narrow circumstances: (1) when the warrant is "so facially deficient" that no executing officer could reasonably presume it to be valid; (2) when the warrant results from recklessly or knowingly misleading the issuing judge; (3) when the affidavit supporting the warrant is "bare bones"; and (4) when the issuing judge "wholly abandons his or her judicial role." *Id.* at 922–23.

As the district court found after a careful and thoughtful analysis, none of those circumstances exists here. ER27–31. Deputy Creager's affidavit accurately described facts establishing Martinez's possession of a loaded handgun in the

SUV. The affidavit walked the state magistrate through indicators that Martinez might be a gang member and might have additional illegal weapons at home. This information corresponded to the categories of evidence sought by the warrant, justifying the officers' reliance on the warrant as valid authorization for the search. And as already discussed, Deputy Creager did not recklessly or knowingly mislead the magistrate about anything.

Deputy Creager's affidavit sufficed at least "to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Leon*, 468 U.S. at 926. In fact, the district court found that the affidavit "established *more* than a 'colorable argument for probable cause' to search [Martinez's] residence for firearms and certain evidence of gang membership." ER30 (citation omitted) (emphasis added). And the state magistrate found probable cause and signed the warrant. So Martinez's claim that "reasonable judges would not disagree that the warrant did not provide probable cause" (AOB48) necessarily fails.

Martinez cites no case where this Court has ever found an equivalent search warrant to fall outside the *Leon* good-faith exception. To the contrary, the Court has applied the good-faith exception to search warrants less substantial than this one. *See, e.g.*, *United States v. Jobe*, 933 F.3d 1074, 1077–78 (9th Cir. 2019); *United States v. Needham*, 718 F.3d 1190, 1195–96 (9th Cir. 2013); *Crews*, 502 F.3d at 1136–38; *United States v. Clark*, 31 F.3d 831, 835–36 (9th Cir. 1994).

This case is nothing like *United States v. Nora*, 765 F.3d 1049, 1055–60 (9th Cir. 2014), where this Court had to purge an affidavit of tainted evidence from an "unlawful arrest." Under such circumstances, this Court "do[es] not defer, as we normally would, to the issuing magistrate's determination that probable cause existed." *United States v. Artis*, 919 F.3d 1123, 1132 (9th Cir. 2019). Here, in contrast, that "great deference" is required. *Garay*, 2019 WL 4419679, at *5; *Crews*, 502 F.3d at 1135.

Martinez's other caselaw is similarly off-point. The affidavit in *United States v. Luong*, 470 F.3d 898, 903 (9th Cir. 2006), contained "no appreciable indicia of probable cause," while the affidavit in *United States v. Grant*, 682 F.3d 827, 836–41 (9th Cir. 2012), was "considerably weaker than the one challenged in *Luong*" and did not "set out *any plausible connection* between Grant's home and the gun or ammunition used" in a murder nine months earlier. *See Elmore*, 917 F.3d at 1078 ("*Grant* is distinguishable from this case.").

Similarly, the "bare bones" affidavit in *United States v. Underwood*, 725 F.3d 1076, 1081–82 (9th Cir. 2013), contained nothing but "foundationless expert opinion and conclusory allegations" and lacked any recitation of "underlying facts so that the issuing judge can draw his or her own reasonable inferences and conclusions." *See Garay*, 2019 WL 4419679, at *5 (distinguishing *Underwood*). The affidavit in *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990), a

child-exploitation case, gave no "reason to believe" that the defendant was a pedophile. This Court views "*Weber* as distinguished by its facts." *Gourde*, 440 F.3d at 1074. And in *Messerschmidt v. Millender*, 565 U.S. 535, 544–56 (2012), the Court upheld the reasonableness of the search. If anything, *Messerschmidt* supports a finding of probable cause here. ER30–31; CR17 at 13–14.[10]

Finally, even if *Leon* did not apply here, suppression would still be unjustified. This Court may use the exclusionary rule only as a last resort and only to deter flagrant or intentional police misconduct. *Herring*, 555 U.S. at 140; *Jobe*, 933 F.3d at 1078. No misconduct occurred here, and the benefits of deterrence would not nearly outweigh suppression's heavy costs. *See Strieff*, 136 S. Ct. at 2061; *Elmore*, 917 F.3d at 1076. Thus, the exclusionary rule does not apply.

IV. *REHAIF* DOES NOT AFFECT MARTINEZ'S CONVICTIONS

A. Standard of review

Martinez concedes that since he did not assert this claim below, he must establish plain error. AOB61. This requires him to establish (1) an error or defect (2) that was "clear or obvious," (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 734, 736 (1993). He cannot.

[10] Martinez also cites *People v. Elizalde*, 61 Cal. 4th 523, 541 (2015). AOB48–49; ER30. But that state-court decision did not involve a search warrant or probable-cause analysis and has no bearing here.

B. Applicable law

Before June 2019, every court of appeals to consider the issue had determined that the knowledge element in 18 U.S.C. § 922(g) prosecutions applied only to the defendant's possession of a firearm or ammunition, not to his restricted status. But in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court held that a defendant's knowledge "that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)" is an element of a § 922(g) offense. *Id.* at 2194.

Rehaif now requires the government to prove in a § 922(g) prosecution that the defendant "knew he had the relevant status when he possessed" the firearm. *Id.* But it does not require that the defendant knew of § 922(g)'s restrictions and willfully violated the statute. *Id.* at 2205. The government must instead prove that the defendant knew, when he possessed the firearm, the facts that placed him into one of the status categories listed in § 922(g)—for example, that the defendant had received a conviction "in any court" for "a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9).

C. Martinez waived this claim

In requesting a conviction on stipulated facts at a bench trial, Martinez stipulated to facts that he and his counsel agreed proved his guilt on both counts beyond a reasonable doubt. ER129–32; SER1–12. Martinez did not just stipulate

that he had knowingly possessed these guns, or that he had a 2012 conviction for a misdemeanor crime of domestic violence. ER129–32; SER7–9. He also admitted that "at the time of the events described above, *it was not lawful* under Title 18, United States Code, Section 922(g)(9) for Defendant to possess any firearms." ER132; SER9 (emphasis added). Martinez reserved only his ability to appeal the district court's suppression order. ER130; SER10.

Martinez's stipulations and waivers dispose of any *Rehaif* claim. In *United States v. Benamor*, __ F.3d __, 2019 WL 4198358 (9th Cir. Sept. 5, 2019), the defendant stipulated at trial to one element of 18 U.S.C. § 922(g)(1): "that, on the date when he was arrested" for possessing the firearm, "he had been convicted of a crime punishable by imprisonment exceeding one year." *Id.* at *5. This Court held that this "factual stipulation was binding, and it relieved the government of the burden to prove [his] status as a felon." *Id.* The Court went on to conduct the plain-error analysis "[a]ssuming, however, that the stipulation does not end the discussion as to Defendant's *knowledge* of his status as a felon." *Id.* *Benamor* thus contemplates that the defendant's stipulation to his prohibited status could "end the discussion" of the *Rehaif* knowledge question—even before plain-error review.

Like the *Benamor* defendant, Martinez stipulated that he had a prior conviction at the time of his arrest that made his possession of firearms unlawful. But Martinez's stipulations were even broader: he also stipulated that his

possession of the charged firearms "was not lawful." ER132; SER9. Without some kind of argument (not made here) that Martinez was in fact ignorant of his domestic-violence conviction and that his possession of the guns was lawful, his stipulations and waivers should remove the *Rehaif* knowledge-of-status issue from dispute. Martinez stipulated to facts that he admitted proved his guilt beyond a reasonable doubt. And he stipulated that his possession of these guns "was not lawful" under 18 U.S.C. § 922(g)(9). Martinez thus waived his right to challenge the sufficiency of evidence on any element.

D. Alternatively, Martinez cannot satisfy plain error's requirements

Even "[a]ssuming" that Martinez's stipulations at the bench trial do "not end the discussion as to [his] *knowledge* of his status," he still cannot satisfy plain error's "stringent" requirements. *Benamor*, 2019 WL 4198358, at *5. Under *Rehaif*, the district court erred at the bench trial by omitting the statute's knowledge-of-status element. SER5–6. And this error is "'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997). But because "the third and fourth prongs of the plain-error test are not met," *Benamor*, 2019 WL 4198358, at *5, Martinez deserves no relief.

1. The error did not affect Martinez's substantial rights

In *Benamor*, this Court confirmed that instructional-error analysis is appropriate when considering an unpreserved *Rehaif* claim like Martinez's. *Id.*

Although *Benamor* arose from a jury trial, the same logic applies here. Omitting *Rehaif*'s knowledge-of-status element at the stipulated-facts bench trial Martinez requested was a legal error like instructional error. And just as omitting an element from jury instructions does not always affect a defendant's substantial rights, *see United States v. Nguyen*, 565 F.3d 668, 677 (9th Cir. 2009), the same is true here.

To show an impairment of his substantial rights, Martinez must therefore establish "a reasonable probability" that the proceeding's outcome would have been different but for the omission of *Rehaif*'s knowledge-of-status element. *Benamor*, 2019 WL 4198358, at *5 (citing *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)). This determination turns on "'the strength of the evidence against'" Martinez and "whether [he] contested the omitted element 'and raised evidence sufficient to support a contrary finding.'" *United States v. Tydingco*, 909 F.3d 297, 305 (9th Cir. 2018) (citation omitted).

Martinez cannot make this showing. The Supreme Court emphasized in *Rehaif* that it was not imposing a "burdensome" evidentiary requirement and that "'knowledge can be inferred from circumstantial evidence.'" 139 S. Ct. at 2198 (citation omitted). Here, along with the knowledge that the district court could reasonably infer from the stipulated fact of Martinez's prior domestic-violence misdemeanor conviction, the totality of evidence forecloses any reasonable probability of acquittal.

In *Benamor*, this Court rejected the same claim Martinez presses here. Reviewing for plain error, it held that the defendant did "not meet that stringent standard." 2019 WL 4198358, at *5. Although "the absence of an instruction requiring the jury to find that Defendant knew he was a felon was clear error under *Rehaif*," the Court held that the "third and fourth prongs of the plain-error test are not met," and that the defendant failed to carry his burden of showing that "but for the error, the outcome of the proceeding would have been different." *Id.*

Contrary to Martinez's approach (AOB59–62), *Benamor* considered facts outside the trial record. The defendant had several prior felony convictions. 2019 WL 4198358, at *5. The Court noted the lengths of those sentences, plus the types of some convictions—evidence never presented at trial. *Id.* This evidence, drawn from the Presentence Investigation Report (PSR), convinced the Court that the defendant "had the knowledge required by *Rehaif* and that any error in not instructing the jury to make such a finding did not affect Defendant's substantial rights or the fairness, integrity, or public reputation of the trial." *Id.*

So too here. In fact, *Benamor*'s reasoning applies with even greater force. Martinez did not have to know of a particular prior conviction *punishable* by a particular sentence—the standard for felons under 18 U.S.C. § 922(g)(1). He only had to know when he possessed these guns that he had a conviction from "any

court" for a "misdemeanor crime of domestic violence," regardless of sentence. 18 U.S.C. § 922(g)(9).

Martinez has never claimed ignorance of his 2012 domestic-violence conviction. And at his bench trial, he chose to stipulate to that prior conviction, which he admitted meant that "at the time" he possessed these guns, "it was not lawful" under 18 U.S.C. § 922(g)(9) for him "to possess any firearms." ER132; SER9. Martinez's stipulations sufficed for a reasonable factfinder to infer that Martinez had the requisite knowledge in 2016–2017 when he obtained and possessed these guns. *See* CR35 at 4 (defense counsel noting that "Mr. Martinez admitted he obtained the guns in October 2016"); PSR ¶ 18.

The facts of Martinez's 2012 conviction reinforce this conclusion. The domestic-violence offense was no doubt a momentous event in Martinez's life. He struck the mother of his children while he held the couple's daughter. PSR ¶ 39. When police arrived, Martinez ran off, ignored commands to stop, and threatened the officers: "I'll sit down if you want, but if you put your hands on me then it's on." *Id.* After an officer drew a Taser, Martinez submitted to arrest. *Id.* Along with his domestic-violence conviction, he received a misdemeanor conviction for obstructing police. *Id.* The state court sentenced him in May 2012 to three years' probation. *Id.* Two months later, the court revoked probation and sent him to jail for 180 days. *Id.* And in 2013, he received another misdemeanor conviction and

20-day custodial sentence for violating a restraining order. PSR ¶¶ 39–40; ER94–95, 111. These are not events that Martinez would have forgotten by 2016–2017 when he obtained and possessed these guns.

Martinez's more recent behavior also reveals his knowledge. When police searched his apartment in 2017 under this search warrant, Martinez made statements (both pre- and post-*Miranda* warnings) confirming that he knew his possession of these guns was unlawful—guns that he said he had bought "'on the streets'" from a "source" he "refused to name." PSR ¶ 18. Defense counsel has likewise acknowledged that the pistol Martinez kept in the SUV was a stolen firearm that he obtained through "hand-to-hand deals." ER103–04. If Martinez had been ignorant of his prohibited status, it is unlikely that he would have obtained firearms on the black market.

The circumstantial evidence of Martinez's knowledge is strong. Especially with no countervailing evidence, Martinez cannot establish the prejudice that plain-error review demands. There is no reasonable probability that the outcome at trial would have been different but for the district court's omission of the knowledge-of-status element. *See United States v. Smith*, 561 F.3d 934, 938–39 (9th Cir. 2009). Martinez has thus not established the prejudice to his "substantial rights" required for relief. Fed. R. Crim. P. 52(b).

2. The defect did not seriously affect the fairness, integrity, or public reputation of judicial proceedings

Finally, Martinez cannot show that the omission of the knowledge-of-status element seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 737. Only a grave error that results in a "miscarriage of justice" merits relief under this discretionary prong of plain-error review. *United States v. Covian-Sandoval*, 462 F.3d 1090, 1096 (9th Cir. 2006).

Affirming Martinez's convictions would not be a miscarriage of justice. First, circumstantial evidence overwhelmingly shows that he knew of his 2012 domestic-violence conviction when he possessed these firearms. Thus, "there is no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' Indeed, it would be the reversal of a conviction such as this which would have that effect." *Johnson*, 520 U.S. 470 (citation omitted).

Second, Martinez asked for a conviction at a stipulated-facts bench trial and chose not to put the government to its proof. SER7; ER130. He received the benefits of his bargain—preserving his right to appeal the suppression order while ensuring that he would receive a full three-level reduction in his offense level at sentencing. ER106; *see* USSG § 3E1.1; *cf. United States v. Hardin*, 139 F.3d 813, 817 (11th Cir. 1998).

Third, by stipulating to facts that he agreed proved his guilt, Martinez prevented the government from introducing other evidence. *See Benamor*, 2019 WL 4198358, at *5. He cannot complain about an error that he helped cause through his own "tactical decision." *United States v. Myers*, 804 F.3d 1246, 1257–58 (9th Cir. 2015); *see United States v. Shwayder*, 312 F.3d 1109, 1122 (9th Cir. 2002) (if "tactical behavior is likely, we should take great care before exercising our discretion to reverse for plain error"). Because Martinez has not satisfied plain error's third or fourth prongs, *Rehaif* does not entitle him to a new trial.[11]

CONCLUSION

The Court should affirm Martinez's convictions.

Dated: September 25, 2019

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

MERRY JEAN CHAN
Chief, Appellate Section, Criminal Division

s/ Jonas Lerman
JONAS LERMAN
Assistant United States Attorney

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

[11] Even if Martinez could satisfy all four prongs of plain-error review, he would be entitled at most to remand for a retrial, not reversal. *See United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995). The same Federal Public Defender's Office has conceded this point elsewhere. *United States v. Luong*, No. 16-10213, Dkt. 59 (9th Cir. Aug. 30, 2019).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 18-10498

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[X] I am aware of one or more related cases currently pending in this court. The case number and name of each related case (asserting a *Rehaif* claim) are:

- *United States v. Cotton*, No. 17-10171
- *United States v. Gonzalez-Martin*, No. 19-10095
- *United States v. Hessiani*, No. 18-10176
- *United States v. Jordan-McFeely*, No. 16-10456
- *United States v. Luong*, No. 16-10213
- *United States v. Marcum*, Nos. 18-30116 & 18-30113
- *United States v. Martinez*, No. 18-10498
- *United States v. Qazi*, No. 18-10483
- *United States v. Rangel*, No. 18-50406
- *United States v. Schmidt*, No. 18-30128
- *United States v. Vandergroen*, No. 19-10075
- *United States v. Winn*, No. 18-10473

Signature s/ Jonas Lerman **Date** September 25, 2019
*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) **18-10498**

I am the attorney or self-represented party.

This brief contains **13,995** **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Jonas Lerman **Date** September 25, 2019
*(use "*s/[typed name]*" to sign electronically-filed documents)*