No. 12-

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RHONDA LEE OVERSTREET
OVERSTREET SLOAN, PLLC
Suite 101
806 East Main Street
Bedford, VA 24523
(540) 597-1024

ADAM H. CHARNES
RICHARD D. DIETZ*
KILPATRICK TOWNSEND
& STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300
rdietz@kilpatricktownsend.com

**Counsel of Record*

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248055

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer under 18 U.S.C. § 922(a)(6) for making a false statement about the identity of the buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

The lower courts uniformly agree that a buyer's intent to resell a gun to someone who cannot lawfully buy it is a fact "material to the lawfulness of the sale." But the Fourth, Sixth, and Eleventh Circuits have split with the Fifth and Ninth Circuits about whether the same is true when the ultimate recipient *can* lawfully buy a gun. The questions presented are:

1. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under § 924(a)(1)(A).

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INTRODUCTION

This case presents a straightforward, five-circuit split on a significant legal issue involving the federal firearm laws.

Petitioner Bruce Abramski, a former police officer, bought a gun for his uncle. Abramski's uncle is a law-abiding citizen legally entitled to buy a gun himself. But because Abramski worked in law enforcement, he receives a discount at many gun stores. So Abramski bought the gun to save his uncle some money, then drove to his uncle's hometown, met his uncle at a nearby gun store, and signed the necessary ATF paperwork to transfer ownership.

When Abramski bought the gun initially, he checked a box on an ATF form indicating that he was the "actual buyer." However, the instructions on the form indicate that a person who buys a gun intending to later transfer it to someone else is not an "actual buyer."

After discovering that Abramski bought the gun for his uncle but had checked the "actual buyer" box on the ATF form, the government indicted him for making a false statement that is "intended or likely to deceive" a licensed gun dealer "with respect to any fact material to the lawfulness of the sale." 18 U.S.C. § 922(a)(6). The government relied on the "straw purchaser" doctrine, a court-created legal fiction that treats the ultimate recipient of a firearm as the true purchaser.

Before trial, Abramski moved to dismiss the indictment, asserting that the straw purchaser doctrine only applies when the ultimate recipient of the firearm

is not eligible to buy or possess a gun. Thus, because Abramski's uncle was legally entitled to buy and own a gun himself, federal law did not prohibit a gun dealer from selling the gun to Abramski even if the dealer knew Abramski later planned to resell it to his uncle. As a result, Abramski's answer to the "actual buyer" question was not "material to the lawfulness of the sale."

Had Abramski been prosecuted in a court in the Fifth or Ninth Circuits, he would not have been convicted. As the Fifth Circuit has explained "§ 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms. . . . Thus, if the true purchaser can lawfully purchase a firearm directly, § 922(a)(6) liability (under a 'straw purchase' theory) does not attach." *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997).

But in this case, the Fourth Circuit joined the Sixth and Eleventh Circuits in expressly rejecting that reasoning and holding that *"[t]he identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6)."* App. 15a-16a (emphasis in original).

As explained below, the Fifth and Ninth Circuits' reasoning is correct. But regardless of which interpretation is the correct one, this Court's review is warranted. The circuit split on this significant legal issue is deep and persistent. The lack of national uniformity is particularly troubling because the government processes an average of more than 45,000 gun applications every day. *See* Fed. Bureau of Invest. National Instant Criminal Background

Check System (NICS) Operations Report 2011 at 8, *available at* http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011.

In addition, recent tragedies involving gun violence have put tremendous pressure on federal officials to enforce existing gun laws. That pressure makes prosecutors less willing to exercise their discretion to avoid the injustice that can result when conduct that is perfectly lawful in one state is a federal felony just a few states away. The Court should grant review to resolve this glaring discord among the circuits.

OPINIONS BELOW

The Fourth Circuit's decision below is reported at 706 F.3d 307 and reprinted in the Appendix (App.) at 1a-24a. The District Court ruled on Petitioner's March 10, 2011 motion to dismiss orally from the bench. The transcript excerpt containing that ruling is reprinted at App. 25a-27a. The District Court's judgment is unreported and reprinted at App. 28a-41a.

JURISDICTION

The Fourth Circuit rendered its decision on January 23, 2013. App. 1a. On April 4, 2013, the Chief Justice extended the time to file a petition for a writ of certiorari to June 21, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

18 U.S.C. § 922(a)(6) provides:

> (a) It shall be unlawful . . . (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. § 924(a)(1)(A) provides:

> (a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter . . . shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT

In the Fall of 2009, Petitioner Bruce Abramski's elderly uncle decided he wanted a gun to protect himself inside his home. He went to Abramski for advice because Abramski was a former police officer and had experience with firearms. Abramski told his uncle that he received a law enforcement discount at gun stores and offered to buy the gun for his uncle to save him some money. App. 3a; J.A. 548-559.[1]

Abramski's uncle then spoke to three different licensed gun dealers near his home to determine whether Abramski could buy the gun for him. All three gun dealers told Abramski's uncle that what he and Abramski proposed was perfectly legal—Abramski would simply need to buy the gun in his hometown in Virginia, fill out the necessary ATF forms, undergo the necessary background check, and then transfer ownership of the gun to Abramski's uncle at a licensed dealer near his uncle's home in Pennsylvania, where Abramski's uncle could fill out the necessary paperwork and undergo his own background check. App. 3a; J.A. 558.

After determining that the gun transfer would be legal, Abramski's uncle sent him a check to cover the cost of the gun. Abramski then went to a local gun store and bought the gun. As part of the necessary paperwork and background check, Abramski filled out ATF Form 4473. Among the questions on the form is Question 11a, which states as follows:

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1. Citations to "J.A." are to the joint appendix filed below, which is available electronically in the Fourth Circuit's PACER docket for this appeal.

> Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**

J.A. 585; *see also* ATF Form 4473, Question 11a, *available at* www.atf.gov/files/forms/download/atf-f-4473-1.pdf .

Abramski checked the "Yes" box in response to question 11a, indicating that he was the actual buyer. App. 4a; J.A. 585. After buying the gun, Abramski traveled to his uncle's hometown and met him at a nearby gun store. Abramski and his uncle filled out all the necessary federal paperwork to resell the gun to his uncle. His uncle passed the required background check and Abramski and his uncle paid all the necessary transfer fees. In the district court, an ATF agent testified that he had reviewed this gun transaction and that "Mr. Abramski not being a prohibited person and Mr. Alvarez [Abramski's uncle] not being a prohibited person, that makes that transfer, if you will, lawful." J.A. 111.

Nevertheless, after discovering that Abramski's uncle wrote a check for the gun *before* Abramski bought it, the government indicted Abramski for violating 18 U.S.C. § 922(a)(6) and 18 U.S.C. § 924(a)(1)(A). Section 922(a)(6) prohibits false statements to a gun dealer that are "material to the lawfulness of the sale." Section 924(a)(1)(A) prohibits false statements to a gun dealer concerning any information "required . . . to be kept" by the dealer under federal law.

Abramski moved to dismiss the indictment on the ground that neither § 922(a)(6) nor § 924(a)(1)(A) apply where a gun buyer purchased the gun to resell it to another lawful purchaser later. App. 8a; J.A. 241-42. The district court denied the motion in an oral ruling. App. 26a. Abramski later entered a conditional guilty plea, reserving his right to appeal on the issue of whether §§ 922(a)(6) and 924(a)(1)(A) apply when a person buys a gun intending to sell it to another lawful purchaser later. App. 10a; J.A. 520, 575. Abramski then timely appealed on that issue. App. 10a; J.A. 596.

The Fourth Circuit rejected Abramski's argument and affirmed. The court acknowledged that there was a split of authority among the circuits on whether § 922(a)(6) applied in a case like this one, where the ultimate recipient of the firearm was lawfully entitled to buy a gun himself. App. 14a. The Fourth Circuit adopted the reasoning of the Sixth and Eleventh Circuits, creating a 3-2 split among five circuits. App. 15a. Abramski timely filed a petition for a writ of certiorari seeking review of the Fourth Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. FIVE CIRCUITS ARE SPLIT ON THE PROPER INTERPRETATION OF 18 U.S.C. § 922(a)(6).

Congress enacted 18 U.S.C. § 922(a)(6) to help "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett v. United States*, 423 U.S. 212, 220 (1976) (quoting the remarks of Senator Tydings, S. Rep. No. 90-1501 at 22 (1968)).

To achieve that goal, § 922(a)(6) makes it unlawful for a person buying a gun from a licensed dealer "knowingly to make a false or fictitious oral or written statement . . . intended or likely to deceive" a gun dealer "with respect to any fact material to the lawfulness of the sale." 18 U.S.C. § 922(a)(6).

This provision has long been used to prosecute "straw man" purchases in which a person buys firearms intending to later sell them to someone who cannot legally own a gun. *See United States v. Moore*, 109 F.3d 1456, 1460-61 (9th Cir. 1997) (en banc). "The straw man doctrine, which is nothing more than a long-standing construction of the relevant statutes, holds that a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables the ineligible principal to obtain a firearm." *Id.*

The "false statement" in these straw man prosecutions is the statement that the buyer is the "actual purchaser" of the firearm. Under the straw purchaser doctrine, the person standing at the counter buying the gun is a mere "straw man" and the true purchaser is the person not permitted to own the gun but who ultimately will receive it in the future. *Id.* at 1641.

This legal doctrine ordinarily is invoked only when the ultimate recipient of the gun is someone who cannot lawfully purchase a gun under federal law. In that circumstance, the identity of that final recipient—the real purchaser of the gun under the straw man doctrine—always will be "material to the lawfulness of the sale" because federal law prohibits gun dealers from selling

guns to those not lawfully permitted to buy them. *See* 18 U.S.C. § 922(d); *Polk*, 118 F.3d at 295; *Moore*, 109 F.3d at 1460-61; *see generally* Stephen P. Halbrook, *Firearms Law Deskbook* § 2:6 (2012-2013 ed.).

But the same is not true in cases like this one, where the ultimate recipient of the gun could lawfully buy a gun himself. In that circumstance, the circuits are divided on whether the initial buyer violates § 922(a)(6) by failing to disclose the intent to resell the gun to another lawful purchaser later. As explained below, the Fifth and Ninth Circuits have held that the identity of the ultimate recipient of a firearm in that circumstance is not material to the lawfulness of the initial sale. But the Fourth, Sixth, and Eleventh Circuits have rejected that reasoning, holding that the identity of the ultimate recipient *always* is material to the lawfulness of the initial sale. The Court should review this case to resolve this clear circuit split.

A. The Fifth and Ninth Circuits hold that the identity of the ultimate recipient of a firearm is not "material to the lawfulness of the sale" if that person could legally buy the gun himself.

The Fifth Circuit has squarely addressed the issue presented in this case and held that the identity of the ultimate recipient of a gun is not material to the lawfulness of the initial sale if both the initial buyer and the final recipient lawfully can buy firearms. *See United States v. Polk*, 118 F.3d 286 (5th Cir. 1997).

Polk was charged with aiding and abetting a violation of § 922(a)(6) after he paid a man named Davidson to buy guns for him. Polk argued "that the transactions at

[the gun store] were not 'straw purchases' because Polk had every right to purchase firearms (i.e., he was not an unlawful purchaser through Davidson)." *Id.* at 295. But the government contended that "Davidson's purchases *were* 'straw purchase' transactions because, notwithstanding the fact that Polk could lawfully purchase firearms, Davidson falsely informed a federally licensed firearms dealer that he was the true purchaser of the weapons." *Id.*

The Fifth Circuit agreed with Polk, holding that "[i]t is clear to us—indeed, the plain language of the statute compels the conclusion—that § 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms." *Id.* "Thus, if the true purchaser can lawfully purchase a firearm directly, § 922(a)(6) liability (under a 'straw purchase' theory) does not attach." *Id.*

The Ninth Circuit also has indicated that § 922(a)(6) is not violated if the ultimate recipient of the gun lawfully can purchase firearms. *See United States v. Moore*, 109 F.3d 1456, 1460-61 (9th Cir. 1997) (en banc). In *Moore*, an elderly man named Wiley was convicted under § 922(a)(6) for purchasing a gun for a fourteen-year-old boy named Bobby. Wiley argued that he could not be convicted under § 922(a)(6) because he had actually purchased the gun for Bobby's mother, who was lawfully entitled to buy a gun. Wiley contended that he "was *her* lawful agent implementing *her* lawful decision; he was not a straw man, and thus, Wiley . . . did not violate the statute." *Id.* at 1461. The Ninth Circuit affirmed Wiley's conviction, holding that "[w]hether the defense is correct, of course, depends entirely on the facts. It was for the jury to decide whose agent Wiley was and whether Bobby was the actual buyer

of the gun." The Court explained that "[i]f the jurors had a reasonable doubt about whether the buyer was Bobby, they would have acquitted. They did not." *Id.*

Although the court affirmed Wiley's conviction, this discussion demonstrates that the Ninth Circuit, like the Fifth Circuit, does not believe § 922(a)(6) applies to straw purchases where the ultimate recipient of the firearm was someone like Bobby's mother, who lawfully could have purchased the gun herself.

B. The Fourth, Sixth, and Eleventh Circuits hold that the identity of the ultimate recipient of a firearm always is material to the lawfulness of the sale of that firearm.

In this case, the Fourth Circuit joined the Sixth and Eleventh Circuits in expressly rejecting the reasoning from *Polk* and *Moore*. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271, 1281 (11th Cir. 2010).

As the Fourth Circuit explained in this case, "[p]ut simply, we are unable to agree with *Polk*. It is clear to us that the prohibition against false and fictitious statements in § 922(a)(6) is not limited to those persons who are prohibited from buying or possessing a firearm." App. 15a.

The court held that the identity of the ultimate recipient of the firearm always is "material to the lawfulness of the sale":

> [T]o say that the identity of the actual purchaser is material to the lawfulness of one sale but not

> to another, is counterintuitive. Although *Polk* focused on whether one's identity affected the lawfulness of a sale under § 922(a)(6), we focus on whether one's identity is a fact that is material to the lawfulness of a sale. *The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6)*. Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

App. 15a-16a (emphasis in original).

The Fourth Circuit's discussion quotes extensively from the Eleventh Circuit's decision in *Frazier*, which held that "false statements of the identity of the actual buyer satisfy the 'fact material to the lawfulness of a sale' element, regardless of whether the actors were all lawfully eligible to purchase a firearm." *Frazier*, 605 F.3d at 1280. The Sixth Circuit also adopted this reasoning in *Morales*, explaining that because "the *Frazier* court's reasoning is sound, we likewise hold that the identity of the actual purchaser is material to the lawfulness of a firearms transaction." *Morales*, 687 F.3d at 701.

In sum, the Fifth and Ninth Circuits interpret this important and frequently-used criminal statute in a manner directly contrary to the Fourth, Sixth, and Eleventh Circuits. As a result of this five-circuit split, well-intentioned citizens like Abramski can be convicted of a federal felony in Atlanta, Cincinnati, or

Richmond for conduct that is perfectly lawful in Houston or San Francisco. This deep circuit split in a key area of (purportedly) uniform federal criminal law warrants this Court's review.

II. THE CIRCUIT SPLIT CREATES A RECURRING INJUSTICE THAT WILL PLAGUE WELL-INTENTIONED GUN BUYERS.

This Court's review of the five-circuit split concerning §922(a)(6) is particularly important because this is a common, recurring issue for the federal criminal justice system. In 2011, for example, the government processed an average of 45,000 gun applications every day. *See* Fed. Bureau of Invest. National Instant Criminal Background Check System (NICS) Operations Report 2011 at 8, *available at* http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011. From those thousands of applications, there are hundreds of § 922(a)(6) prosecutions each year. *See* William J. Krouse, Cong. Research Serv., RL32842, Gun Control Legislation 24 (2012).

Moreover, several recent tragedies involving firearms have thrust gun enforcement issues to the center of the public consciousness. This, in turn, has put increasing pressure on law enforcement officials to get tougher on violators of existing gun laws. *See* Michael S. Schmidt, *Both Sides in Gun Debate Agree: Punish Background-Check Liars*, N.Y. Times, Jan. 14, 2013, at A1.

As a result, now more than ever, well-intentioned gun purchasers like Bruce Abramski risk felony prosecution in some federal circuits for conduct that is perfectly lawful

in others. And prosecutors under pressure to get tough on gun law violations may be less willing to exercise their discretion to avoid the injustice that results from this disagreement among the circuits. This Court should step in now and restore national uniformity to this important area of the country's gun laws.

III. THE FOURTH CIRCUIT'S INTERPRETATION OF § 922(a)(6) IS ERRONEOUS.

The deep circuit split on this recurring issue of criminal law easily is sufficient to warrant this Court's review. But here, review is particularly appropriate because the Fourth Circuit's decision is erroneous and will lead to felony prosecutions of ordinary, law-abiding citizens like Abramski for conduct that Congress did not intend to criminalize.

As explained above, this Court has held that the purpose of § 922(a)(6) is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett*, 423 U.S. at 220. But despite this stated purpose, the plain text of § 922(a)(6) and the rest of the federal gun control laws do not prohibit gun dealers from selling guns to persons who intend to later resell them illegally, nor do those laws prohibit a gun buyer from purchasing a gun intending to resell it illegally. *See* 18 U.S.C. §§ 922, 924. The same is true of the regulations from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) promulgated under these gun control statutes. *See* 27 C.F.R. § 478.99.

In other words, when Congress enacted the federal guns laws that exist today, it did not create an express statutory provision that prohibited "straw purchases." But courts soon realized that "[i]f an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated." *United States v. Nelson*, 221 F.3d 1206, 1209 (11th Cir. 2000). Thus, in a purported effort to effectuate congressional intent, the lower courts interpreted § 922(a)(6) to prohibit straw purchases although the statute's plain text does not.

They did so through a legal fiction: the notion that the person standing at the counter buying a gun is not the "actual buyer" if he intends to later resell the gun to someone who cannot lawfully possess it. As the Ninth Circuit has explained, this legal fiction is simply an application of common law agency principles to effectuate congressional intent:

> In effect, this doctrine is merely an application of a principle that dates back to the time when the legal profession relied regularly on maxims expressed in Latin to illuminate the law: "*Qui facit per alium facit per se*," or "He who acts through another acts himself." In this context, it is a construction of the statute that directly serves the primary purpose of the Gun Control Act, which is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

Moore, 109 F.3d at 1461 (quoting *Barrett*, 423 U.S. at 220).

Applying this legal fiction, the government prosecutes straw purchasers under § 922(a)(6) by alleging that, when they stated on the ATF form that they were the "actual buyer" of the gun, they lied. The actual buyer, the government contends, is the person who will ultimately receive the gun and who is "not legally entitled to possess it because of age, criminal background, or incompetency." *Barrett*, 423 U.S. at 220. Because a gun dealer cannot sell a gun to that ultimate recipient—other portions of § 922 expressly prohibit those sales, *see* 18 U.S.C. § 922(b)—the government prosecutes the buyer under the theory that this "false statement" about who is the actual purchaser is "material to the lawfulness of the sale." *Moore*, 109 F.3d at 1464.

Whatever the merits of this straw purchaser fiction when the ultimate recipient is an ineligible person, it has no application in a case like this one, where both Abramski and his uncle are legally entitled to buy guns. In this circumstance, as the Fifth and Ninth Circuits have held, the identity of this future "actual buyer" is not material to the lawfulness of the sale. *See Polk*, 118 F.3d at 295. This is so because, under § 922 and its accompanying regulations, even if the gun dealer had been told of the buyer's intent to resell the gun to another lawful purchaser, the dealer still could have sold the gun. *See* 18 U.S.C. § 922; 27 C.F.R. § 478.99.

Tellingly, the government's position for many years was fully consistent with the Fifth and Ninth Circuit's reasoning. The government long advised gun buyers that the straw purchaser doctrine only applied when "the purchaser of record is merely being used to disguise the actual sale to another person, *who could not personally*

make the purchase or is prohibited from receiving or possessing a firearm." *United States v. Dollar*, 25 F. Supp. 2d 1320, 1324 (1998) (quoting Federal Regulations of Firearms and Ammunition, ATF P 5300.12 (1980)). Indeed, Form 4473 stated for years "that a 'straw purchase' may violate federal firearms laws if the licensee knows [or] has reasonable cause to believe that the true purchaser of the firearm(s) *is 'ineligible' to make that purchase directly*." *Polk*, 118 F.3d at 295 n.7 (emphasis added).

In the mid-1990s, ATF changed the wording of Form 4473 and the Federal Firearms Regulations Reference Guide by "redefining the term 'straw purchase' to include eligible purchasers." *Dollar*, 25 F. Supp. 2d at 1324; *see also Polk*, 118 F.3d at 295 n.7. Neither change was subject to any public notice and comment procedure or other administrative rulemaking procedure.

Moreover, even now, the government's position on the straw purchaser doctrine remains confused. The current version of Form 4473 states that a buyer is the "actual buyer" of a firearm "if you are legitimately purchasing the firearm as a gift for a third party." *See* ATF Form 4473, Page 4, *available at* www.atf.gov/files/forms/download/atf-f-4473-1.pdf. There is no basis in the text or legislative history of § 922(a)(6) to punish a person who buys a gun for someone else with the intent to be repaid, but not the identically-situated person who buys a gun for someone else without expecting repayment.

Nevertheless, the Fourth Circuit accepted the government's current interpretation of the "straw purchaser" doctrine and upheld Abramski's conviction on the ground that "[*t*]*he identity of the purchaser is a*

constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6)." App. 16a. (emphasis in original). Because the court-created straw purchaser doctrine does not apply here, the Fourth Circuit's reasoning is flawed. Abramski *did* provide the "identity of the purchaser" to the gun dealer—*he* was the purchaser. And he remained so until he later transferred ownership to his uncle by filling out the appropriate ATF forms at another licensed gun dealer in his uncle's hometown.

In short, Abramski did not provide any material false information about the "identity of the purchaser" of the firearm. App. 4a. At most, he made a false statement by checking the "yes" box on the ATF form's "actual buyer" question when the information on the form told him he should have checked the "no" box. J.A. 585. But no federal statute or regulation prohibits a gun dealer from selling a gun to someone who checks the "no" box.[2] Thus, Abramski's answer to the "actual buyer" question on that

2. To be sure, ATF Form 4473 itself states that a dealer cannot sell a gun to someone who is not the "actual buyer." *See* ATF Form 4473, Question 11a, *available at* www.atf.gov/files/forms/ download/atf-f-4473-1.pdf. But that government form does not have the force of law. And for whatever reason, Congress and the ATF have never enacted statutes or regulations that prohibit dealers from selling guns in this circumstance, although Form 4473 seemingly implies that they have. *See* 18 U.S.C. §§ 922, 924; 27 C.F.R. § 478.99. Indeed, the only statute that even arguably addresses this issue is 18 U.S.C. § 922(d), which merely prohibits gun dealers from selling guns to *ineligible* purchasers, such as convicted felons and persons committed to mental institutions. *See* 18 U.S.C. § 922(d). Where both the initial purchaser and the ultimate recipient of the gun lawfully can buy a gun, § 922(d) does not apply.

ATF form was not material to the lawfulness of the sale, and the Fourth Circuit erred by holding that it was.

IV. THE COURT ALSO SHOULD REVIEW THE FOURTH CIRCUIT'S ERRONEOUS INTERPRETATION OF § 924(a)(1)(A).

The government also prosecuted Abramski under 18 U.S.C. § 924(a)(1)(A), a similar provision of the federal gun control laws that criminalizes knowingly making "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter." 18 U.S.C. § 924(a)(1)(A).

Abramski's conviction under § 924(a)(1)(A) is infirm for the same reason as his § 922(a)(6) conviction: it turns entirely on the erroneous application of the straw purchaser doctrine. Section 924(a)(1)(A) applies only to information "required by this chapter to be kept" in a gun dealer's records. But there is no statute or regulation that *requires* gun dealers to record whether a gun purchaser intends to later sell the gun to someone else. In other words, the "actual buyer" question on ATF Form 4473, which Abramski filled out when buying the gun, is not information "required . . . to be kept" by the dealer. *See* 27 C.F.R. §§ 478.21, 478.124(f); s*ee also* ATF Form 4473, Question 11a, *available* at www.atf.gov/files/forms/download/atf-f-4473-1.pdf

To get around this hurdle, the government argues that the false statement "with respect to information

required by this chapter to be kept" is not Abramski's answer to Question 11 on the ATF Form, but rather the identification of *himself* as the buyer of the gun. Not surprisingly, the identity of the gun buyer *is* a piece of information required to be kept by gun dealers. *See* 18 U.S.C. § 922(b)(5). Relying on the court-created "straw purchaser" doctrine described above, the government convicted Abramski under § 924(a)(1)(A) on the theory that he lied about his identity when he bought the gun. The government insists that, although Abramski stood at the counter, filled out the forms, and bought the gun himself, he falsely identified himself as the buyer because it was really his uncle who bought the gun.

As explained above, applying the straw purchaser legal fiction in a case like this one conflicts with this Court's precedent. As the Court has explained, the purpose of these federal gun reporting laws is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Barrett v. United States*, 423 U.S. 212, 220 (1976). These laws thus ensure the firearms cannot be "obtained by individuals whose possession of them would be contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

When viewed through the prism of this congressional intent, Abramski's purchase of the gun in this case is not subject to the court-created "straw purchaser" fiction. Abramski's uncle is a law-abiding citizen legally entitled to own a gun. J.A. 111. The only reason Abramski bought the gun was to take advantage of his law enforcement discount. App. 3a. Abramski provided the gun dealer with all the information "required to be kept" for that purchaser,

including his name, age, and contact information. When Abramski later transferred the gun to his uncle at another licensed gun dealer, he and his uncle again provided all the information "required . . . to be kept," 18 U.S.C. § 924(a)(1)(A), including his uncle's name, age, and contact information. App. 3a-4a; J.A. 111. Thus, the government had complete, truthful information about the identity and location of the gun at all times.

As noted above, even in cases involving a buyer intending to resell the gun illegally, the straw purchaser doctrine is on tenuous footing. Courts freely acknowledge that this legal fiction was created to plug a loophole in the federal gun laws concerning the illegal resale or transfer of guns. *See United States v. Ortiz*, 318 F.3d 1030, 1037 (11th Cir. 2003) ("If an *ineligible* buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated.") (emphasis added). Of course, it is ordinarily for Congress, not the courts, to address a problem that arises because a particular provision *should be* part of a statutory scheme, but is not. *See United States v. Evans*, 333 U.S. 483, 495 (1948).

In any event, whatever the merits of the "straw purchaser" doctrine in those cases involving illegal gun sales, the legal fiction simply cannot apply in a case like this one, where a well-intentioned person buys a gun for a family member who also is lawfully entitled to buy a gun. In that circumstance, the court-created doctrine does not plug a loophole in the gun laws; rather, it impermissibly expands the plain language of a criminal statute to cover conduct that Congress never intended to make criminal.

In sum, the Fourth Circuit's decision to uphold Abramski's conviction under §§ 922(a)(6) and 924(a)(1)(A) cannot be squared with the plain language of the statute, the well-reasoned decisions of the Fifth and Ninth Circuits, and this Court's precedent governing federal gun laws. Accordingly, the Court should grant review to clarify that the straw purchaser doctrine cannot be used to prosecute a gun buyer under §§ 922(a)(6) and 924(a)(1)(A) for failing to inform a gun dealer of the intent to later resell the gun to another lawful buyer.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Rhonda Lee Overstreet
Overstreet Sloan, PLLC
Suite 101
806 East Main Street
Bedford, VA 24523
(540) 597-1024

Adam H. Charnes
Richard D. Dietz*
Kilpatrick Townsend
& Stockton LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300
rdietz@kilpatricktownsend.com

*Counsel of Record

June 21, 2013

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED JANUARY 23, 2013

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-4992

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE JAMES ABRAMSKI, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Glen E. Conrad, Chief District Judge.
(7:10-cr-00068-GEC-1).

Argued: December 4, 2012
Decided: January 23, 2013

Before KING, SHEDD, and DAVIS, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Shedd and Judge Davis joined.

Appendix A

OPINION

KING, Circuit Judge:

On November 17, 2009, in purchasing a Glock 19 handgun for his uncle in Pennsylvania, Bruce James Abramski, Jr., assured the firearms dealer in Virginia that he was the "actual buyer" of the handgun. Abramski was thereafter charged with being an illegal "straw purchaser" of the firearm. Pursuant to conditional pleas of guilty, Abramski was convicted in the Western District of Virginia on June 29, 2011, for two firearm offenses: (1) making a false statement that was material to the lawfulness of a firearm sale, in violation of 18 U.S.C. §§ 922(a)(6); and (2) making a false statement with respect to information required to be kept in the records of a licensed firearms dealer — that is, that he was the actual buyer of the firearm, when in fact he was buying it for someone else — in contravention of 18 U.S.C. § 924(a)(1)(A).

Prior to his guilty pleas, the district court denied Abramski's motions to dismiss the charges and suppress evidence. Abramski appeals from the criminal judgment, maintaining that the court erred in two respects. First, he argues that the court erred in denying his motion to dismiss the indictment because his conduct was beyond the purview of §§ 922(a)(6) and 924(a)(1)(A), in that both he and his uncle were legally entitled to purchase and own the Glock 19 handgun. Second, he contends that the court erred in denying his motion to suppress on the ground that inculpatory evidence had been unconstitutionally

seized from his residence. As explained below, we reject Abramski's contentions of error and affirm.

I.

The facts underlying Abramski's convictions are undisputed. Prior to November 2009, Abramski, who lived in Franklin County, Virginia, and his uncle, Angel Alvarez, who resided in Pennsylvania, had several conversations concerning Alvarez's desire to obtain a Glock 19 handgun. Abramski offered to purchase a Glock 19 for Alvarez because, as a former Virginia police officer, Abramski could obtain a favorable price from a firearms dealer that catered to police officers in Collinsville, Virginia. Before purchasing the handgun, Abramski spoke with three licensed federal firearms dealers and discussed how to legally conduct such an acquisition. The dealers apparently advised Abramski, in essence, that a licensed dealer in Pennsylvania could complete the transfer to his uncle after the handgun had been purchased by Abramski in Virginia. In order to implement the transaction, Alvarez sent Abramski a check for $400 on November 15, 2009. The term "Glock 19 handgun" was written in the memo line of the check.

On November 17, 2009, Abramski went to the firearms dealer in Collinsville and purchased a Glock 19 handgun, among other items, paying for them with more than $2000 in cash. In conducting the transaction, Abramski completed Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473, which contained several questions about the purchase of firearms, to be answered

by checking boxes marked "Yes" or "No." Of importance here, question 11.a. on the ATF Form 4473 stated:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? *Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.*

J.A. 585 (emphasis on Form 4473).[1] Abramski checked the answer "Yes" to question 11.a. Three days later, on November 20, 2009, the $400 check from Alvarez was deposited in Abramski's bank account, and the next day Abramski transferred the Glock 19 handgun to Alvarez at a licensed federal firearms dealer in Easton, Pennsylvania. At that time, Alvarez gave Abramski a receipt confirming the transfer, reflecting that Alvarez had purchased the Glock 19 handgun for $400.

Meanwhile, on November 12, 2009, a bank robbery occurred at Franklin Community Bank in Rocky Mount, Virginia. An investigation of the robbery led the FBI to suspect Abramski. Abramski had been fired from the Roanoke police department in 2007, looked similar to the masked bank robber, and was down on his luck (Abramski and his wife had recently separated and their home was in foreclosure).

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1. Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

Abramski was arrested in early July 2010 on state law charges relating to the bank robbery. In connection therewith, two FBI agents investigating the robbery sought and secured search warrants relating to the investigation. The first warrant was issued on July 1, 2010, for the search of a home on Highland Farm Road in Calloway, Virginia, where Abramski's parents lived, and where Abramski had moved a short time earlier. The "items to be seized" included things believed to be related to the bank robbery, such as a black square duffle bag, a black ski mask, firearms, and the catch-all phrase covering "[a]ny and all articles that appear to be relevant to the commission of a robbery." J.A. 224. The second search warrant was obtained about three weeks later, on July 19, 2010, for a home on Iron Ridge Road in Rocky Mount, Virginia, which was Abramski's marital residence. This warrant specified some of the same items as the first warrant and also included the same catch-all phrase. In executing the search warrant for the Iron Ridge Road property, agents found and seized a green Franklin Community Bank zippered bag containing the written receipt confirming the transfer of the Glock 19 handgun from Abramski to Alvarez on November 21, 2009.

The federal authorities have never charged Abramski with bank robbery, and the state bank robbery charges against him were dismissed on October 15, 2010. On November 18, 2010, however, the federal grand jury indicted Abramski for the firearms offenses underlying this appeal. A corrective superseding indictment that apparently only deleted information about the firearms dealer was returned on May 12, 2011. The superseding

indictment (hereinafter the "indictment") charged Abramski, in Count One, with making the false and fictitious statement on the ATF Form 4473 that he was the actual buyer of the Glock handgun, in violation of 18 U.S.C. § 922(a)(6) and § 924 (a)(2).[2] Count Two of the indictment

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2. Count One of the indictment alleged, in relevant part, as follows:

> On or about November 17, 2009, in the Western Judicial District of Virginia, the defendant, BRUCE JAMES ABRAMSKI, JR., in connection with his acquisition of a firearm, a Glock Model 19, 9 mm semi-automatic pistol, from a federally licensed firearms dealer, did knowingly make a false and fictitious written statement to said dealer, which statement was likely to deceive said dealer, as to a fact material to the lawfulness of such sale of the said firearm to the defendant, BRUCE JAMES ABRAMSKI, JR., under chapter 44 of Title 18, in that the defendant, BRUCE JAMES ABRAMSKI, JR., represented that he was the actual buyer of the firearm, when in fact, as the defendant . . . then well knew, he was buying the firearm for another individual [in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2)].

J.A. 381.

Section 922(a)(6) provides, in relevant part,

> [It shall be unlawful] for any person in connection with the acquisition of . . . any firearm . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale[.]

18 U.S.C. § 922(a)(6). Section 924(a)(2) of Title 18 provides for punishment of a person who has violated § 922(a)(6) by both fine and imprisonment.

charged Abramski with making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of § 924(a)(1)(A).[3] In both charges, the prosecution relied on the theory that Abramski was merely a "straw purchaser" of the firearm that was immediately transferred to Alvarez.[4]

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3. Count Two of the indictment alleged, in relevant part, as follows:

> BRUCE JAMES ABRAMSKI, JR., knowingly made a false statement and representation in connection with his acquisition of a firearm, to a federally licensed firearms dealer, with respect to information required by the provisions of Chapter 44 of Title 18, United States Code, to be kept in the records of Town Police Supply, in that [he] represented that he was the actual buyer of the firearm, when in fact, as the defendant, BRUCE JAMES ABRAMSKI, JR., then well knew, he was buying the firearm for another individual [in violation of 18 U.S.C. § 924(a)(1)(A)].

J.A. 382.

Section 924(a)(1)(A) provides, in relevant part,

> [It shall be unlawful to] knowingly make[ ] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter[.]

18 U.S.C. § 924(a)(1)(A).

4. A "straw purchase" of a firearm has been described as a sale where the individual making the purchase represents himself to be the actual buyer, but is actually the agent of another person who will receive possession of the firearm. *See United States v. Nelson*, 221 F.3d 1206, 1208-09 (11th Cir. 2000).

On March 10, 2011, Abramski moved to dismiss both counts of the indictment (the "first dismissal motion"), contending that, because the firearm was legally transferred to Alvarez and Abramski made no material misrepresentations to the Virginia firearms dealer, the firearms statutes were never intended to punish his conduct. Also on March 10, 2011, Abramski moved to suppress the receipt found in the money bag in his home, arguing that its seizure was unconstitutional under the Fourth Amendment.[5] The district court denied both these motions from the bench on March 14, 2011. *See* J.A. 276, 310-11. The court ruled, first of all, that 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A) were violated when a false or fictitious statement is made on an ATF Form 4473, and, second, that the search warrant for Abramski's home was amply supported by probable cause. In any event, according to the court, seizure of the receipt was proper under the good faith exception to the exclusionary rule.

On April 18, 2011, after the court had denied his first dismissal motion and his initial motion to suppress, Abramski filed a second motion to dismiss the indictment (the "second dismissal motion"). He therein contended that question 11.a. on the ATF Form 4473 is not required

5. In his March 10, 2011, motion to suppress, Abramski incorrectly asserted that the receipt had been seized during execution of the search warrant for the Highland Farm Road property. *See* J.A. 220-21. During the March 14, 2011, court hearing, however, Abramski orally amended his motion to suppress to challenge the constitutionality of the second warrant, the one dedicated to the Iron Ridge Road property, where the receipt was actually seized. *See id*. at 261.

by law (but was created by the ATF) and that, inasmuch as the ATF itself decided that the "actual buyer" of a firearm must be ascertained at the time of acquisition, the ATF had failed to comply with the notice and comment procedures required by the Administrative Procedure Act. After conducting a hearing on the second dismissal motion on April 22, 2011, the district court rejected that motion by a published decision filed on April 25, 2011. *See United States v. Abramski*, 778 F.Supp.2d 678, 680 (W. D. Va. 2011) (determining that disclosure of actual firearm purchaser is required by law). Notably, Abramski does not appeal the court's denial of the second dismissal motion.[6] On June 27, 2011, Abramski filed a second motion to suppress, asserting that, after the denial of his first motion to suppress, he discovered evidence that undermined the credibility of a witness who had provided information concerning the search warrants. *See* J.A. 385. The court denied this suppression motion from the bench following an evidentiary hearing conducted on June 27, 2011, and the second motion to suppress is not relevant to this appeal. *See* J.A. 514.

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6. From our assessment of the briefs, the government appears to consider the district court's denial of the second dismissal motion to be a subject of this appeal. *See* Br. of Appellee 6 (citing district court's April 25, 2011, decision denying second dismissal motion). We emphasize, however, that Abramski has, on the dismissal point, only appealed the denial of his first dismissal motion, which was disposed of from the bench on March 14, 2011. *See* Br. of Appellant 3 (recognizing that Abramski's second dismissal motion was "based upon administrative deficiencies," and was denied, and advising that "Abramski does not raise this issue on appeal").

On June 29, 2011, pursuant to a plea agreement with the United States Attorney, Abramski entered conditional guilty pleas, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, to both charges in the indictment.[7] On October 3, 2011, the court sentenced Abramski to five years of probation on each offense, to run concurrently. Abramski thereafter filed a timely notice of appeal.

II.

We review de novo legal issues relating to statutory construction. *United States v. Broncheau*, 645 F.3d 676, 683 (4th Cir. 2011). In evaluating a district court's denial of a motion to suppress evidence, we review the court's factual findings for clear error and its legal determinations de novo. *United States v. Doyle*, 650 F.3d 460, 466 (4th Cir. 2011). In evaluating a probable cause issue with respect to a search warrant, we assess whether the magistrate judge had a "substantial basis" for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

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7. Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides, in pertinent part, that:

> With the consent of the court and the government, a defendant may enter a conditional plea of guilty[,] reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion.

Fed. R. Crim. P. 11(a)(2).

III.

We must first address a potential procedural defect that could impact our jurisdiction in this appeal. This court has recognized that, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, the "'direct review of an adverse ruling on a pretrial motion is available only if the defendant expressly preserves that right by entering a conditional guilty plea.'" *See United States v. Bundy*, 392 F.3d 641, 645 (4th Cir. 2004) (quoting *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990). Indeed, we have observed that, "[a]bsent a valid conditional guilty plea, we will dismiss a defendant's appeal from an adverse pretrial ruling on a non-jurisdictional issue." *Bundy*, 392 F.3d at 645.

In order for a defendant to pursue an appeal after a Rule 11(a)(2) conditional guilty plea, the relevant agreement must be in writing and must identify the specific pretrial rulings that the defendant intends to appeal. These requirements serve to "document that a particular plea was in fact conditional, and . . . identify precisely what pretrial issues have been preserved for appellate review." Fed. R. Crim. P. 11 advisory committee's note. As we have explained, the "conditions must be expressly described in writing, or at least so clearly shown on the record that there is no doubt that a conditional plea was agreed to." *Bundy*, 392 F.3d at 645.

Abramski's plea agreement identifies only one adverse ruling that he intends to appeal, and that ruling was made on June 28, 2011, the day prior to his guilty pleas. The plea

agreement describes the conditional nature of his guilty pleas as follows:

> I understand that the United States consents to my making of a conditional plea of guilty in this case in accordance with Rule 11(a)(2) of the Federal Rules of Criminal Procedure. I reserve the right to appeal any and all adverse rulings of the court to date, to specifically include the court's *oral* ruling *at a charge conference in chambers yesterday, June 28*, that the subsequent legal transfer of the firearm in question from the defendant Abramski to his uncle Angel "Danny" Alvarez, in Pennsylvania, does not negate the illegality of the defendant's acts in acquiring the firearm from a federally licensed firearm dealer in Virginia.

J.A. 575 (handwritten additions emphasized). Although the issue resolved by the first dismissal motion is fairly framed in the plea agreement, the agreement misidentifies the ruling at the June 28 charge conference, rather than the court's denial of the first dismissal motion, as the issue sought to be appealed. Perhaps more significantly, an appeal of the suppression rulings is not mentioned in the plea agreement.

During the plea hearing, the issues reserved for appeal were not specified on the record, although the district court and the prosecutors briefly discussed alterations of the plea agreement, presumably for the purpose of specifying issues that could be appealed. The court suggested the following:

> if it makes it any simpler, why don't you just change [the conditional plea] to read that the defendant reserves the right to appeal all pretrial legal rulings that the Court has made? Why is it necessary that we have more complicated language? Couldn't you just agree to that?

J.A. 520. In response, the government agreed to the court's suggestion. Based on this dialogue, it is evident that the parties anticipated that the defendant could appeal court rulings other than the single one specified in the plea agreement. Rule 11(a)(2) and our precedent are clear, however, that the issues to be appealed after a conditional guilty plea should be specified in writing, or, at the very least, clearly stated on the record. Nevertheless, because the court and the government orally agreed in broad terms to Abramski's conditional pleas, we are satisfied to address the merits of his appeal on the first dismissal motion and the first motion to suppress. Accordingly, we possess jurisdiction pursuant to 28 U.S.C. § 1291.

A.

1.

Abramski first contends that the district court erred in denying his motion to dismiss the charges in the indictment, and in ruling that Abramski's purchase of the Glock 19 handgun constituted a straw purchase that violated 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A). Abramski maintains that, because he and Alvarez were both legally entitled to purchase such a firearm, he was not a "straw

purchaser" and his "Yes" answer on the ATF Form 4473 — representing that he was the "actual buyer" thereof — was not material and was never intended to be punished by the Gun Control Act of 1968, or by §§ 922(a)(6) or 924(a)(1)(A). Indeed, Abramski asserts that Congress's intent in enacting those statutes was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them." Br. of Appellant 12. Under Abramski's theory, he could only be prosecuted for his Virginia acquisition of the Glock 19 handgun if Alvarez had been ineligible to possess a firearm, e.g., a convicted felon, thereby rendering the "actual buyer" question on the ATF Form 4473 "material to the lawfulness of the sale." *See* 18 U.S.C. § 922(a)(6). On the legal proposition pursued by Abramski, there appears to be a split in the courts of appeals. At least three of our sister circuits have heretofore addressed the issue, and one of them seems to agree with Abramski.

In support of his position, Abramski relies on the Fifth Circuit's decision in *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997). In that case, the court of appeals assessed whether § 922(a)(6) liability attached where "the true purchaser [here, Alvarez] can lawfully purchase a firearm directly." *Id.* at 295. The Fifth Circuit determined that it did not, ruling that

> the plain language of the statute compels the conclusion . . . that § 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the "*lawfulness of the sale*" of firearms. . . . Thus, if the true purchaser can

> lawfully purchase a firearm directly, § 922(a)(6) liability (under a "straw purchase" theory) does not attach.

Id. (emphasis in original).

Put simply, we are unable to agree with *Polk*. It is clear to us that the prohibition against false and fictitious statements in § 922(a)(6) is not limited to those persons who are prohibited from buying or possessing a firearm. To establish a violation of § 922(a)(6), the prosecution is obligated to prove four elements: "(1) the defendant knowingly made (2) a false or fictitious oral or written statement that was (3) material to the lawfulness of the sale or disposition of a firearm, and was (4) intended to deceive or likely to deceive a firearms dealer." *United States v. Harvey*, 653 F.3d 388, 393 (6th Cir. 2011). The straw purchaser issue goes directly to the third of these essential elements — materiality.

Abramski's contention that § 922(a)(6) does not apply to a firearm transaction involving two eligible purchasers was recently rejected by the Sixth Circuit in *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012). In that case, the court also took issue with the reasoning of *Polk* and agreed with the Eleventh Circuit's decision in *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010). In *Frazier*, the court of appeals had likewise rejected *Polk*, explaining its decision in language that we readily approve:

> [t]o say that the identity of the actual purchaser is material to the lawfulness of one sale but not to another, is counterintuitive. Although

> *Polk* focused on whether one's identity affected the lawfulness of a sale under § 922(a)(6), we focus on whether one's identity is a fact that is material to the lawfulness of a sale. *The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6).* Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

Id. (emphasis added).

In denying Abramski's first dismissal motion from the bench on March 14, 2011, the court relied on the *Frazier* case, expressing concern that Abramski's theory "creates an extra element in the prosecution of the offense" in that the government would have to "prove that the middleman, in this case [Abramski], knew that a subsequent purchaser was a prohibited person." J.A. 266. The court rejected that theory, ruling that "both counts of the indictment are legally sound. It seems to me that, if the government is able to prove what the grand jury has alleged in the indictment, that the defendant would be in violation of these two statutes." J.A. 276. In sum, we are satisfied that the Sixth and Eleventh Circuits, as well as the district court, correctly and properly ruled that the identity of the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition under § 922(a)(6).

The ATF Form 4473, as completed and signed by Abramski, warned him — in bold type — that he was not the actual buyer of the Glock 19 handgun if he was buying it for someone else. And the undisputed facts show that Abramski's transfer of the Glock 19 to Alvarez was not an afterthought. On this record, that transfer was a carefully calculated event — indeed, it was the sole reason for Abramski's purchase of the Glock 19 handgun. Because the identity of the actual purchaser of the handgun was material to the lawfulness of its acquisition by Abramski on November 17, 2009, he made a false and fictitious statement to the licensed dealer when he answered "Yes" to question 11.a. on the ATF Form 4473, assuring the dealer that he was the actual buyer.

2.

Turning to Count Two, § 924(a)(1)(A) of Title 18 criminalizes "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter." 18 U.S.C. § 924(a)(1)(A). To establish a violation of § 924(a)(1)(A), the government must prove that: (1) the dealer was a federally licensed firearms dealer at the time the offense occurred; (2) the defendant made a false statement or representation in a record that the licensed firearm dealer was required by federal law to maintain; and (3) the defendant made the false statement with knowledge of its falsity. This statutory provision does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself. Although Abramski argues that his "Yes" answer

to question 11.a. on the Form 4473 was not material to the recordkeeping requirements of § 924(a)(1)(A), the plain statutory language is unambiguous, and it does not require a showing of materiality. *See United States v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012) ("the text of § 924(a)(1)(A) unambiguously describes which false statements and representations it prohibits — simply those that are made with respect to information that is required to be kept by federally licensed firearms dealers"); *United States v. Sullivan*, 459 F.2d 993, 994 (8th Cir. 1972) ("While a violation of 18 U.S.C.A. § 922(a)(6) expressly requires a showing of materiality no such expression is found in § 924(a).").

3.

In sum, the assertion that Abramski was the actual buyer of the Glock 19 handgun was a false and fictitious answer to question 11.a. of the ATF Form 4473, and that false statement was material to the lawfulness of the Virginia sale of the handgun. Moreover, the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm. By virtue of the bold-print warning on question 11.a. of the ATF Form 4473, Abramski was on notice that he was not the actual buyer of the handgun if he was purchasing it for someone else. Accordingly, the district court properly denied Abramski's motion to dismiss both charges of the indictment.

B.

Abramski next contends that the second search warrant (relating to the Iron Ridge Road property), was defectively issued and not supported by probable cause. As a result, he maintains that the agents' seizure of the receipt concerning his transaction with Alvarez from the Iron Ridge Road residence exceeded the scope of that warrant.

As spelled out above, the FBI agents executed two search warrants in their robbery investigation of Abramski. They first searched his parents' home on Highland Farm Road in Calloway, and the results of that search led them, at least in part, to also search Abramski's marital home on Iron Ridge Road in Rocky Mount. Abramski argues on appeal, first, that the affidavit for the search warrant for the Iron Ridge Road property was legally insufficient. Additionally, Abramski contends that execution of the search warrant for the Iron Ridge Road property contravened the warrant's directives, resulting in an unconstitutional seizure of the receipt for Abramski's transfer of the Glock 19 handgun to Alvarez.

1.

The affidavit supporting the search warrant for the Highland Farm Road property included information about what the bank robber was wearing, what he carried, and the vehicle he was driving (a blue Ford Explorer). The affidavit shows that one of the bank tellers picked Abramski's picture from a photo lineup as a "suspicious

white male who visited the bank" several days before the robbery. J.A. 230. The affidavit explained that when Abramski made his purchase of the Glock 19 handgun at Town Police Supply, he paid in cash from a green zippered money pouch with white lettering. It also demonstrated that Abramski had limited financial resources and had been discharged by the Roanoke police department because he was believed to have stolen money during an investigation. Among other details, the affidavit revealed that Abramski had tested a green Ford Explorer on the day of the robbery.

During the search on Highland Farm Road, Abramski's father told the officers that Abramski had only been living there for about a week. The affidavit supporting the search warrant for the Iron Ridge Road property included information that Abramski may have left his belongings at that residence. The affidavit explained that the agents had already seized inculpatory evidence in the Highland Farm Road search, including a "green zippered money pouch," and specified that the application for the Iron Ridge Road warrant "does not seek authority to seize these items." Nevertheless, one of the agents conducting the search at Iron Ridge Road found an additional green zippered money bag from Franklin Community Bank. The receipt for the transfer to Alvarez of the Glock 19 handgun was found and seized from inside that bag.

Following the suppression hearing conducted on March 14, 2011, the district court ruled from the bench that "both warrants were valid and that the items seized

pursuant to those search warrants are properly admitted." J.A. 310. The court then concluded that "[c]learly there's probable cause for both search warrants."[8] *Id.*

2.

A judicial officer's determination of probable cause is entitled to "great deference" by a reviewing court. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983). "The probable cause standard 'is not defined by bright lines and rigid boundaries' but 'allows a [judicial officer] to review the facts and circumstances as a whole and make a common sense determination' whether there is a fair probability that evidence of a crime will be found." *United States v. Wellman*, 663 F.3d 224, 228 (4th Cir. 2011) (quoting *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005)).

The prosecution maintains that the district court's suppression ruling must be affirmed, arguing that the "catch-all" clause in the search warrant for the Iron Ridge Road property required seizure of the receipt. It asserts that the green Franklin Community Bank money bag fell within that clause, as did the handgun receipt, because the officers then believed that Abramski had robbed the bank with a Glock handgun. The United States also contends that, in any event, the green bag

8. Finally, in the alternative, the court determined that, "even if the warrants were too broad or somewhat stale, I think that the officers were entitled to, in good faith, rely on the issuance of the warrants in conducting the searches. So even if the probable cause is somewhat weak, I think good faith protects the outcome of the searches." *Id.* at 310-11.

was in plain view, and that the officers were entitled to seize it because its incriminating character was readily apparent. The prosecutors finally argue that the good faith exception applies, even if the search warrant was based on stale evidence and seizure of the green bag was somehow improper.

a.

First and foremost, it is clear to us that the Iron Ridge Road search warrant was supported by probable cause. The supporting affidavit for that warrant connected Abramski to the Rocky Mount bank robbery in several ways:

- Abramski was flagged as a suspicious customer at the bank just a few days before the robbery;
- He was having financial difficulties;
- He had been fired by the police department for allegedly stealing money;
- He was about the same height as the robber;
- Abramski was seen wearing a watch and jacket similar to those worn by the robber;
- He had tested a green Ford Explorer on the day of the robbery, and the witnesses asserted that the robber made his getaway in a blue Ford Explorer; and

- Abramski had purchased firearms with a large amount of cash after the bank robbery.

In these circumstances, there was a substantial basis for the magistrate judge to conclude that probable cause existed for the search of Abramski's residence on Iron Ridge Road.

b.

Finally, we reject Abramski's challenge to the scope of the search warrant for the Iron Ridge Road residence. The agents were then investigating the robbery of Franklin Community Bank, which had been carried out with a firearm similar to a Glock 19 handgun. When the agents discovered the green zippered bag bearing the Franklin Community Bank logo, and when they found inside that bag the receipt for Alvarez's purchase of the Glock 19 handgun, such evidence had to be seized. In these circumstances, the Iron Ridge Road warrant was properly issued, and the agents' seizure of the receipt was not unconstitutional. The district court therefore did not err in declining to suppress that evidence.[9]

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9. In his reply brief, Abramski asserts that neither of the affidavits supporting the search warrant demonstrates that the agents believed the items sought would be found at Abramski's residence seven months after the robbery. Rep. Br. of Appellant 5. Inasmuch as this is a staleness argument concerning the timeliness of the warrants, we need not address it, in that it was abandoned by not being raised in Abramski's opening brief on appeal. *See United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) (recognizing that "contentions not raised in the argument section of the opening brief are abandoned").

IV.

Pursuant to the foregoing, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B — EXCERPT OF TRANSCRIPT OF MOTIONS HEARING IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, DATED MARCH 14, 2011

[1]UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:10-CR-00068
MARCH 14, 2011 2:07 P.M.
MOTION HEARING
VOLUME I OF I

Before:
HONORABLE GLEN E. CONRAD
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRUCE JAMES ABRAMSKI, JR.,

Defendant.

* * *

[32] . . . the notices within the form. Also, "I understand that by answering "yes" to question 11(a) when I am not

the actual buyer is a crime punishable as a felony under federal law and may also violate state and/or local law."

Your Honor, as to the issue as to the motion to dismiss, if you do not have any other questions for the government, we would rely on the case law that we have submitted.

THE COURT: Anything else, Mr. Cleaveland?

MR. CLEAVELAND: No, Your Honor, not on this motion.

THE COURT: Well, as I've said, I think that both counts of the indictment are legally sound. It seems to me that, if the government is able to prove what the grand jury has alleged in the indictment, that the defendant would be in violation of these two statutes, and, accordingly, the motion to dismiss the indictment must be denied.

Are there other motions? I know that there's one final motion concerning the warrant, Mr. Cleaveland.

MR. CLEAVELAND: That's correct.

THE COURT: At least one more motion, maybe more.

MR. CLEAVELAND: No. I think just the motion to dismiss is the only one we have.

THE COURT: Okay.

MR. CLEAVELAND: Your Honor, I would like to ask that Special Agent Kenya Gillis take the stand.

THE COURT: Is there an opening comment? What are . . .

* * * *

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, FILED OCTOBER 4, 2011

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA

v.

BRUCE JAMES ABRAMSKI, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW710CR000068-001

Case Number:

USM Number: 15779-084

William H. Cleaveland, Esq.
Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	One and Two
☐	pleaded *nolo contendere* to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 922(a)(6)	False Statement in the Acquisition of a Firearm	11/17/2009	1
18 U.S.C. § 924(a)(1)(A)	Cause a Federally Licensed Firearms Dealer to Keep False Records	11/17/2009	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

Appendix C

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 3, 2011
Date of Imposition of Judgment

/s/
Signature of Judge

Glen E. Conrad, Chief United States District Judge
Name and Title of Judge

October 3, 2011
Date

Appendix C

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 4—Probation

Judgment—Page 2 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

PROBATION

The defendant is hereby sentenced to probation for a term of:

Five (5) Years, consisting of Five (5) Years as to each of Counts One and Two, to run concurrently

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

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate

with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix C

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 4C—Probation

Judgment—Page 3 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

SPECIAL CONDITIONS OF SUPERVISION

1 - The defendant shall participate in the Location Monitoring Program under home detention for a period of six months and shall abide by all program requirements. The defendant is restricted to his residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the officer.

3 - The defendant shall pay the costs of the location monitoring services.

4 - The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.

5 - The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms.

Appendix C

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 5 - Criminal Monetary Penalties

Judgment-Page 4 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

CRIMINAL MONETARY PENALTIES

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

	Assessment	**Fine**	**Restitution**
TOTALS	$200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Appendix C

Name of Payee	**Total Loss***
Restitution Ordered	**Priority or Percentage**
TOTALS	$0.00 $0.00

☐ Restitution amount ordered pursuant to plea agreement $_____.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

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

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

Appendix C

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 6 - Schedule of Payments

Judgment-Page 5 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $ 200 immediately, balance payable

☐ not later than _____, or

☒ in accordance ☒ C, ☐ D, ☐ E, ☐ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F or, ☐ G below); or

C ☒ Payment in equal monthly (*e.g.*, weekly, monthly, quarterly) installments of $ 50 over a period of months (*e.g.*, months or years), to commence 30 days (*e.g.*, 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g.*, weekly, monthly, quarterly) installments of $_____ over a period of _____ (*e.g.*, months or years), to commence _____ (*e.g.*, 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (*e.g.*, 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ During the term of imprisonment, payment in equal _____ (*e.g.*, weekly, monthly, quarterly) installments of $____, or ____% of the defendant's income, whichever is greater, to commence _____ (*e.g.*, 30 or 60 days) after the date of this judgment; AND payment in equal _____ (*e.g.*, weekly, monthly, quarterly) installments of $_____ during the term of supervised release, to commence _____ (*e.g.*, 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C. §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or

supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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