No. 17-30017

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEON RAMON IRELAND,

Defendant-Appellant.

Appeal from the United States District Court

for the District of Oregon

Portland Division

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

STATE CASES

STATE STATUTES

OTHER

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the charged offense against the laws of the United States under 18 U.S.C. § 3231. Mr. Ireland filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure on January 27, 2017, from the judgment and commitment order entered on January 26, 2017. ER 1, 3. With the consent of the government and the district court, Mr. Ireland preserved the issues asserted in this appeal for appellate review by means of a conditional plea under Rule 11(a)(2) of the Federal Rules of Criminal Procedure. Jurisdiction is conferred on this Court by 28 U.S.C. § 1291.

STATEMENT OF ISSUES

An individual commits a federal felony in violation of 18 U.S.C. § 922(n) if the person willfully receives a firearm while "under indictment for a crime punishable by imprisonment for a term exceeding one year[.]" Mr. Ireland received firearms in 2012, while on probation following an order of "conditional discharge" for state drug possession charges. The questions presented are:

I. Is an individual "under indictment" within the meaning of 18 U.S.C. § 922(n) after the individual has received an order of "conditional discharge" for a state offense pursuant to a law that, upon a plea of guilty or finding of guilt, permits courts to defer further proceedings and place the person on temporary probation, where the final entry of a conviction or discharge depends solely on the successful fulfillment of conditions?

II. In the alternative, is a crime "punishable by imprisonment for a term exceeding one year" within the meaning of 18 U.S.C. § 922(n) where the maximum incarceration sentence available to the sentencing court was 30 days in jail?

STATEMENT OF THE CASE

Nature of the Case

This is the direct appeal from a judgment of conviction for the crime of unlawfully receiving a firearm while "under indictment" for a felony in violation of 18 U.S.C. § 922(n), entered on January 26, 2017, by the Honorable Michael J. McShane, United States District Judge for the District of Oregon. Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, Mr. Ireland preserved his right to have an appellate court review the adverse determination of his pretrial motion to dismiss the indictment.

Relevant Facts And Procedural History

1. State Court History

In April 2010, a grand jury in Jackson County, Oregon, returned an indictment charging Leon Ramon Ireland with possession of cocaine in violation of Or. Rev. Stat. § 475.884. ER 250. Mr. Ireland entered a guilty plea to the charge on November 2, 2010, ER 252-54, and, on the same date, the state court judge entered an order of conditional discharge pursuant to Or. Rev. Stat. § 475.245. ER 255-58. Consistently with that statute, the conditional discharge order deferred further proceedings "without entering a judgment of guilt," and placed Mr. Ireland on probation for 18 months. ER 256. Upon successful completion of the probationary period and

fulfillment of specified conditions, the court would "discharge the defendant and dismiss the proceedings against the defendant without an adjudication of guilt." ER 258. The plea petition stated that defendant would fall into "gridblock 1-I" on the Oregon Sentencing Grid, and advised him that upward departure sentences were limited by law. ER 252. Mr. Ireland successfully completed the terms of his conditional discharge and the court entered a judgment of dismissal on April 25, 2013. ER 259.

2. Federal Indictment And Motion To Dismiss

On July 7, 2016, a federal grand jury returned an indictment against Mr. Ireland charging him with three counts of violating 18 U.S.C. § 922(n), which prohibits the receipt of a firearm while "under indictment for a crime punishable by imprisonment for a term exceeding one year[.]" ER 260-61. The indictment alleged that the three statutory violations occurred on June 9, 2012, October 2, 2012, and November 3, 2012, respectively. *Id.* These dates fell during the period of time that Mr. Ireland was on probation for the state charges—*after* he received the order of conditional discharge but *before* the state court entered the final order of dismissal.

Mr. Ireland filed a motion to dismiss the indictment, raising two grounds for dismissal. ER 241-49. First, Mr. Ireland argued that possession of cocaine is not an offense "punishable by imprisonment for a term exceeding one year" because

binding state law prohibited an incarceration sentence exceeding one year for the offense. ER 245-46. Second, Mr. Ireland argued that he was not "under indictment" during the time period of the alleged violations because he had already pleaded guilty, received a conditional discharge, and the case had been deferred; all that remained on the charge was dismissal of the case if probation was successful, or entry of a conviction if not. ER 246-49.

The district court denied Mr. Ireland's motion to dismiss, rejecting both grounds. As to the first contention, the district court agreed with the defense that the law prohibited imposition of a sentence of more than one year imprisonment on the charged offense, but the court considered itself bound by this Court's precedent deeming the five-year statutory maximum term for "Class C Felonies" to be the relevant "punishable" term:

> The Ninth Circuit has addressed this issue in the context of 18 U.S.C. § 922(g). "The term by which a crime is 'punishable' is determined by the statutory maximum punishment, not the actual term imposed or served." *United States v. Carr*, 513 F.3d 1164, 1166 (9th Cir. 2008); *see also United States v. Murillo*, 422 F .3d 1152, 1154 (9th Cir. 2005) ("[T]he maximum sentence is the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines."); *Unites States v. Fletes-Ramos*, 612 F. App'x 484, 485 (9th Cir. 2015) (reaffirming the holding of *Murillo*). Although *I agree that Mr. Ireland could not be subjected legally to a sentence exceeding six months as a maximum departure under Oregon's sentencing guideline scheme* for Possession of Cocaine, I am bound by Ninth Circuit precedent.

ER 11-12 (footnote omitted) (emphasis added).

As to the second asserted grounds for dismissal, the district court concluded that a defendant subject to a conditional discharge in Oregon is "under indictment" for purposes of § 922(n) for the same reasons stated in the Tenth Circuit's opinion in *United States v. Saiz*, 797 F.3d 853 (10th Cir. 2015), regarding New Mexico's conditional discharge statute. ER 13-14. In *Saiz*, the Tenth Circuit had concluded that a conditional discharge under New Mexico law "puts off a finding of guilt," and so "simply prolongs the life of the indictment." ER 13 (quoting *Saiz*, 797 F.3d at 857). The district court here also supported its decision by asserting that a conditional discharge is not a final judgment given that a defendant may withdraw his guilty plea "at any time before judgment," and the conditional discharge order is not subject to appeal. ER 14.

On November 2, 2016, Mr. Ireland pleaded guilty to Counts 1 through 3 pursuant to a plea agreement preserving his right to appeal the adverse judgment on his motion to dismiss. ER 103, 111, 116, 121-30. The Court sentenced Mr. Ireland to five years probation. ER 4.

Relevant Statutory Provisions

- **18 U.S.C. § 922(n)**

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or

transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

- **18 U.S.C. § 921(a)(14)**

The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.

- **Or. Rev. Stat. § 475.245 (2010)**

Whenever any person pleads guilty to or is found guilty of possession of a controlled substance under ORS 475.840 (3), 475.854, 475.864, 475.874, 475.884 or 475.894 or of a property offense that is motivated by a dependence on a controlled substance, the court, without entering a judgment of guilt and with the consent of the district attorney and the accused, may defer further proceedings and place the person on probation. Upon violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. There may be only one discharge and dismissal under this section with respect to any person.

Standard of Review

A district court's interpretation of a criminal statute is a legal question that the Court reviews de novo. *United States v. Alexander*, 725 F.3d 1117, 1118 (9th Cir. 2013).

Custody Status

Mr. Ireland is out of custody, serving the sentence of probation imposed in this case.

SUMMARY OF ARGUMENT

Mr. Ireland's conduct did not match the statutory elements of 18 U.S.C. § 922(n). First, Mr. Ireland was not "under indictment" at the time that he received the firearms. The plain language of the statute, its common sense interpretation, and canons of construction, all support the conclusion that "under indictment" requires that the defendant be subject to active prosecution, not a deferral or suspension, and that a defendant is no longer "under indictment" following a finding or admission of guilt on the charges, when the only remaining action is entry of a conviction or dismissal. This court should follow the persuasive reasoning of the Eighth Circuit in *United States v. Hill*, 210 F.3d 881 (8th Cir. 2000), and other courts that have held a defendant is not under indictment following entry of a guilty plea and deferral of further proceedings.

Here, the indictment against Mr. Ireland had already been resolved by his admission of guilt and the court had deferred the proceedings subject to a "conditional discharge," an ameliorative statutory provision that entitles a defendant to dismissal of charges upon successful completion of a period of probation and the fulfillment of certain condition. A "conditional discharge" under Or. Rev. Stat. § 475.245 does not satisfy the "under indictment" requirement of § 922(n) because it defers the prosecution for a period of probation, during which time the guilt or

innocence of the accused is not at issue, and no pursuit of criminal charges occurs during the proceedings. Moreover, because the conditional discharge requires a finding or admission of guilt, the accusation in the indictment is no longer relevant. For both of these reasons, a defendant is not "under indictment" while subject to a conditional discharge in Oregon. Although the plain meaning of § 922(n) controls, a contrary interpretation would be foreclosed by the rule of lenity and would constitute a significant broadening of its scope that would risk infringement of the Second Amendment right to bear arms.

Second, and in the alternative, the crime charged in the state court indictment against Mr. Ireland was not "a crime punishable by imprisonment for a term exceeding one year" because, even assuming hypothetical aggravating facts that appear nowhere on this record, the maximum permissible incarceration sentence was less than twelve months. The district court erred in concluding that it was bound to follow prior circuit precedent holding that a different, inapplicable statutory provision defines the maximum term by which a crime is "punishable." That precedent has been undermined by the Supreme Court's intervening decisions in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), which require courts to consider the actual sentence available in the particular case, not hypotheticals, when determining the potential incarceration

term by which an offense is punishable. S*ee Miller v. Gammie*, 335 F. 3d 889, 900 (9th Cir. 2003) (en banc) (holding that district courts and three-judge panels must follow "intervening higher authority" from the Supreme Court when the high court's mode of analysis is clearly irreconcilable with prior circuit precedent).

ARGUMENT

I. A Defendant Who Receives A Conditional Discharge Under Or. Rev. Stat. § 475.245 Is No Longer "Under Indictment" For Purposes Of § 922(n).

Although this case presents a question of first impression in this Court, the plain language and a common sense interpretation of the statute support the conclusion that "under indictment" means subject to active prosecution, not a deferral or suspension, and that a defendant is no longer "under indictment" following a finding or admission of guilt on the charges, when the only remaining action is entry of a conviction or dismissal.

Because a conditional discharge under Or. Rev. Stat. § 475.245 defers the prosecution for a period of probation, during which time the guilt or innocence of the accused is not at issue, no pursuit of criminal charges occurs during that period. Moreover, because the conditional discharge requires a finding or admission of guilt, the accusation in the indictment is no longer relevant. For both of these reasons, a defendant is not "under indictment" while subject to a conditional discharge in

Oregon. Although the Court need not resort to canons of construction because the meaning of § 922(n) is clear, this interpretation of the statute is also supported by both the rule of lenity and the doctrine of constitutional avoidance.

A. The Statutory Text Establishes That "Under Indictment" Does Not Include Oregon's Conditional Discharge Status Because It Requires That A Defendant Be Subject To An Active And Unresolved Accusation Of A Crime.

In 2010, Oregon permitted a criminal defendant charged with certain drug-related crimes to receive a "conditional discharge." Or. Rev. Stat. § 475.245 (2010). The statute required that the defendant first enter a guilty plea or be found guilty pursuant to trial. *Id.* Thereafter, "the court, without entering a judgment of guilt and with the consent of the district attorney and the accused, may defer further proceedings and place the person on probation." *Id.*

If the defendant fulfills the conditions, then the court "shall discharge the person and dismiss the proceedings against the person," without an adjudication of guilt and without a conviction. Dismissal is the presumptive outcome of a conditional discharge and is required when the probationary period expires "without the state having initiated a probation-violation proceeding[.]" *State v. Herrera*, 280 Or. App. 830, 835-36 (2016). On the other hand, if the defendant violates "a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided." Or. Rev. Stat. § 475.245. A defendant cannot appeal a

judgment of conviction following an unsuccessful conditional discharge. *Herrera*, 280 Or. App. at 839.

Whether a defendant is "under indictment" while on probation pursuant to Oregon's conditional discharge scheme is a question of statutory interpretation. Statutory interpretation begins with the plain language of the statute, *Alexander*, 725 F.3d at 1118, and the statutory language derives meaning from "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal quotation marks omitted). Terms that are undefined take their "ordinary, contemporary, and common meaning." *Gallegos*, 613 F.3d at 1214. When the meaning of a statute remains ambiguous after considering its plain meaning, the Court will consider "canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir.2006).

Here, Congress did not define the phrase "under indictment" for purposes of § 922(n). However, it defined "indictment" to mean "an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year *may be prosecuted*." 18 U.S.C. § 921(a)(14) (emphasis added).

"Prosecuted," in turn, means "[t]o institute and pursue a criminal action against (a person)." BLACK'S LAW DICTIONARY 1416 (10th ed. 2014). Relatedly, BLACK'S LAW DICTIONARY defines "indictment" to mean "[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person." *Id.* at 891.

Together, these definitions suggest that a defendant is "under indictment" only during the time when the government is pursuing an accusation of a crime against the defendant. But upon a conditional discharge, the proceedings are deferred for a probationary period. As a result, the "pursuit" of the indictment is suspended, the guilt or innocence of the accused is irrelevant, and only the successful or unsuccessful completion of probation controls the outcome of the case. Additionally, because a conditional discharge requires a finding or admission of guilt to the criminal charge, it effectively ends proceedings on the indictment itself, leaving only the entry of a conviction or dismissal remaining, with no further option for a protestation of innocence. The presumption of innocence is lifted and the government has satisfied its burden under the indictment.

The district court found it persuasive that there was no adjudication of guilt or dismissal of the charges upon a conditional discharge until completion of probation, but that distinction has no substance when the admission of guilt resolves

the question of the defendant's commission of the crime. The only thing left to adjudicate—a dismissal or entry of a conviction—depends not on the defendant's guilt, with the typical right to a jury trial, but on the completion of sentence-like conditions. Indeed, the presumption favors dismissal. *Herrera*, 280 Or. App. at 835. If the simple fact that the litigation remains open and that a conviction remains possible is sufficient to trigger 18 U.S.C. § 922(n), then the prohibition would extend to appellate proceedings where a conviction is still possible. Under Or. Rev. Stat. § 475.245, the proceedings on the indictment are complete; "discharge" has already been promised, subject only to conditions.

Like the district court here, courts that have interpreted "under indictment" in § 922(n) to encompass conditional discharge status have placed undue emphasis on the fact that the conditional discharge does not "extinguish" the indictment and that the court has not entered a final judgment on the case. ER 13-14; *Saiz*, 797 F.3d at 856 ("The charges in an indictment are not extinguished upon the guilty plea or verdict. Instead, they remain in suspension until the defendant completes his term of probation."). But that analysis ignores the statute's focus on the defendant's *current* status of being subject to an active prosecution. During the time a defendant is on probation pursuant to Or. Rev. Stat. § 475.245, the proceedings are "deferred," the defendant's guilt or innocence of the crime is irrelevant, and indeed already

established by the finding or admission of guilt. Without further action by the government, the defendant will be entitled to a full discharge. And in the event a conviction is ultimately entered, the defendant has no right of appeal. Accordingly, the defendant is not "under indictment" at the time of a conditional discharge.

Mr. Ireland committed no federal offense for reasons similar to *United States v. Hill*, where the Eighth Circuit concluded that a defendant was not "under indictment" in Missouri following his entry of a guilty plea and the state court's order suspending the imposition of a sentence. 210 F.3d 881 (8th Cir. 2000). Like the district court here, the district court in *Hill* had reasoned that the defendant was still under indictment: "In order for a court to maintain jurisdiction and the authority to punish a defendant where imposition of sentence is suspended, an indictment or some form of the original charge against defendant must still be extant in some form." 210 F.3d at 883. Like the defendant here, Mr. Hill asserted the prosecutorial purposes of indictment were no longer in effect.

On de novo review, the Eighth Circuit reversed, concluding that the indictment served no further purpose after the defendant pleaded guilty: "The essence of the state-court indictment against Hill, then, was an allegation that he committed certain acts criminalized by Missouri law. By entering a guilty plea, Hill admitted each allegation contained in the indictment." *Hill*, 210 F.3d at 884. The

Eighth Circuit rejected the government's argument that satisfaction of the indictment necessarily deprived the sentencing court of jurisdiction to impose sentence. *Id.*

The Court in *Hill* emphasized the ameliorative nature of the state suspended sentence procedure, calling it a "hybrid" that was "intended to provides courts with an alternative means of handling defendants worthy of lenient treatment by giving them a chance to clear their record[.]"210 F.3d at 883. The court concluded that entry of a guilty plea was not a conviction under state law, but nor could it leave the defendant "under indictment," given that the purpose of the indictment to allege criminal wrongdoing had been served.

Applying similar reasoning to *Hill*, the district court in *United States v. Hartsfield* granted a motion to dismiss an indictment alleging that the defendant made a false written statement in connection with the purchase of a gun by stating that he was not "under indictment" at the time of the purchase. 387 F. Supp. 16 (M.D. Fla. 1975). The defendant had previously pleaded guilty to a state charge of receiving stolen property, but the state court had withheld adjudication of guilt and imposition of sentence pending a period of probation. The defendant completed the firearm purchase application while still on probation. In dismissing the federal indictment, the district court judge concluded that the defendant was no longer "under indictment" following his guilty plea:

> When the judge decided to withhold adjudication and sentence and instead placed defendant on probation under Section 948.01(3) of the Florida Statutes, it is clear that the defendant could no longer be tried on the information. At that point only two real alternatives existed with regard to future proceedings—defendant could either abide by the terms of his probation, in which case no further court action would be necessary; or he could violate the terms of probation, in which case he would be returned to court, his probation would be revoked, and he would be adjudicated guilty of the charge of receiving stolen property and sentenced therefor. *In any case, he was certainly no longer under indictment or information when he purchased the gun*.

Id. at 18 (emphasis added).

As in *Hill* and *Hartfield*, a conditional discharge in Oregon requires "satisfaction of the indictment" by a finding or admission of guilt thereto. During the 18-month period of probation, further proceedings on the indictment are "deferred." Thus, even if the indictment is not "extinguished" for all purposes, the defendant is not actively "under indictment" while on probation for a conditional discharge.

B. Excluding Conditional Discharge Status From The Scope Of § 922(n) Is Supported By The Rule Of Lenity And The Doctrine Of Constitutional Avoidance.

If the text and context of § 922(n) leave any doubt that a conditional discharge qualify a defendant as being "under indictment," the Court may turn to canons of statutory construction to resolve the issue. Here, the Court must construe any ambiguity in the phrase "under indictment" narrowly in favor of the defendant.

Moreover, even if no ambiguity exists, the Court should construe the statute to avoid the serious constitutional implications that would be raised by a broader interpretation of Congress's restriction on firearms possession by individuals with no criminal history.

1. Ambiguity In The Scope Of § 922(n) Must Be Resolved In Favor Of The Defendant.

The rule of lenity requires that an ambiguous statute be construed narrowly to avoid an unjust and unintended punishment. *United States v. Bass*, 404 U.S. 336, 348 (1971) ("This policy [of resolving ambiguous statutes in favor of lenity] embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'"). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,]" this Court must apply the rule of lenity "and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). The reason for lenity lies in the constitutionally-based need for "fair warning." *Bass*, 404 U.S. at 348.

The Supreme Court has noted the deep roots and fundamental values protected by the rule of lenity:

> In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious Congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 5 Wheat. 76, 105, 5 L.Ed. 37 (1820). And Justice Frankfurter, writing for the court in another

> case, said the following: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955).

United States v. Santos, 553 U.S. 507, 515 (2008).

If § 922(n) does not plainly exclude conditional discharge status, then its ambiguity is manifest given the contrary interpretations afforded the statute by the Eighth and Tenth Circuits and varying district courts. These alternative constructions should yield to the narrowest interpretation, which excludes from the phrase "under indictment" the period of time during which proceedings on an indictment are suspended or deferred pursuant to an ameliorative conditional discharge provision.

2. The Court Should Narrowly Construe § 922(n) To Avoid Potential Infringement On Second Amendment Rights And To Avoid Unconstitutional Vagueness.

The doctrine of constitutional avoidance leads to a similar result and applies to avoid the ambiguity in "under indictment." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). When an act of Congress raises a serious constitutional question, the Court should "'first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas*, 533 U.S. at 689 (citing *Crowell v. Benson*, 285 U.S. 22 (1932)). In *Zadvydas*, an immigration statute appeared to permit the government to indefinitely detain aliens under certain circumstances. 533 U.S. at 683. The Court did not determine whether indefinite detention would violate due

process, but instead opted to supplement the statutory language with an implied six-month limit on the detention. *Zadvydas*, 533 U.S. at 689, 701. The Court recognized that, while courts must adhere to congressional intent, there was not a sufficiently clear indication that Congress intended to authorize indefinite detention to justify leaving the statute with that potentially unconstitutional element. *Zadvydas*, 533 U.S. at 697-99; *accord Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("[Constitutional avoidance] is a tool for choosing between plausible interpretations of statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

Similarly, in *United States v. Buckland*, this Court opted to reinterpret the Controlled Substances Act in order to avoid a serious constitutional problem. 289 F.3d 558, 564 (9th Cir. 2002) (en banc). Previously, "virtually everyone," including all of the Circuits that had considered the question, treated drug quantity as a sentencing factor that did not need to be found beyond a reasonable doubt by a jury. *Id.* In *Buckland*, this Court concluded that such an interpretation of the statute might violate the constitutional principles announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires elements that increase the statutory maximum to be proven beyond a reasonable doubt. 289 F.3d at 563–64. Accordingly, this Court

avoided the constitutional issue by construing the statute to require proof of drug quantity to the jury beyond a reasonable doubt. *Id.*

The Second Amendment confers an individual right to keep and bear arms upon which criminal laws may not infringe. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). This Court applies intermediate scrutiny to the question of whether a firearm restriction violates the Second Amendment. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). This Court has held that bans on felons and domestic violence misdemeanants from possessing guns do not violate the Second Amendment. *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (felons); *Chovan*, 735 F.3d 1140-41 (domestic violence misdemeanants). However, the Court has never addressed the prohibition on receipt of firearms by individuals "under indictment" under § 922(n).

In *United States v. Laurent*, the district court addressed whether § 922(n) infringes on Second Amendment rights and held the statute constitutional, but not without misgivings. 861 F. Supp. 2d 71, 104-05 (E.D.N.Y. 2011). The court questioned "the government's categorical presumption that all individuals under indictment for a felony are more likely to misuse firearms," citing Bureau of Justice Statistics data "stating that, in 2004, only 1.8% of felony defendants violated the terms of their pre-trial release by committing any other crime." *Id.* However, *Laurent*

upheld § 922(n) on the basis that Congress had previously considered and rejected a narrower ban that would have limited the prohibition on receipt of firearms to violent indictees. *Id.* Because that more limited scope did not sufficiently reduce gun violence, Congress expanded the prohibition to all indictees.

The reasoning of *Laurent* supports a narrow interpretation of § 922(n) to exclude from its scope defendants under conditional discharge status. Unlike the broader class of all-indictees, defendants who have received a conditional discharge are first-time offenders who have no history of criminal violence and who are charged solely with nonviolent crimes. The Oregon legislature singled out the offenses to which Or. Rev. Stat. § 475.245 applies as being specifically deserving of ameliorative relief. Interpreting § 922(n) to apply when a defendant has received a conditional discharge would extend the prohibition on receipt of firearms for years, without any active prosecution and without ever requiring a criminal conviction. It would continue to apply even after the defendant had done everything necessary to earn dismissal of the charges, so long as the judge had not formally entered a conclusive order of discharge.

Moreover, a broader interpretation of "under indictment" would make impractical the mental state element of § 922(n) because § 924(a)(1)(D) requires defendants to act "willfully." The mens rea of "willfully" requires a defendant to

have "acted with knowledge that his conduct was unlawful." *Dixon v. United States*, 548 U.S. 1, 5 (2006). But defendants would not know in good faith whether a particular state diversion, deferral, or conditional discharge scheme qualifies as being "under indictment."[1] The common perception that a conditional discharge ends the prosecution against the defendant would render the statute an unfair trap for the unwary. To avoid fatal vagueness, this Court should narrowly construe the statute. *See Skilling v. United States*, 561 U.S. 358, 405-09 (290) (narrowly construing statute to avoid question of unconstitutional vagueness).

In sum, the same concerns that caused hesitation for the court in *Laurent* would likely tip the statute toward unconstitutionality if it were more broadly construed. This Court should construe § 922(n) to resolve any ambiguity in the defendant's favor and to avoid the serious risk of unconstitutionally infringing on the individual right to bear arms under the Second Amendment and the danger of vagueness in criminal prosecutions. Because Mr. Ireland was on probation pursuant to a conditional discharge at the time that he is alleged to have received the firearms

[1] The government below argued that Mr. Ireland acted willfully because he was aware that possession of firearms was prohibited as a matter of his conditional discharge, but that argument was misplaced. Willfulness in 18 U.S.C. § 924(a)(1)(D), means that the defendant must have acted with knowledge that his conduct was "unlawful." A violation of court-imposed conditions may trigger sanctions, even though the conduct is not necessarily unlawful.

in this case, he was not "under indictment" within the meaning of 18 U.S.C. § 922(n), as constitutionally construed.

II. Oregon Possession Of Cocaine Is Not A Crime "Punishable By Imprisonment For A Term Exceeding One Year" Because The Maximum Sentence Permitted By State Law Is Twelve Months.

Possession of cocaine, as charged in the Lane County indictment against Mr. Ireland, is not "a crime punishable by imprisonment for a term exceeding one year" within the meaning of § 922(n) because the maximum period of potential incarceration on the offense, even assuming hypothetical aggravating facts that appear nowhere on this record, is no more than twelve months.

This Court is not bound to follow prior circuit precedent that considers an irrelevant statutory provision to define the maximum term by which a crime is "punishable." S*ee Miller*, 335 F. 3d at 900 (Where the Supreme Court's reasoning has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable . . . a three-judge panel of this court . . . should consider [itself] bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled."). That precedent has been undermined by the Supreme Court's intervening decisions in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), which require courts to consider the actual sentence available in the

particular case, not the potential punishment in a hypothetical prosecution, when determining the potential incarceration term by which an offense is punishable.

A. Mr. Ireland Did Not Face An Imprisonment Sentence Exceeding One Year In His State Prosecution For Unlawful Possession Of Cocaine.

In Oregon, the mandatory sentencing guideline grid and related statutes governing its application provide the only source for determining the maximum imprisonment term that a defendant faces. *State v. Davis*, 315 Or. 484, 487-88 (1993). Based on the crime charged against Mr. Ireland, he could not have been sentenced to more than twelve months in jail, even assuming all potential upward departures.

As the Oregon Supreme Court explained in *Davis*, "[t]he centerpiece of the sentencing guidelines is the 99-block Sentencing Guidelines Grid." 315 Or. at 487 (1993). The guidelines establish an offender's "presumptive sentence" on a grid system that uses a "Crime Seriousness Scale" as the vertical axis and a "Criminal History Scale" as the horizontal axis. *Id.*; Or. Admin. R. 213-004-0001, App. 1. When an offender's crime seriousness level and criminal history fall in a grid block below the "dispositional line," an offender is subject to a presumptive sentence of probation. Or. Admin. R. 213-005-0007. In that case, the grid block defines (in days) the maximum jail term that can accompany a probationary sentence as well as the

maximum number of "sanction units" available for violations of probation. Or. Admin. R. 213-005-0011 (defining "sanction units"); Or. Admin. R. 213-005-0013 (limiting jail imposed as a part of a sentence of probation). If an offender violates probation, the maximum sentence on revocation is six months incarceration. Or. Rev. Stat. § 137.593(2)(d).

While Oregon state law lists maximum indeterminate sentences for certain classes of felonies, Or. Rev. Stat. § 161.605, those indeterminate sentences do not provide the "statutory maximum sentence" for a particular offense. *State v. Dilts*, 337 Or. 645, 649 (2004). Instead, "the incarcerative guidelines and any other guidelines so designated by the Oregon Criminal Justice Commission shall be mandatory and constitute presumptive sentences." Or. Rev. Stat. § 137.669 (emphasis added). Under this system, the maximum indeterminate sentence set out in Or. Rev. Stat. § 161.605 (limiting sentences to 20 years, 10 years, and 5 years, respectively for Class A, B, and C felonies), retains relevance only in that it limits the maximum term of incarceration and post-prison supervision combined, *State v. Mitchell*, 236 Or. App 248, 253-54 (2010), and provides a ceiling that the sentencing guidelines cannot exceed.

As the Oregon Supreme Court explained in *Dilts*, the presumptive sentence under the sentencing guidelines, based on the facts alleged in an indictment or

admitted in a plea agreement, is the "statutory maximum sentence" a court may permissibly impose. 337 Or. at 649. For offenses subject to a presumptive sentence of probation, courts may not impose a "dispositional departure" to a term of imprisonment unless the defendant admits aggravating facts or a jury finds such facts beyond a reasonable doubt. *State v. Gornick*, 340 Or. 160, 165 (2006); Or. Rev. Stat. §§ 136.770 and 136.773 (defendant may elect to have a jury find aggravating factors). Procedurally, the prosecutor must identify and give the defendant notice of any aggravating factor that may provide a basis for an upward departure sentence. Or. Rev. Stat. § 136.765. In the event of a dispositional departure, the sentencing court is still limited in the sentence that it may impose. OAR 213-008-0005(1), (3).

The state court indictment at issue here alleged that Mr. Ireland committed the crime of unlawful possession of cocaine in violation of Or. Rev. Stat. § 475.884. ER 250. On the face of the indictment itself, it provides that the offense falls within crime seriousness level 1, the lowest level on the guideline grid. Thus, the presumptive sentence that could lawfully imposed without findings to support a departure was 30 days in jail. Even if the procedures necessary to make the necessary finding of substantial and compelling reasons for a dispositional departure and a further durational departure, the sentencing judge would not have authority in any case to impose a sentence greater than 12 months. Or. Admin. R. 213-008-0005.

B. Intervening Supreme Court Authority Requires Courts To Consider The Sentence That Could Be Imposed On A Particular Defendant, Undermining Ninth Circuit Precedent Relying On Hypothetical Statutory Maximum Provisions.

Pursuant to *Miller*, this Court is bound by the "mode of analysis," and not just the express holding, of intervening Supreme Court precedent:

> The underlying principle has been most notably explicated by Justice Scalia in a law review article describing lower courts as being bound not only by the holdings of higher courts' decisions but also by their "mode of analysis." . . . . Justice Kennedy expressed the same concept in terms of a definition of stare decisis in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 . . . (1989). "As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Id.* at 668 . . . (Kennedy, J., concurring in part and dissenting in part).
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> * * * * *
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> We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

Miller, 335 F.3d at 900 (citations omitted).

In *Carachuri-Rosendo*, the Supreme Court held that a prior state conviction for simple possession of marijuana was not a conviction for a crime punishable by imprisonment for more than one year under the federal Controlled Substances Act because the prior conviction did not establish that the defendant had previously been convicted of a controlled substance offense, a sentencing factor required to expose

the defendant under federal law to a sentence of more than one year. *Carachuri-Rosendo*, 560 U.S. at 576-77. The Court held that a federal court "cannot, ex post, enhance the state offense of record[.]" *Carachuri-Rosendo*, 560 U.S. at 577. The Supreme Court held that the maximum imprisonment term for a state offense must be determined based on the sentence permissible for the particular defendant under the facts established in the record of conviction for the particular case, not the hypothetical sentence that could be imposed on a theoretical defendant after a finding of aggravating circumstances. 560 U.S. at 576-77.

In *Moncrieffe*, the Court further rejected the "hypothetical approach," and held that a state offense was not punishable by more than one year's imprisonment under the federal Controlled Substances Act, as required to constitute an aggravated felony, unless the facts necessary for the offense to qualify as a felony are established by the record. 133 S. Ct. at 1686, 1688. Citing its earlier decision in *Carachuri-Rosendo*, the Court held that, where an offense is punishable as a felony only if "an 'amalgam' of offense elements and sentencing factors" are present, that amalgam of elements and sentencing factors must be established by the record of the prior conviction. *Id.* at 1687 (quoting *Carachuri-Rosendo*, 560 U.S. at 568-69.

The analysis in *Carachuri-Rosendo* and *Moncrieffe* directly undermines this Court's precedent upon which the district court relied and, at the very least, counsels

against expansion of the cases to § 922(n). In *United States v. Murillo*, 422 F.3d 1152, 1154-55 (9th Cir. 2005), the Court held that "the maximum sentence that makes a prior conviction under state law a predicate offense under 18 U.S.C. § 922(g) remains . . . *the potential maximum sentence* defined by the applicable criminal statute" and not the actual sentence that could have been imposed. 422 F.3d at 1155 (emphasis added). This focus on the highest "potential" sentence and disregard for the actual sentence available is clearly irreconcilable with *Carachuri-Rosendo* and *Moncrieffe*, which require the opposite.[2]

The district court's conclusion that *Murillo* remains binding conflicts with the views of the Fourth, Eighth, and Tenth Circuits, which have each determined in published, precedential decisions that *Carachuri-Rosendo* overruled their own precedent that derived from *Murillo*, because the Supreme Court "expressly directed courts not to take into account potential facts 'outside the record of conviction'" in determining the "punishable" term of a prior crime. *United States v. Simmons*, 649

[2] The district court also cited *United States v. Carr*, 513 F.3d 1164 (9th Cir. 2008). ER 11. However, *Carr* involved a distinguishable issue related to whether the defendant pleaded guilty to a felony violation or a misdemeanor violation of a domestic violence protection order. The district court's reliance on the memorandum disposition in *United States v. Fletes-Ramos*, 612 F. App'x 484 (9th Cir. 2015), also cannot withstand scrutiny because that case is non-precedential, it involved plain error review of an unpreserved issue, and it neither cited nor discussed *Carachuri-Rosendo* or *Moncrieffe*.

F.3d 237, 245 n. 4 (4th Cir. 2011) (en banc) (quoting *Carachuri-Rosendo*, 560 U.S. at 582); *see also United States v. Brooks*, 751 F.3d 1204, 1213 (10th Cir. 2014); *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011). Since this Court has not addressed in a precedential ruling whether the "mode of analysis" in *Carachuri-Rosendo* and *Moncrieffe* undermines *Murillo*, no controlling law binds this Court to depart from the well-reasoned opinions of the other circuits and reach a different conclusion regarding indistinguishable circuit precedent. *Miller*, 335 F.3d at 900.

As all three of the other circuits recognized, *Carachuri-Rosendo* requires the federal sentencing court to look at the maximum permissible punishment based on the elements and sentencing factors established in the record of conviction, not based on how a hypothetical defendant might be charged and convicted. *Brooks*, 751 F.3d at 1213 ("*Hill*—which looked to the hypothetical worst possible offender to determine whether a state offense was punishable by more than a year in prison—cannot stand in light of *Carachuri-Rosendo*."); *Simmons*, 649 F.3d at 244 ("*Carachuri* also forbids us from considering hypothetical aggravating factors when calculating Simmons's maximum punishment"); *Haltiwanger*, 637 F.3d at 884 ("In accord with *Carachuri-Rosendo*, the hypothetical possibility that some recidivist

defendant could have faced a sentence of more than one year is not enough to qualify Haltiwanger's conviction as a felony.").

Particularly instructive here is *Brooks*, because of the similarities between sentencing laws in Kansas and Oregon. In Kansas, as in Oregon, the presumptive sentence in a case is determined based on the current crime of conviction and the defendant's prior criminal history. *Brooks*, 751 F.3d at 1205. In Kansas, as in Oregon, upward departures from the presumptive sentence are permitted only with notice by the state of specific aggravating circumstances, a finding by the jury, and ratification by the court. *Id.* at 1206; *see* Kans. Stat. Ann. § 21-6815(b)(2); 21-6816 to 21-6818.

In *Brooks*, the Tenth Circuit determined that, where the presumptive Kansas guideline range allowed for a maximum of seven months and the prosecutor did not seek an upward departure, the offense was punishable by no more than seven months' imprisonment and so it could not qualify as a career offender predicate. *Id.* at 1208. Prior to *Carachuri-Rosendo*, the Tenth Circuit had held that such an offense was punishable by imprisonment for more than one year because the maximum potential sentence for the crime was over one year. *Id.* at 1207 (citing *United States v. Hill*, 539 F.3d 1213, 1221 (10th Cir. 2008)). That prior precedent had, in turn, cited the Ninth Circuit's decision in *Murillo*. *Hill*, 539 F.3d at 1219, 1220 (citing

Murillo for the proposition that the relevant inquiry is the potential maximum sentence). Recognizing that *Carachuri-Rosendo* invalidated its prior precedent, the Tenth Circuit reversed course in *Brooks* and held that, because *Brooks* could not have been sentenced to more than seven months for his conviction, the conviction did not qualify as an offense punishable by imprisonment for a term exceeding one year. *Brooks*, 751 F.3d at 1210-11.

The Fourth Circuit also persuasively refuted the contention that *Carachuri-Rosendo* and *Moncrieffe* are distinguishable because they involved comparison of the state offense to a hypothetical federal crime, rather than determining the sentence available for a state offense under state law. *Simmons*, 649 F.3d at 248-49. As the Fourth Circuit explained, regardless of the question—determining whether a state conviction was punishable by more than a year under federal law or determining whether it was punishable by more than a year under state law—the holding of *Carachuri-Rosendo* is that courts may not consider "facts not at issue in the crime of conviction." *Simmons*, 649 F.3d at 248. The Supreme Court in *Carachuri-Rosendo* directed courts to determine what sentence was available based on "the conviction itself," not "what might have or could have been charged." 560 U.S. at 576. Likewise in *Moncrieffe*, the Supreme Court required courts to determine "whether the conditions" that would make the offense a felony "are present or

absent" based only on the "fact of a conviction . . . standing alone." 133 S. Ct. at 1686. Applying these rules here, the record of conviction establishes that Mr. Ireland was charged with an offense that fell within crime seriousness level 1, and therefore that the maximum jail term was 30 days absent findings to support a departure. Under *Moncrieffe* and *Carachuri-Rosendo*, the inquiry ends here.

The application of *Moncrieffe* and *Carachuri-Rosendo* is particularly straightforward here because no combination of circumstances would make the offense alleged in the state court indictment against Mr. Ireland punishable by more than one year. Even if he had the worst criminal history (in fact he had no criminal history at all), and even if substantial and compelling reasons supported a dispositional departure to imprisonment and a further upward departure, the maximum sentence available to the sentencing judge would have been only 12 months. Therefore, Mr. Ireland was not by any stretch of legal imagination under indictment for a "crime punishable by imprisonment for a term exceeding one year."

Following *Carachuri-Rosendo* and *Moncrieffe*, this Court can no longer look to an irrelevant statute to determine the maximum punishable term for an offense on the grounds that the statute sets the "potential punishment" for the offense. The Supreme Court's "mode of analysis" does not permit hypotheticals and limits the inquiry to the punishment permissible for the offense actually charged. The offense

actually charged against Mr. Ireland was punishable by 30 days, and in no case more than 12 months. Accordingly, it could not support a conviction under 18 U.S.C. § 922(n).

Conclusion

For the foregoing reasons, Mr. Ireland respectfully requests that this Court reverse the judgment of conviction against him and remand to the district court with instructions to dismiss the indictment.

Respectfully submitted this 4th day of August, 2017.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 17-30017**
	)	
v.	)	
	)	
LEON RAMON IRELAND,	)	
	)	
Defendant-Appellant.	)	

STATEMENT OF RELATED CASES

I, Elizabeth G. Daily, undersigned counsel of record for defendant-appellant, Leon Ramon Ireland, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

Dated this 4th day of August, 2017.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 17-30017**
	)	
v.	)	
	)	
LEON RAMON IRELAND,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 7792 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013, 14-point Times New Roman font.

Dated this 4th day of August, 2017.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, I electronically filed the foregoing Opening Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jill C. Dozark
Jill C. Dozark