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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA, ) Case No.: 19cr4768-GPC  
10 )  
11 Plaintiff, )  
12 ) Motion to dismiss Count 5 or 6 based on  
13 v. ) multiplicity  
14 )  
15 GIOVANNI TILOTTA, )  
16 )  
17 Defendant. )  
18 )  
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**Introduction**

Counts 5 and 6 of the superseding indictment are multiplicitous. The alleged straw purchases occurred at the same time, at the same place, with the same parties, and involved a single allegedly false statement on a single form. As such, it is one alleged crime impermissibly split into two counts. The government cannot go forward on both.

**Statement of relevant facts**

Counts 5 and 6 charge violations of 18 U.S.C. §§ 924(a)(1)(A) and 2, aiding and abetting false statements in the acquisition of firearms. These two counts address a single transaction on April 24, 2017, when co-defendant Magana allegedly acquired two Walther off-roster pistols in a straw purchase for co-defendant Hamel.

Count 5 charges Mr. Tilotta with “accept[ing] a United States Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 Firearms Transaction Record, stating that Magana was the actual buyer of a Walther PPS M2 9mm pistol, bearing serial number AR5980, when, in truth and in fact, as defendant TILOTTA then well knew, Magana was not the actual buyer of the firearm, in that he was acquiring the firearm on behalf of Hamel.” ECF-152 at 15-16. Count 6 is identical as to date and conduct, apart from naming a different pistol and serial number. *Id.* at 16.

These two counts rely on a single ATF-4473 form seeking to purchase the two Walthers (attached). It alone contains the allegedly false information: Magana’s certification that he is the actual purchaser. Because the evidence will be about one transaction, the testimony will be identical for both Counts 5 and 6, along with this singular ATF-4473 form identified in each count.

### Argument

An indictment is multiplicitous “when it charges multiple counts for a single offense, producing two penalties for one crime and thus raising double jeopardy questions.” *United States v. Stewart*, 420 F.3d 1007, 1012 (9th Cir. 2005). The test for multiplicity is whether each count “requires proof of an additional fact which the other does not[.]” *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (citation and quotations omitted).

In *United States v. Long*, 524 F.2d 660, 662 (9th Cir. 1975), the Ninth Circuit held that, under a nearly identical firearms acquisition offense, 18 U.S.C. §

1 922(a)(6), “[t]he unit of prosecution proscribed by Congress was the giving of false  
2 information.” *Id.* Thus, in the context of allegedly false ATF forms, “each separate  
3 form” is the “proper unit of prosecution.” *Id.*

4  
5 Here, there was only one form-4473 with only one alleged false statement  
6 “stating that Magana was the actual buyer.” ECF-152 at 15-16. One false statement  
7 equals one offense even if it was made to purchase two firearms. Breaking apart  
8 one transaction into separate crimes is multiplicitous. *See Long*, 524 F.2d at 662;  
9 *see also United States v. Brown*, 623 F.2d 54, 59 (9th Cir. 1980) (“we are unable to  
10 conclude that Congress clearly intended to impose cumulative *punishments for a*  
11 *single document that twice violates section 922(a)(6)....* Therefore, we are compelled  
12 by the rule of lenity to hold that imposition of consecutive sentences for Counts I  
13 and II was error.”) (Emphasis added).

14  
15  
16 Judge Lorenz addressed a similar indictment in *United States v. Holley*, 2011  
17 U.S. Dist. LEXIS 30533 (10cr725-L, ECF-104) (March 24, 2011). He determined  
18 that in enacting 18 U.S.C. § 922(a)(6), Congress intended a single offense,  
19 accomplishable by various means of false statements: “The Court finds that the  
20 proscribed conduct is the use of deceit in order to obtain a firearm. *See e.g. United*  
21 *States v. Brozyna*, 571 F.2d 742, 745 (2d Cir. 1978) (‘The statute creates a single  
22 offense, the gravamen of which is the use of deceit in order to obtain a firearm.’).”  
23 ECF-104 at 8. Interestingly, and directly supporting Mr. Tilotta’s motion, Judge  
24 Lorenz noted, “[i]f the Government had filed two separate counts based on the same  
25 ATF form, the indictment would have been vulnerable to attack for multiplicity.”  
26  
27  
28

1 *Id.* at n.2.<sup>1</sup>

2 That is the precise scenario here. An analogy to the felon in possession statute  
3 is helpful. Just as the unit of prosecution in recordkeeping offenses like §§ 922(a)  
4 and 924(a)(1)(A) is a false statement, the gravamen of a felon in possession 922(g)  
5 offense is the felony status of the defendant. Accordingly, “regardless of the number  
6 of firearms involved, there is only one offense of being a felon in possession unless  
7 there is a showing that the firearms were stored or acquired at different times and  
8 places.” *United States v. Ankeny*, 502 F.3d 829, 838 (9th Cir. 2007) (quotation  
9 omitted).

10 The final question is remedy. The answer is simple; the Court should require  
11 pretrial election. Indeed, “[t]he risk of a trial court not requiring pretrial election is  
12 that it may falsely suggest to a jury that a defendant has committed not one but  
13 several crimes.” *United States v. Johnson*, 130 F. 3d 1420, 1426 (10th Cir. 1997)  
14 (citation and quotations omitted); *accord United States v. Reed*, 639 F.2d 896, 904  
15 and n.6 (2d Cir. 1981) (“The vice in multiplicity of charges is that it may . . .  
16 improperly prejudice a jury by suggesting that a defendant has committed not one  
17 but several crimes,” and noting “[t]he defendant may move to have the prosecution  
18 elect among the multiplicitous counts, with all but the one elected dismissed.”).

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27 <sup>1</sup> The note cites *United States v. UCO Oil Co.*, 546 F. 2d 833, 838 (9th Cir. 1976).  
28 *UCO Oil* analyzed 18 U.S.C. § 1001, and wrote, “it is difficult to assume Congress  
intended that a defendant found guilty of falsifying one document be exposed to two  
or more sentences of up to five years imprisonment and a \$10,000 fine each.” *Id.*



**Conclusion**

Because Counts 5 and 6 involve a single transaction, a single alleged false statement, and identical proof, the Court should find them multiplicitous, and order the government to elect which Count it will present to the jury. *See* Fed. R. Crim. P. 14(a).

Dated: December 10, 2021

*s/ Jeremy Warren*  
Jeremy Warren  
Attorney for Mr. Tilotta

# Exhibit:

Magana ATF-4473  
(redacted and highlighted)

Department of Justice  
Alcohol, Tobacco, Firearms and Explosives

## Firearms Transaction Record

**WARNING:** You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Transferor's/Seller's  
Transaction Serial  
Number (If any)

Read the Notices, Instructions, and Definitions on this form. Prepare in original only at the licensed premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). All entries must be handwritten in ink. "PLEASE PRINT."

2907

## Section A - Must Be Completed Personally By Transferee/Buyer

1. Transferee's/Buyer's Full Name (If legal name contains an initial only, record "IO" after the initial. If no middle initial or name, record "NMN".)

Last Name (Including suffix (e.g., Jr, Sr, II, III))

First Name

Middle Name

MAGANA

FRED

NMN

2. Current State of Residence and Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)

Number and Street Address

City

County

State

ZIP Code

[REDACTED] CT

CHULA VISTA

SAN DIEGO

CA

91913

3. Place of Birth

U.S. City and State

-OR-

Foreign Country

4. Height

5. Weight

6. Sex

7. Birth Date

LOS ANGELOS  
CALIFORNIA

Ft. 5

(Lbs.)

☒ Male

Month

Day

Year

In. 9

200

☐ Female

8. Social Security Number (Optional, but will help prevent misidentification)

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)

10.a. Ethnicity

10.b. Race (In addition to ethnicity, select one or more race in 10.b. Both 10.a. and 10.b. must be answered.)

☐ Hispanic or Latino☐ American Indian or Alaska Native☐ Black or African American☒ White☒ Not Hispanic or Latino☐ Asian☐ Native Hawaiian or Other Pacific Islander

11. Answer the following questions by checking or marking "yes" or "no" in the boxes to the right of the questions.

a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you. Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b. (See Instructions for Question 11.a.)

Yes No

☒ ☐

b. Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)

☐ ☒

c. Have you ever been convicted in any court of a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)

☐ ☒

d. Are you a fugitive from justice? (See Instructions for Question 11.d.)

☐ ☒

e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.

☐ ☒

f. Have you ever been adjudicated as a mental defective OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)

☐ ☒

g. Have you been discharged from the Armed Forces under dishonorable conditions?

☐ ☒

h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)

☐ ☒

i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)

☐ ☒

12.a. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.)

☒ United States of America (U.S.A.)☐ Other Country/Countries (Specify):

12.b. Have you ever renounced your United States citizenship?

Yes No

☐ ☒

12.c. Are you an alien illegally or unlawfully in the United States?

☐ ☒

12.d.1. Are you an alien who has been admitted to the United States under a nonimmigrant visa? (See Instructions for Question 12.d.)

☐ ☒

12.d.2. If "yes", do you fall within any of the exceptions stated in the instructions?

☒ N/A☐ ☐

13. If you are an alien, record your U.S.-Issued Alien or Admission number (AR#, USCIS#, or I94#):

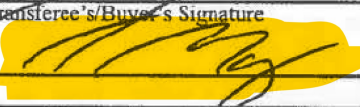
Previous Editions Are Obsolete

Transferee/Buyer Continue to Next Page  
STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5300.9)  
Revised October 2016



I certify that my answers in Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual transferee/buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.i and/or 12.b. through 12.c. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12.d.1. is prohibited from receiving or possessing a firearm, unless the person answers "yes" to question 12.d.2. and provides the documentation required in 18.c. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of Federal law. (See Instructions for Question 14.)

14. Transferee's/Buyer's Signature 	15. Certification Date <b>04/24/17</b>
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### Section B - Must Be Completed By Transferor/Seller

16. Type of firearm(s) to be transferred (check or mark all that apply): <input checked="" type="checkbox"/> Handgun <input type="checkbox"/> Long Gun (rifles or shotguns) <input type="checkbox"/> Other Firearm (frame, receiver, etc. See Instructions for Question 16.)		17. If transfer is at a qualifying gun show or event: Name of Function: _____ City, State: _____	
18.a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 18.a.) Issuing Authority and Type of Identification <b>CA DRIVERS LICENSE</b>		Number on Identification <div style="background-color: black; width: 100px; height: 1.2em; margin: 0 auto;"></div>	Expiration Date of Identification (if any) Month <div style="background-color: black; width: 20px; height: 1.2em; display: inline-block;"></div> Day <div style="background-color: black; width: 20px; height: 1.2em; display: inline-block;"></div> Year <div style="background-color: black; width: 20px; height: 1.2em; display: inline-block;"></div>
18.b. Supplemental Government Issued Documentation (if identification document does not show current residence address) (See Instructions for Question 18.b.)			
18.c. Exception to the Nonimmigrant Alien Prohibition: If the transferee/buyer answered "YES" to 12.d.2. the transferor/seller must record the type of documentation showing the exception to the prohibition and attach a copy to this ATF Form 4473. (See Instructions for Question 18.c.)			

### Questions 19, 20, or 21 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 19, 20 and 21.)

19.a. Date the transferee's/buyer's identifying information in Section A was transmitted to NICS or the appropriate State agency: Month <div style="border: 1px solid black; padding: 2px 5px; text-align: center;">4</div> Day <div style="border: 1px solid black; padding: 2px 5px; text-align: center;">24</div> Year <div style="border: 1px solid black; padding: 2px 5px; text-align: center;">2017</div>		19.b. The NICS or State transaction number (if provided) was:  <div style="text-align: center; font-weight: bold;">08150-02078, 02084</div>	
19.c. The response initially (first) provided by NICS or the appropriate State agency was: <input checked="" type="checkbox"/> Proceed <input type="checkbox"/> Delayed <input type="checkbox"/> Denied <i>[The firearm(s) may be transferred on _____ if State law permits (optional)]</i> <input type="checkbox"/> Cancelled		19.d. The following response(s) was/were later received from NICS or the appropriate State agency: <input type="checkbox"/> Proceed _____ (date) <input type="checkbox"/> Overturned <input type="checkbox"/> Denied _____ (date) <input type="checkbox"/> Cancelled _____ (date) <input type="checkbox"/> No response was provided within 3 business days.	
19.e. (Complete if applicable.) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: _____ (date). <input type="checkbox"/> Proceed <input type="checkbox"/> Denied <input type="checkbox"/> Cancelled			
19.f. The name and Brady identification number of the NICS examiner. (Optional) _____ (name)    _____ (number)		19.g. Name of FFL Employee Completing NICS check. (Optional) _____	
20. <input type="checkbox"/> No NICS check was required because a background check was completed during the NFA approval process on the individual who will receive the NFA firearm(s), as reflected on the approved NFA application. (See Instructions for Question 20.)			
21. <input type="checkbox"/> No NICS check was required because the transferee/buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS. (See Instructions for Question 21.)			
Issuing State and Permit Type	Date of Issuance (if any)	Expiration Date (if any)	Permit Number (if any)

### Section C - Must Be Completed Personally By Transferee/Buyer

If the transfer of the firearm(s) takes place on a different day from the date that the transferee/buyer signed Section A, the transferee/buyer must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 22 and 23.)

I certify that my answers to the questions in Section A of this form are still true, correct, and complete.

22. Transferee's/Buyer's Signature 	23. Recertification Date <b>05/16/17</b>
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Transferor/Seller Continue to Next Page  
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**Section D - Must Be Completed By Transferor /Seller Even If The Firearm(s) is Not Transferred**

24. Manufacturer and Importer (If any) (If the manufacturer and importer are different, the FFL must include both.)	25. Model (If Designated)	26. Serial Number	27. Type (See Instructions for Question 27.)	28. Caliber or Gauge
1. <b>WALTHER</b>	<b>PPS M2</b>	<b>AR5980</b>	<b>PISTOL</b>	<b>9MM</b>
2. <b>WALTHER</b>	<b>PPQ M2</b>	<b>FCH4067</b>	<b>PISTOL</b>	<b>9MM</b>
3.				
4.				

**REMINDER - By the Close of Business Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days**

29. Total Number of Firearms Transferred (Please <i>handwrite</i> by printing e.g., zero, one, two, three, etc. <b>Do not use numerals.</b> )	30. Check if any part of this transaction is a pawn redemption. <input type="checkbox"/> Line Number(s) From Question 24 Above:
<b>TWO</b>	
31. For Use by Licensee (See Instructions for Question 31.)	32. Check if this transaction is to facilitate a private party transfer. <input type="checkbox"/> (See Instructions for Question 32.)

33. Trade/corporate name and address of transferor/seller and Federal Firearm License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)

**HONEY BADGER FIREARMS****4304 TWAIN AVE SUITE B, SAN DIEGO, CALIFORNIA 92120****9-33-073-07-8J-04572****The Person Transferring The Firearm(s) Must Complete Questions 34-37.****For Denied/Cancelled Transactions, the Person Who Completed Section B Must Complete Questions 34-36.**

I certify that: (1) I have read and understand the Notices, Instructions, and Definitions on this ATF Form 4473; (2) the information recorded in Sections B and D is true, correct, and complete; and (3) this entire transaction record has been completed at my licensed business premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless this transaction has met the requirements of 18 U.S.C. 922(c). Unless this transaction has been denied or cancelled, I further certify on the basis of — (1) the transferee's/buyer's responses in Section A (and Section C, if applicable); (2) my verification of the identification recorded in question 18 (and my re-verification at the time of transfer, if Section C was completed); and (3) State or local law applicable to the firearms business — it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

34. Transferor's/Seller's Name (Please print)	35. Transferor's/Seller's Signature	36. Transferor's/Seller's Title	37. Date Transferred
<b>JESUS DIAZ JR</b>		<b>SALES REP</b>	<b>5-6-17</b>

**NOTICES, INSTRUCTIONS, AND DEFINITIONS**

**Purpose of the Form:** The information and certification on this form are designed so that a person licensed under 18 U.S.C. 922 may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The transferor/seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the transferor/seller must be familiar with the provisions of 18 U.S.C. 921-931 and the regulations in 27 CFR Parts 478 and 479. In determining the lawfulness of the sale or delivery of a rifle or shotgun to a resident of another State, the transferor/seller is presumed to know the applicable State laws and published ordinances in both the transferor's/seller's State and the transferee's/buyer's State. (See ATF Publication 5300.5, State Laws and Published Ordinances.)

Generally, ATF Form 4473 must be completed at the licensed business premises when a firearm is transferred over-the-counter. Federal law, 18 U.S.C. 922(c), allows a licensed importer, manufacturer, or dealer to sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises only if the transferee/buyer meets certain requirements. These requirements are set forth in section 922(c), 27 CFR 478.96(b), and ATF Procedure 2013-2.

After the transferor/seller has completed the firearms transaction, he/she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his/her permanent records. Such Forms 4473 must be retained for at least 20 years and after that period may be submitted to ATF. Filing may be chronological (by date of disposition), alphabetical (by name of purchaser), or numerical (by transaction serial number), as long as all of the transferor's/seller's completed Forms 4473 are filed in the same manner.

**FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED:** If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not completed after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his/her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

If the transferor/seller or the transferee/buyer discovers that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and the transferor/seller or the transferee/buyer wishes to correct the omission(s) or error(s), photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. The transferor/seller should only make changes to Sections B and D. The transferee/buyer should only make changes to Section A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of the transferor's/seller's permanent records.

**Exportation of Firearms:** The State or Commerce Departments may require a firearms exporter to obtain a license prior to export. **Warning:** Any person who exports a firearm without proper authorization may be fined not more than \$1,000,000 and/or imprisoned for not more than 20 years. See 22 U.S.C. 2778(c).

**Section A**

The transferee/buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the transferee/buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the transferor/seller. Two persons (other than the transferor/seller) must then sign as witnesses to the transferee's/buyer's answers and signature/certification in question 14.