No. 20-3191

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

MARK PRICE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana (Indianapolis)
No. 1:18-cr-00348-JMS-MPB-1, Chief Judge Jane Magnus-Stinson

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT MARK PRICE

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January 29, 2021

ORAL ARGUMENT REQUESTED

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Appellate Court No: 20-3191

Short Caption: United States v. Mark Price

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Mark Price

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Ansell Law Firm; The Law Office of Kenneth J. Riggins;
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Attorney's Signature: /s/ Sarah M. Konsky Date: January 29, 2021

Attorney's Printed Name: Sarah M. Konsky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☒ **No** ☐

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Attorney's Signature: /s/ David A. Strauss Date: January 29, 2021

Attorney's Printed Name: David A. Strauss

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☒

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JURISDICTIONAL STATEMENT

This is a direct appeal from a final judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, in a criminal case. A jury in the United States District Court for the Southern District of Indiana found Defendant-Appellant Mark Price ("Price") guilty of one count of possessing ammunition in violation of 18 U.S.C. § 922(g)(1) and two counts of possessing firearms in violation of 18 U.S.C. § 922(g)(1). Dkts. 80; 105 at 1, A1.[1] The district court sentenced Price to 92 months in prison for each count, to be served concurrently. Dkt. 105 at 2, A2.

The district court entered its final judgment on November 9, 2020. Dkt. 105, A1–6. Price timely appealed his conviction to this Court on November 10, 2020. Dkts. 107; 110.

The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this direct appeal, which appeals a final order or judgment that disposes of all of Price's claims, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

This Court issued an Order on November 17, 2020, granting trial counsel's motion to withdraw and appointing undersigned Counsel of Record to represent Price in this appeal pursuant to the Criminal Justice Act. 7th Cir. Dkt. 6.

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[1] Citations to "Dkt. __" are to the district court docket in the case below, *United States v. Price*, No. 1:18-cr-00348-JMS-MPB-1 (S.D. Ind.). Citations to "7th Cir. Dkt. __" are to this Court's docket in this case, No. 20-3191. Citations to "A_" are to the required short appendix bound with this brief.

STATEMENT OF ISSUES

1.) Whether the district court erred in denying Price's motion to suppress evidence in this case, because officers' warrantless searches of a vehicle he had driven and of his shared residence were not authorized by Price's parole agreement and were in violation of the Fourth Amendment.

2.) Whether the district court erred in holding that the government's evidence was sufficient to establish that Price "constructively possessed" two firearms in violation of 18 U.S.C. § 922(g)(1), because the evidence presented at trial was insufficient to show the required nexus between Price and either of these firearms.

3.) Whether the district court erred in applying enhancements to the Guidelines Range for Price's sentence, because the enhancements were not appropriate on the record of this case.

STATEMENT OF THE CASE

A. Indy Trading Post Visits

On October 10, 2018, Price visited Indy Trading Post, a firearms retailer and shooting range, on behalf of his significant other, Telisa Cockrell ("Cockrell"). Trial Tr. 27–29, 204; Dkt. 98 at 7. Cockrell and Price lived together at the time, and they have two children. Dkt. 85 at 6, A42; Dkt. 98 at 7–8. While at the store, Price made general inquiries about Ruger rifle accessories and asked about the facility's shooting range. Trial Tr. 27–28. Price then attempted to place an order for a Ruger magazine for Cockrell and, pursuant to the store's "standard operating procedure," provided his identification. *Id.* 28–

29; 204–05. Store employees did not conduct a criminal background check because Price was not purchasing a firearm. *See id.* 30. But Tyler Hands ("Hands"), a store employee, testified at trial in this case that Price set off some "kind of red flags" during this general conversation. *Id.* 27. Hands decided to run Price's name on a public records database, and he testified that "some items . . . just didn't sound good." *Id.* 29. Hands then contacted Special Agent Brian Clancy ("Clancy"), the store's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") liaison. *Id.* 29-30, 121.

About a week later, on October 16th, Cockrell drove to Indy Trading Post, and she and Price both went into the store to pick up the magazine. *Id.* 122–23; 200, 205; 32. Price inquired again about the magazine, and Indy Trading Post staff gave him a shell of a magazine that was inoperable, because they were waiting on ATF's investigation to determine whether to proceed with the order. *Id.* 31–33. Cockrell and Price walked around the store for several minutes. *Id.* 36–41. Store video shows someone handing a box of ammunition to Price and Price holding a box of .40 caliber ammunition. *Id.* 228; 41. Eventually, Price purchased .40 caliber ammunition and a holster. *Id.* 33; 202–03, 207. Sometime later that day, Price and Hands spoke by telephone about issues with the magazine, and Hands suggested that Price return to Indy Trading Post the next day. *See id.* 42–43. Hands then contacted ATF, and Agent Clancy decided to act as an undercover store employee when Price returned to the store. *Id.* 42–43, 124.

B. Arrest And Warrantless Searches

The next day, on October 17th, Price went to Indy Trading Post with his friend Jurnee Reveles ("Reveles") to return the magazine. *Id.* 43–44, 125; 231. Reveles was also interested in using the store's shooting range. *Id.* 231–32. Agent Clancy was at the store in an undercover capacity, posing as a store worker, while two members of his team waited in an office at the back of the store. *Id.* 124–25. After Reveles and Price entered the store, Price informed the staff that he was interested in teaching Reveles how to shoot, and Price talked to the staff about which rentals would not be "too much for her." *See id.* 44–45. Reveles and Price then looked at some of the store's rental firearms, which were unloaded. *Id.* 45, 48. Both Hands and Agency Clancy testified at trial that store employees primarily handed the firearms to Reveles. *Id.* 48–49, 127. At one point, however, Price briefly held a rental firearm to check its safety. *Id.*

At that point, Agency Clancy (still undercover as a store employee) led Price to the back of the store and arrested him. *Id.* 128. Agent Clancy then performed a "search incident to arrest" to ensure that there was no contraband or weapons on Price's person. *Id.* 128–29. Agent Clancy did not find any weapons or other contraband during this search. *Id.* He found keys to Cockrell's Ford Escape car, which Price had driven to the store that day, and keys to Cockrell's and Price's shared home. *Id.* 89, 128–29; *see id.* 108, 110.

Agent Clancy did not immediately seek a warrant to search either the car or Price's home. Though Price was on parole at the time, his parole agreement did *not* state that federal law enforcement officers were authorized to conduct

warrantless searches of his residence or property. *Id.* 66; Dkt. 42-1. The parole agreement instead stated that Price's "residence or property under [his] control may be subject to reasonable search by [his] supervising officer or authorized official of the Department of Correction if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole." Dkt. 42-1.

Instead of applying for a search warrant, Agent Clancy called in state parole officers to conduct a warrantless search of Cockrell's Ford Escape. Trial Tr. 69–70; Dkt. 59 at 3, A9. Agent Clancy informed the parole agents that Price was in custody. Trial Tr. 79, 129. Three state parole agents (Agents John Hosler, Max Richardson, and Nathaniel Hester) arrived at the Indy Trading Post. *Id.* 56–57, 68–70, 104, 129. Parole Agent Hester testified at trial that Agent Clancy "asked [the state parole agents] to initiate the investigation" of the vehicle at Indy Trading Post, although Agent Clancy stated that "[he] did not directly ask them to search the vehicle." *Id.* 69–70, 153.

Agent Clancy handed Parole Agent Hosler the keys to Cockrell's Ford, at which point the parole agents began their search and found a .40 caliber pistol in the closed center console. *Id.* 60, 108–09, 129. The parole agents immediately stopped the search and notified Agent Clancy about the firearm. *Id.* 61–62, 109. Only then did Agent Clancy seek a warrant to search the vehicle. *Id.* 85, 129–30. A warrant was obtained and the search resumed, but the only weapon found in the vehicle was the already-discovered pistol. *Id.* 130; *see* Dkt. 59 at 3, A9. Agent Clancy also questioned Reveles, who informed him

that she never saw Price with the pistol or even open the center console. Trial Tr. 150–51.

Agent Clancy did not seek a warrant to search Price's and Cockrell's joint residence at this time. Instead, after the search of Cockrell's Ford was completed, the parole agents "were asked to go to" Price's and Cockrell's shared residence to conduct a second warrantless search. *Id.* 62. With Price in his custody, Agent Clancy accompanied the parole agents to the residence and waited outside while parole agents conducted a search inside. *Id.* 109–10, 134. When Parole Agent Richardson found ammunition inside the home, he immediately stopped searching and told Agent Clancy. *Id.* 91, 134–35. Agent Clancy then asked the parole agents to show him the ammunition, and they took him into the residence. *Id.* 135. Agent Clancy instructed the parole agents to stop and freeze the scene while he began the process of requesting a second search warrant—this time, to search the home, the van in the driveway, and an outbuilding. *Id.* 111–12, 135.

The search resumed after the warrant was issued, and officers discovered in the bedroom mail addressed to Price, the .40 caliber ammunition purchased at Indy Trading Post and a key in a TV stand, and a firearm and ammunition (including .223 caliber ammunition) in a toolbox in the closet. *Id.* 135–45. Parole Agent Hosler also found a Ruger Mini rifle wrapped in a blanket in the van parked on the property. *Id.* 112–16. The van, like the Ford Escape, was owned by Cockrell, not Price. *Id.* 149; 216. Subsequent forensic work did not

find Price's fingerprints or DNA on any of the firearms discovered in any of the searches. *Id.* 147–48.

C. Procedural History

Based on the fruits of these searches, Price was charged in the U.S. District Court for the Southern District of Indiana with one count of possessing ammunition in violation of 18 U.S.C. § 922(g)(1) and two counts of possessing firearms in violation of 18 U.S.C. § 922(g)(1). Dkt. 15. These counts were based on the ammunition purchased at Indy Trading Post, the pistol found in the console of Cockrell's Ford at the Indy Trading Post, and the rifle found in Cockrell's van at the residence.

Price filed a motion to suppress the evidence from the searches of the vehicles and residence. Dkts. 40; 41. In his motion, Price argued that the officers violated his Fourth Amendment rights when they searched the vehicle and residence without a warrant and without valid consent. Dkt. 40. Price explained that the parole officers were acting as an improper "stalking horse" by conducting their searches of Cockrell's Ford and their shared home "at the request of and in concert with law enforcement officers." Dkt. 41 at 10. Because "the ATF Agent and the Task Force officers used the parole search to [] evade the Fourth Amendment's usual warrant and probable cause requirements," the fruits from the illegal searches should be suppressed. *Id.* at 10–11. In its opposition to the motion to suppress, the government argued that the parole agents properly conducted the searches pursuant to Price's parolee agreement, *see* Dkt. 42 at 4–7, and that the inevitable discovery doctrine

applied, because law enforcement would have obtained search warrants and because the vehicle would have been towed and inventory searched, *see id.* at 7.

The district court denied the motion to suppress without a hearing. Dkt. 59, A7–18. In its written order, the district court held that "the stalking horse theory has no application" to Price's case. *Id.* at 11–12, A17–18. The district court's opinion discussed the Supreme Court's trilogy of Fourth Amendment cases concerning probationers and parolees—*Griffin v. Wisconsin*, 483 U.S. 868 (1987), *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006)—and concluded that the stalking horse theory did not apply in this case because the government was not asserting the "special needs" exception to the warrant requirement articulated in *Griffin*. Dkt. 59 at 7–10, A13–16. The district court held that, following *Knights* and *Samson*, the relevant inquiry in this case was whether the warrantless searches were reasonable, balancing the intrusion upon Price's privacy against the government's interests. *Id.* at 10, A16. The district court acknowledged that the parole and probation terms in *Samson* and *Knights* were more expansive than Price's—meaning his expectation of privacy "was not necessarily diminished to the extent" of the defendants in those cases—but concluded that his expectation was "diminished nonetheless." *Id.* at 10–11, A16–17. The court therefore held that, weighed against the state's "'overwhelming interest' in supervising parolees," the warrantless searches were reasonable. *Id.* at 11, A17

(quoting *Samson*, 547 U.S. at 853). The district court declined to reach the government's inevitable discovery argument. *Id.* at 12 n.3, A18 n.3.

The case was tried before a jury on February 18, 2020, and February 19, 2020. Dkts. 77; 78. At trial, Price again objected to the admission of the evidence recovered in the searches on Fourth Amendment grounds. Trial Tr. 73–74, A20–21. Relying on its earlier ruling on Price's motion to suppress, the district court found that the searches were constitutional. *Id.* 74, A21. On day two of the trial, after the conclusion of the government's case, Price moved for a Federal Rule of Criminal Procedure ("Rule") 29 judgment of acquittal, arguing that the government had not met its burden on all three counts. Trial Tr. 182–94, A23–35. The court denied the motion with respect to each count. *Id.* 194, A35. Following the trial, the jury found Price guilty of the three counts of violating 18 U.S.C. § 922(g)(1). Dkt. 105 at 1, A1; Dkt. 80.

Price filed a timely motion for judgment of acquittal under Rule 29 and for a new trial under Rule 33. Dkt. 83. In this motion, Price argued that there was insufficient evidence for all counts. Dkt. 83 at 3–4. For Count 1, Price argued that he could not be convicted of possessing ammunition, because the language in his parole agreement prohibiting him from possessing "firearms, explosive devices or deadly weapons" led him to believe that Indiana had restored his civil right to possess ammunition. *Id.* at 4–8, *see* Dkt. 42-1. For Count 2, Price argued that the government failed to prove his power and intention "to exercise dominion and control over the pistol" found in Cockrell's Ford at the Indy Trading Post. *Id.* at 8–10. Finally, for Count 3, Price argued

that the government failed to demonstrate the required nexus between himself and the rifle found in Cockrell's van parked at their residence. *Id.* at 10–12.

The district court denied the post-trial motion. Dkt. 85, A37–46. In its written order, the district court rejected Price's challenges to Count 1. *Id.* at 6, A42. The district court held that the language in Price's parole agreement did not constitute a restoration of civil rights under Seventh Circuit precedent. *Id.* at 3–6, A39–42. It also held that there was sufficient evidence for a jury to find that Price constructively possessed the firearms underlying Counts 2 and 3. *Id.* at 7–9, A43–45. In reaching this conclusion, the district court pointed to evidence presented at trial for Count 2 (including Price's purchase of ammunition for a .40 caliber pistol, a comment about "his forty," and the pistol's location in Cockrell's car, which Price drove to the Indy Trading Post) and Count 3 (including Price's order of a magazine for a Ruger rifle, the rifle's location in a vehicle to which Price had access, and ammunition found in his and Cockrell's shared home). *Id.*

D. Sentencing Proceedings

At sentencing, Price objected to three Guidelines enhancements sought by the government. First, Price objected to a two-level enhancement for an offense involving at least three firearms, *see* U.S.S.G. § 2K2.1(b)(1)(A), arguing that the government failed to establish that he possessed three firearms. *See* Sent'g Hr'g Tr. 7–8, A49–50. Second, Price objected to a two-level enhancement for an offense involving a stolen firearm, *see* U.S.S.G. § 2K2.1(b)(4)(A), because he was unaware the firearm at issue was stolen. Sent'g Hr'g Tr. 10, A52. Third,

Price objected to a two-level enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1. Dkt. 99 at 2–4; Sent'g Hr'g Tr. 6–16, A48–58. The government sought this enhancement based on Price's trial testimony that he never held a firearm before the encounter at the Indy Trading Post on October 17th, and that he had not touched his friend's arm during that encounter. Dkt. 99 at 2–3. Price testified that he had not willfully misled the court, but was instead confused about the government's questions. Sent'g Hr'g Tr. 11–13, A53–55.

The district court overruled Price's objections and adopted each of these two-level sentencing enhancements.[2] Sent'g Hr'g Tr. 9–11, 15–17, A51–53, 57–59. The three contested enhancements imposed by the district court increased Price's base offense level from level 20 to level 26, increasing the Guidelines Range from 51 to 63 months to 92 to 115 months. *Id.* 18; *see* U.S.S.G. § 5A. The district court sentenced Price to 92 months for each of the three counts to be served concurrently. Dkt. 105 at 2, A2.

Price filed a timely appeal on November 10, 2020. Dkts. 107; 110.

[2] The district court based its two-level enhancement for possession of three or more firearms on the two firearms for which Price was convicted and the additional firearm he held while at the Indy Trading Post on October 17th. Sent'g Hr'g Tr. 7–9, A49–51. The district court held that the uncharged firearm found in Price's and Cockrell's shared residence was not relevant conduct giving rise to this enhancement, because that firearm was not "attributable to [Price] because there is no indication of an intent to exercise dominion and control, and it was a jointly held property." Dkt. 99 at 2; Sent'g Hr'g Tr. 7–10, A49–52.

SUMMARY OF ARGUMENT

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause[.]" U.S. Const. amend IV. Absent a warrant, the police can only conduct a search under a set of narrowly prescribed exceptions to the warrant requirement.

In this case, federal law enforcement directed two warrantless searches: the first of the vehicle Price had been driving the day of the search, and the second of the home Price shared with Cockrell. The district court held that these warrantless searches did not violate the Fourth Amendment because Price was a parolee, but that is incorrect. While parolees have a diminished expectation of privacy, the Constitution continues to protect their Fourth Amendment rights. *See United States v. Walton*, 763 F.3d 655, 660–61 (7th Cir. 2014). Price's parole agreement did *not* authorize warrantless searches by law enforcement. To get around this, after placing Price under arrest, a federal law enforcement agent used parole agents as his pawns. The federal law enforcement agent called state parole agents to the scene, directed them to conduct a warrantless search of the vehicle Price had driven earlier, and stopped to get a search warrant for that vehicle only after the parole agents discovered a firearm in it. The federal law enforcement agent then repeated the same routine—directing parole agents to Price's shared residence, directing them to conduct a warrantless search of the residence, and stopping to get a

second search warrant only after the parole agents discovered contraband. Such warrantless searches are a *per se* violation of the Fourth Amendment, or in the alternative violate the Fourth Amendment because they are unreasonable. The district court therefore erred in denying Price's motion to suppress the evidence discovered in the officers' searches in this case. This Court should vacate the judgment of conviction and reverse the denial of Price's motions to suppress.

In the alternative, the district court erred in denying Price's motion for acquittal, because the government failed to prove an essential element of the crime beyond a reasonable doubt. Price lived with his significant other, Cockrell. Counts 2 and 3 in this case alleged that Price violated 18 U.S.C. § 922(g)(1) by possessing two firearms—one officers found in the center console of Cockrell's Ford that Price had driven the day of the search, and one officers found in Cockrell's van parked on Price's and Cockrell's joint property later that day. The government's evidence was insufficient as a matter of law to establish that Price possessed these firearms, as required for a conviction under § 922(g)(1). The government did not present any evidence that anyone had ever seen Price with either of these firearms, and testing on these firearms failed to return any DNA or fingerprints matching Price. The government's evidence also was insufficient to establish "constructive possession" as a matter of law, because the government failed to establish the required nexus between Price and the firearms. The district court therefore erred in denying

Price's motions for acquittal. Accordingly, in the alternative, this Court should reverse Price's convictions on Counts 2 and 3 of the superseding indictment.

Finally, the district court erred in imposing enhancements under the Sentencing Guidelines on the record of this case. The two-level enhancement for an offense involving between three to seven firearms under U.S.S.G. § 2K2.1(b)(1)(A) was not appropriate in this case. The jury convicted Price of possessing only two firearms, and the district court misapprehended the relevant authority in attributing a third firearm to him for purposes of this enhancement. The two-level stolen firearm enhancement under U.S.S.G. § 2K2.1(b)(4) also was not appropriate in this case, because the government failed to provide any evidence that Price knew the firearm was stolen. Finally, the two-level obstruction of justice enhancement under U.S.S.G. § 3C1.1was in error because the district court failed to make sufficient findings of materiality or willfulness. Thus, this Court should vacate Price's conviction and remand for resentencing.

STANDARDS OF REVIEW

When reviewing challenges to the denial of a motion to suppress, the Court reviews factual determinations for clear error and reviews conclusions of law *de novo*. *United States v. Nichols*, 847 F.3d 851, 856–57 (7th Cir. 2017).

When reviewing a denial of a Rule 29 motion for acquittal, the Court's review is *de novo*. *United States v. Mohamed*, 759 F.3d 798, 803 (7th Cir. 2014).

When reviewing sentencing decisions, the Court conducts *de novo* review of the district court's interpretations of the Sentencing Guidelines, as well as its determinations of whether the facts satisfy the requirements for imposing a sentencing enhancement. *United States v. Johnson*, 612 F.3d 889, 892 (7th Cir. 2010). The Court reviews the district court's factual findings for clear error. *Id.*

ARGUMENT

I. The district court erred in denying Price's motions to suppress evidence obtained through unconstitutional searches.

The warrant requirement is an integral part of the Fourth Amendment's protections and should only be excused under "a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). The Supreme Court has long recognized the importance of an impartial, ex-post judicial determination of probable cause before individual privacy is intruded upon via a search or seizure. *See*, *e.g.*, *Wong Sun v. United States,* 371 U.S. 471, 481–82 (1963). "The warrant clause of the Fourth Amendment is not dead language," *United States v. Dist. Ct.*, 407 U.S. 297, 315 (1972), and should not be dispensed with as "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire,* 403 U.S. 443, 481 (1971). Absent an exception such as exigency, a warrantless search is one "conducted outside the judicial process" and is "*per se* unreasonable under the Fourth Amendment." *Arizona v. Gant,* 556 U.S. 332, 338 (2009) (quoting *Katz,* 389 U.S. at 357).

In this case, parole officers conducted warrantless searches of the vehicle Price had previously driven and of his shared residence. In denying Price's

motion to suppress the fruits of these searches (and his subsequent renewal of that motion at trial), the district court concluded that these warrantless searches were permissible because Price was a parolee. *See* Dkt. 59 at 7–12, A13–18. The district court's decision misapprehends Supreme Court caselaw. The searches were *per se* unconstitutional, because the federal law enforcement officers were not permitted to search Price under the terms of his parole agreement, and instead used state parole agents as pawns to conduct the warrantless searches on their behalf. This is *per se* unconstitutional under the Fourth Amendment. Alternatively, the warrantless searches were unconstitutional under the Fourth Amendment because they were unreasonable given the totality of the circumstances. The fruits of the searches therefore should be suppressed.

A. The terms of Price's parole agreement did not permit warrantless searches by law enforcement officers.

Although parolees have a diminished expectation of privacy, the Constitution continues to protect their Fourth Amendment rights. *See Walton*, 763 F.3d at 660–61 (explaining that parolees continue to have an expectation of privacy under the Fourth Amendment). This Court looks to "state law" and the textual "terms of parole" to determine if a search violated the parolee's Fourth Amendment protections. *United States v. White*, 781 F.3d 858, 861 (7th Cir. 2015). Indiana law requires that parolee searches conform to the clear text of the parole agreement; warrantless search conditions must be "clearly expressed" in the parole agreement, and the parolee must be "unambiguously

informed" of said conditions. *State v. Vanderkolk*, 32 N.E. 3d 775, 778 (Ind. 2015) (citation omitted). The reasonable privacy expectation of an Indiana parolee—such as Price—is that only searches conforming to their specific parole agreement will occur.

The terms of Price's agreement did not permit warrantless searches by federal agents. Price's parole agreement stated in relevant part:

> I will allow my supervising officer or other authorized officials of the Department of Correction to visit my residence and place of employment at any reasonable time. . . . and that my person and residence or property under my control may be subject to reasonable search by my supervising officer or authorized official of the Department of Correction if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole.

Dkt. 42-1. In entering this parole agreement, Price therefore had the reasonable privacy expectation that only certain searches by his "supervising officer or authorized official of the Department of Correction" would occur. *Id.* *Compare, e.g., Vanderkolk,* 32 N.E. 3d at 778 (where the probation agreement allowed "any Community Corrections staff, Law Enforcement Officer or Probation Officer" to search upon probable cause). Price's parole agreement deliberately did not include federal agents among the acceptable actors authorized to conduct a warrantless search. Price thus did not have the expectation that he could be subjected to federal law enforcement searches under his parole agreement, and searches by federal law enforcement agents were outside the scope of his agreement.

B. It is a Fourth Amendment violation for federal law enforcement officers to use state parole agents as their pawns to conduct warrantless searches.

Because searches by federal law enforcement agents were outside the scope of Price's parole agreement, federal law enforcement agents also could not use state parole officers as their pawns to conduct warrantless searches. Courts sometimes refer to this fact pattern as a "stalking horse" or a "cat's paw" search, as law enforcement agents are co-opting parole officers to circumvent search warrant requirements. This case involves a particularly extreme "stalking horse" or "cat's paw" fact pattern: law enforcement agents were not authorized by Price's parole agreement to carry out warrantless searches, and a federal law enforcement agent instead directed state parole officers to conduct the search to circumvent the warrant requirement. *See* Section I.C, *infra*. This practice violates the Fourth Amendment.

Even after the Supreme Court recognized in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), that the operation of a probation system "may justify departures from the usual warrant and probable-cause requirements," *id.* at 873–74, circuit courts continued to agree that stalking horse searches violate a parolee's Fourth Amendment protections and are *per se* unconstitutional. This Court thus recognized that "federal law enforcement officers (or the police in general) cannot utilize state probation officials to carry out warrantless searches on their behalf which they as federal agents, acting alone, could not execute without a judicial warrant." *United States v. Coleman*, 22 F.3d 126, 129 (7th Cir. 1994) (collecting cases). Other circuits agreed. *See, e.g., United States*

v. Hallman, 365 F.2d 289, 291–92 (3d Cir. 1966); *Smith v. Rhay*, 419 F.2d 160, 162–63 (9th Cir. 1969); *United States v. Cardona*, 903 F.2d 60, 65 (1st Cir. 1990); *United States v. McCarty*, 82 F.3d 943, 947 (10th Cir. 1996). Regardless of the name associated with the theory, the underlying justification remained consistent: "[t]he law will not allow a parole officer to serve as a cat's paw for the police." *Cardona*, 903 F.2d at 65. Without this prohibition, law enforcement agents could use parole officers to systematically dissolve the privacy protections of parolees at their convenience.

The district court in this case departed from these principles, however. It instead held that "the stalking horse theory has no application," and that the Supreme Court's decisions in *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California,* 547 U.S. 843 (2006), foreclosed the argument that a warrantless stalking horse search is *per se* unconstitutional. Dkt. 59 at 10–11, A16–17. The district court acknowledged that the Seventh Circuit has not addressed the continuing viability of the stalking horse line of cases post-*Knights*, and instead relied on non-binding case law from other circuits. *Id.* at 7, 11, A13, 17.[3] That was in error. The Supreme Court cases on which the district court relied are distinguishable, and the district court misapprehended their holdings.

[3] After *Knights*, several circuits have held that the stalking horse theory is foreclosed by *Knights*. *See United States v. Stokes*, 292 F.3d 964, 967–68 (9th Cir. 2002); *United States v. Brown,* 346 F.3d 808, 810–12 (8th Cir. 2003); *United States v. Williams*, 417 F.3d 373, 377–78 (3d Cir. 2015). At least one other circuit has noted a tension between this theory and *Knights*. *See United States v. Ickes*, 922 F.3d 708, 711–12 (6th Cir. 2019).

In *Knights*, the defendant's probation agreement allowed warrantless searches by *any* law enforcement officers for *any* purpose. 534 U.S. at 114. The defendant argued that, despite this sweeping waiver of his Fourth Amendment rights, the warrantless search pursuant to his probation agreement violated the Fourth Amendment because it was not undertaken with a probationary purpose, and instead was undertaken with an investigatory purpose. *See id.* at 116–17. The Supreme Court rejected this argument. *Id.* at 118–19. Critically, however, the probation agreement in *Knights* authorized warrantless searches *by law enforcement officers*. Thus, after recognizing that the warrantless law enforcement search was in accordance with the terms of the agreement, the Court evaluated the propriety of the search using the traditional Fourth Amendment "totality of the circumstances" analysis. *Id.* at 114, 116, 118 (citation omitted). As a result, *Knights* establishes that, when a probation agreement authorizes both law enforcement and probation officers to search without a warrant, law enforcement may in some circumstances conduct reasonable warrantless investigative searches of the probationer. The Supreme Court subsequently reaffirmed this holding in *Samson*. 547 U.S. at 852, 857 (holding that suspicionless, warrantless search of parolee did not violate Fourth Amendment where state law authorized suspicionless, warrantless searches by law enforcement as condition of parole).

This case involves a materially different fact pattern: a parole agreement that does *not* authorize a warrantless search by law enforcement officers, and law enforcement officers who nevertheless use parole agents as pawns to

subvert the search warrant requirement. Neither *Knights* nor *Samson* involved this fact pattern. And neither the narrow holdings of *Knights* nor *Samson* disrupts the reasoning behind the various circuit court opinions holding this stalking horse practice unconstitutional pre-*Knights*. Warrantless searches are presumptively unreasonable, and warrantless searches of parolees that exceed the scope of parole agreements—like the warrantless search in this case—continue to be *per se* unconstitutional. The searches in this case therefore remain unconstitutional stalking horse searches by law enforcement. *See, e.g. Coleman*, 22 F.3d at 129.

C. Law enforcement's warrantless searches in this case were *per se* unconstitutional "stalking horse" searches.

The facts of Price's case exhibit the precise behavior that pre-*Knights* cases determined to be *per se* unconstitutional under the Fourth Amendment. This is an egregious stalking horse case. The parole agreement in this case did not authorize warrantless searches by federal agents. *See* Dkt. 42-1. So, rather than conduct warrantless searches himself, Federal Agent Clancy ordered the Indiana parole agents to conduct a stalking horse search of Price's property in a way that abused the search condition of the parole agreement and side-stepped Price's Fourth Amendment protections. On October 17, 2018, Agent Clancy arrested Price at the Indy Trading Post for Price's possession of ammunition. Trial Tr. 147–48. Instead of seeking a search warrant to search the Ford Escape that Price had driven to the Indy Trading Post, however, Agent Clancy contacted state parole agents. *Id.* 129. The call was not a mere

courtesy; Agent Clancy contacted the parole agents for the purpose of conducting a warrantless search of the Ford Escape. *Id.* 69–70. Upon being asked whether Agent Clancy had called the parole agents to the Indy Trading Post to initiate the investigation of property Price had controlled, Parole Agent Hester testified: "I, I, I, I have an answer, yes. Yeah, I have an answer. Yes." *Id.* Agent Clancy gave the parole agents the keys to the Ford Escape so they could initiate the search and waited for the parole agents to uncover contraband. Trial Tr. 129. And then, when the parole agents found a pistol inside the center console, Agent Clancy proceeded to request a search warrant for only the Ford Escape. *Id.* 60, 129–30.

Agent Clancy then directed a second warrantless stalking horse search. *Id.* 133–34. After executing the search warrant on the Ford Escape, Agent Clancy directed the parole agents to travel to Price's address and conduct a warrantless search of Price's and Cockrell's shared residence. *See id.* 62. The decision to search the residence was not initiated by the parole agents, but rather directed by Agent Clancy. *Id.* As Parole Agent Hester testified, after parole agents conducted the search of the Ford Escape, they "were asked to go to, to the location of the parolee's address." Trial Tr. 62. Agent Clancy once again waited for the parole agents to conduct his search, this time waiting outside the residence until a parole agent found something. *Id.* 134. After ammunition was found, Agent Clancy requested a more expansive search warrant, covering the residence, adjacent vehicles, and a smaller building on the property, and searched for more contraband. *Id.* 135. The decision to

search the Ford Escape and Price and Cockrell's home came exclusively from Clancy, subverting the traditional decision-making process of the Indiana parole agents.

Price's parole agreement did not authorize Agent Clancy to conduct either of these warrantless searches, *see* Dkt. 42-1, and his reasonable expectation of privacy was therefore that federal officers would not conduct warrantless searches. Agent Clancy nevertheless instructed the parole agents to conduct these searches instead of first obtaining search warrants. It is unconstitutional for Agent Clancy to use parole agents as a stalking horse to evade the warrant requirement. The manner in which the searches were conducted, therefore, was *per se* unconstitutional. *Compare Smith*, 419 F.2d at 162–63 (unconstitutional stalking horse search where sheriff enlisted the parole officer to conduct a warrantless search), *with United States v. Jarrad*, 754 F.2d 1451, 1453–54 (9th Cir. 1985) (no stalking horse issue where the parole officer independently initiated a warrantless search and requested police officers' assistance).

D. In the alternative, the district court erred in concluding law enforcement's warrantless searches were reasonable under the totality of the circumstances.

Alternatively, even assuming for sake of argument that the district court was correct that the warrantless stalking horse searches in this case were not a *per se* violation of the Fourth Amendment, the district court erred in concluding that the searches were reasonable under the *Knights* balancing test, and therefore constitutional under the Fourth Amendment.

Under the *Knights* balancing test, "the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Dkt. 59 at 7, A13, *quoting Knights*, 534 U.S. at 118–19. An individual's status as a probationer or parolee, and his terms of conditional release "inform[] both sides of that balance." *Knights*, 534 U.S. at 119. The district court's analysis of both sides of the balance ignored material facts and was erroneous.

As the district court correctly acknowledged, Price's expectation of privacy "was not necessarily diminished to the extent that the defendants' expectations of privacy were in *Samson* and *Knights*—those conditions permitted suspicionless searches. . . ." Dkt. 59 at 10–11, A16–17. But the district court failed to acknowledge that Price also had a reasonable expectation that he would *not* be subjected to warrantless law enforcement searches. *See, e.g., White*, 781 F.3d at 861 ("[T]he extent of [a parolee]'s legitimate expectations of privacy . . . is shaped by the state law that governed [the parolee]'s terms of parole.") (citation omitted). The terms of Price's parole agreement are clear: it allows *only* parole officers, or authorized Department of Correction employees, to search him without a warrant. *See* Dkt. 42-1. This was the specific condition "clearly expressed" to Price, of which he was "unambiguously informed." *Vanderkolk*, 32 N.E. 3d at 778 (citation omitted). And Indiana law dictates that permissible searches of parolees must conform to, and remain within the scope of, the text of the parole agreement, so as not

to violate the parolee's legitimate expectation of privacy. *Id.* The district court therefore erred by failing to recognize Price's legitimate expectation of privacy from law enforcement searches, including those carried out using parole agents as pawns, under his parole agreement and under Indiana law. *See also* Sections I.B and I.C, *supra*.

The district court also erred in assessing the government's interests in this case, incorrectly concluding that "[t]he interest in favor of the state was stronger here than it was in either *Knights* or *Samson*, because Mr. Price was a parolee whereas Mr. Knights was a probationer, and there were circumstances indicating that Mr. Price had committed a crime." Dkt. 59 at 11, A17. Relying on the distinction between parolee and probationer is in contravention to Indiana law, which rejects status alone as authorizing warrantless searches, and further treats parolees and probationers as on par with one another for these purposes. *Vanderkolk*, 32 N.E. 3d at 777, 779 ("[T]he similarities between parole and probation . . . are far greater than the differences."). The fact Agent Clancy directed the agents to search only after Price already was under arrest, *see* Trial Tr. 128–29, cuts in the other direction, as well. Given Price's immobilization, there was no risk to, nor threat of, evidence being destroyed. It would have been reasonable and practicable for Agent Clancy, given the lack of any special exigency, to seek a warrant for the search of the Ford Escape and for Price's residence. And even assuming the district court was right that law enforcement had heightened interests here, they were not sufficient to

overcome Price's expectation of privacy from warrantless stalking horse searches not permitted under the terms of his parole agreement.

It is uncontested that law enforcement agents and parole officers may work together to achieve similar objectives. *See United States v. Emmett*, 321 F.3d 669, 672 (7th Cir. 2003); *United States v. Scott*, 566 F.3d 242, 246–47 (1st Cir. 2009). However, it is unreasonable when law enforcement officers, limited by the express terms of a parole agreement, use parole officers as mere pawns to conduct their warrantless searches, circumvent the warrant requirement, and undermine parolees' reasonable expectations of privacy. To conclude otherwise would eviscerate the privacy protections a parole agreement or parole scheme is meant to have, making it effectively null and ignorable. The searches in this case therefore were unreasonable under the Fourth Amendment.

E. The fruits of the warrantless searches must be suppressed.

Evidence procured by an unreasonable search that violates the Fourth Amendment is barred by the exclusionary rule. *Gentry v. Sevier*, 597 F.3d 838, 850 (7th Cir. 2010). Derivative evidence found as a result of the initial search is also covered by the exclusionary rule. *Id.* at 850–51. For example, if evidence gathered at the initial unreasonable search is used to collect additional evidence, either by serving as the foundation for a search warrant or as justification for a warrantless search, said evidence is inadmissible. *See Murray v. United States*, 487 U.S. 533, 540–42 (1988).

In this case, the warrantless searches of the Ford Escape and the joint residence were unconstitutional. The fruits of those searches therefore should

be suppressed. Following the two warrantless searches, Agent Clancy sought and obtained a warrant to search the joint residence. While that warranted search uncovered additional contraband in the joint residence and in a van parked on that property, that evidence is fruit of the poisonous tree and must also be suppressed. *See, e.g.*, *Murray,* 487 U.S. at 540 (where the government relies on the inevitable discovery doctrine based on the fact it obtained a warrant after the initial search, the government bears the "burden of convincing a trial court that no information gained from the illegal entry affected . . . the law enforcement officers' decision to seek a warrant").[4]

F. The district court erred in concluding that warrantless parole searches by federal law enforcement officers, acting alone, would have been reasonable under the Fourth Amendment.

The final sentence of the district court's order denying Price's suppression motion states: "Furthermore, even if the Parole Officers had not been contacted, and ATF agents conducted the searches themselves, such searches would have been reasonable under the Fourth Amendment for the same reasons that the Parole Officers' searches were reasonable." Dkt. 59 at 12, A18. This conclusion, too, was in error. As discussed above, Price's parole agreement did not permit warrantless searches by law enforcement officers. Price had a reasonable expectation that the terms of his parole did *not* include warrantless law enforcement searches, and a warrantless search by Agent

[4] The district court declined to reach this issue below. Rather, the district court stated in its order denying Price's motion for suppression: "In light of the conclusion that the searches did not violate the Fourth Amendment, it is unnecessary for the Court to address the government's inevitable discovery argument." Dkt. 59 at 12 n.3, A18 n.3.

Clancy or other ATF agents therefore would not fall within the parole exception to the warrant requirement.

II. This Court should reverse Price's convictions related to the firearms found in Cockrell's vehicles.

In the alternative, this Court should reverse Price's convictions.[5] A Rule 29 motion for acquittal should be granted if, viewing the evidence and all reasonable inferences most favorably to the government, "no rational trier of fact could have found that the government proved the essential elements of the crime beyond a reasonable doubt." *United States v. Griffin*, 684 F.3d 691, 694 (7th Cir. 2012). Although this Court has noted that defendants bringing insufficient evidence arguments face a "nearly insurmountable hurdle," *United*

[5] Price preserves for subsequent appeal the argument that his Count 1 conviction for possession of ammunition should be reversed. Price argued below that the government failed to meet its burden under § 922(g), because the language in Price's parole agreement prohibiting him from possessing "firearms, explosive devices, or deadly weapons" led him to believe that the state had restored his civil right to possess ammunition. Dkt. 85 at 3–6, A39–42; Trial Tr. 182–85, A24–26. This Court has held that similar language in a discharge certificate did not restore the defendant's civil right to possess ammunition. *See, e.g.*, *United States v. Wilson*, 437 F.3d 616, 620 (7th Cir. 2006). And while the Supreme Court held in *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019), that the government must prove a felon-in-possession defendant knew of his prohibited status, this Court has subsequently held that *Rehaif* does not require the government to prove that the defendant knew he was prohibited from possessing a firearm or ammunition as a result of his status. *United States v. Maez*, 960 F.3d 949, 954–55 (7th Cir. 2020). Price's argument therefore appears to be foreclosed by circuit precedent.

Price preserves the argument that *Rehaif* requires the government to prove that the defendant in a § 922(g) case knew he was prohibited from possessing a firearm or ammunition. In addition, Price argues that the government did not satisfy its burden of proving that Price knew of his prohibited status following *Rehaif*. While Price stipulated at trial that he knew he had prior felony convictions, there remained a question as to whether Price knew these convictions counted as "felonies" for purposes of § 922(g)'s prohibitions on owning ammunition given the facts of this case. Price therefore urges the Court to reconsider its precedent and, to the extent this Court's precedent forecloses these arguments, preserves these arguments for further appeal.

States v. Johnson, 874 F.3d 990, 998 (7th Cir. 2017) (citation omitted), it has also been clear that "the height of the hurdle depends directly on the strength of the government's evidence." *United States v. Garcia*, 919 F.3d 489, 496–97 (7th Cir. 2019) (quoting *United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013)).

In this case, however, the hurdle is not insurmountable. The government provided insufficient evidence that Price possessed the firearms underlying Counts 2 and 3. Count 2 was based on a .40 caliber pistol found in the center console of Cockrell's Ford at the Indy Trading Post. Dkt. 85 at 6–7, A42–43; Trial Tr. 57–60, 129–30. The .223 caliber rifle underlying Count 3 was discovered in a van, again owned by Cockrell, that was parked on Cockrell's and Price's shared property. Dkt. 85 at 8–9, A44–45; Trial Tr. 112–16. Testing on both firearms failed to return any DNA or fingerprints matching Price. Trial Tr. 147–48. Nor did the government present any evidence that anyone ever saw Mr. Price with either of these firearms.

Because the government did not establish actual possession, Counts 2 and 3 were based on a theory of constructive possession. Constructive possession is a "legal fiction" established when "the defendant knowingly had both the power and the intention to exercise dominion and control over the object[.]" *Griffin*, 684 F.3d at 695. Where, as in this case, contraband was found in shared property, the government must show "a substantial connection between the defendant and both the property *and* the contraband." *United States v. Davis*, 896 F.3d 784, 790 (7th Cir. 2018). This substantial connection

cannot be "mere proximity." *Griffin*, 684 F.3d at 696. Rather, the government must show "proximity coupled with evidence of some other factor—including connection with [an impermissible item], proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise." *Id.* (quoting *United States v. Morris*, 576 F.3d 661, 668 (7th Cir. 2009)).

This Court's decision in *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012), is instructive. *Griffin* held that there was insufficient evidence of constructive possession where ammunition and numerous firearms were found throughout the home the defendant shared with his parents. *Id.* at 693–94. In reversing the conviction, this Court rejected the government's proposed nexus: witness testimony that the defendant said his father purchased "some of the shotguns for the defendant" and that "the two handguns belonged to the defendant and were hidden behind the stove." *Id.* at 694. This nexus was insufficient because the jury only convicted the defendant of possessing ammunition found on the stairs and a shotgun found behind the kitchen door, so the testimony "did not attribute to [the defendant's] possession of the *specific* shotgun or ammunition for which he was convicted." *Id.* at 694, 699 (emphasis added).

Similarly, there is no substantial nexus between Price and the specific firearms for which he was convicted. In support of Count 2, the district court noted that Price purchased ammunition for a .40 caliber pistol and that Indy Trading Post employee Hands testified that Price made comments about "his

forty." Dkt. 85 at 7, A43; Trial Tr. 33, 44. But this does not tie Price to Count 2's *specific* .40 caliber pistol. This proposed nexus is analogous to the one deemed insufficient in *Griffin*, where the statement that "some of the shotguns" found in the home were bought for the defendant could not support the defendant's conviction for possessing a shotgun found in the home. 684 F.3d at 694.

Neither can Price's mere proximity to the pistol in Cockrell's Ford support Count 2. Price's passenger told officers that "she never saw [Price] with the firearm" and she never saw him open the center console. Trial Tr. 151. And the pistol—found in the *closed* center console of the vehicle—was not easily accessible to Price. *Id.* 60. The trial testimony linked three people to the Ford: Cockrell owned it and had driven it to Indy Trading Post the day before the search, Price drove it to the Indy Trading Post on the day of the search, and Price's friend Reveles was a passenger in it on the day of the search. These undisputed facts therefore do not rise to the level of other cases finding constructive possession of contraband in a vehicle. *See, e.g.*, *United States v. Morris*, 576 F.3d 661, 669–70 (7th Cir. 2009) (sufficient evidence that the defendant constructively possessed heroin and firearms found in a vehicle registered to someone else where a detective observed defendant driving the car multiple times and engaging in three separate drug transactions from the car); *United States v. Hampton*, 585 F.3d 1033, 1041 (7th Cir. 2009) (sufficient evidence where the firearm "was found within [the defendant]'s reach" in the vehicle *and* a witness observed the defendant holding a gun before entering the

car); *United States v. Garrett*, 903 F.2d 1105, 1110–13 (7th Cir. 1990) (sufficient evidence of felon-in-possession and possession with intent to distribute where a loaded firearm was found "on the floor *of the driver's side*," directly underneath thirty-eight individual packets of cocaine) (emphasis added).

Nor is there sufficient evidence to support constructive possession of the .223 caliber Ruger rifle, found in Cockrell's van parked at Cockrell's and Price's joint residence, underlying Count 3. In support of Count 3, the district court noted that Price ordered a magazine for a Ruger rifle and later informed Indy Trading Post staff that the magazine did not work. Dkt. 85 at 8, A44; Trial Tr. 27–28, 44, 126. This is even weaker than the nexus this Court rejected in *Griffin*, where witness testimony that the defendant possessed "shotguns" and "handguns hidden behind the stove" could not support a conviction for a shotgun behind a kitchen door or ammunition located elsewhere in the defendant's home. 684 F.3d at 699.

The remaining evidence offered for Count 3 is mere proximity evidence and cannot support constructive possession. The district court noted that Price had "access" to Cockrell's van on their property[6] and that .223 caliber ammunition was found in their shared home.[7] Dkt. 85 at 8, A44. Though

[6] For example, a key to this van was found in a TV stand in the bedroom. Trial Tr. 140. But this, as the district court stated, only demonstrates "access" to the vehicle. Dkt. 85 at 8, A44. And "[a]ccess is not synonymous with possession, nor with either dominion or control." *United States v. LePage*, 477 F.3d 485, 490 (7th Cir. 2007).

[7] The government did not charge Price with possession of the .223 caliber ammunition. Moreover, at the sentencing hearing, the district court found that a firearm found in

possession may be joint, this Court recently reaffirmed that where a husband and wife jointly share a home containing contraband, the government must still connect *both* spouses to the contraband, not just to the home. *See Garcia*, 919 F.3d at 496–500, *citing United States v. DiNovo*, 523 F.2d 197 (7th Cir. 1975). The remaining evidence in this case merely connects the rifle to Cockrell's and Price's shared home, not to Price himself. Thus, the undisputed evidence in this case fails to connect Price to the contraband's location. *Compare, e.g.*, *United States v. Lawrence*, 788 F.3d 234, 241 (7th Cir. 2015) (drugs were found in a drawer that matched a nightstand in the defendant's bedroom containing mail addressed to the defendant and bank checks from an account with his name); *United States v. Reed*, 744 F.3d 519, 526 (7th Cir. 2014) (gun was found in a purse in the master bedroom's closet near the defendant's jackets, and the purse contained personal identifiers of defendant); *United States v. Alanis*, 265 F.3d 576, 592 (7th Cir. 2001) (gun was found in the defendant's shared bedroom "in a nightstand next to his bed, with his eyeglasses, clothing, and wallet nearby"); *United States v. Kitchen*, 57 F.3d 516, 519–20 (7th Cir. 1995) (guns were found in the "bed area" and in a dresser, where bracelet with defendant's nickname was on top of the dresser and the bedroom contained papers similar to those seized from defendant's coconspirator at the scene of defendant's arrest).

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the same location as this ammunition (in a toolbox in the closet of the shared bedroom) could not be attributed to Price. Sent'g Hr'g Tr. 7–10, A49–52.

This Court should therefore reverse the convictions on Counts 2 and 3 because the government failed to establish constructive possession of either firearm.

III. The district court erred in calculating Price's Guidelines Range.

Even if this Court affirms the district court's denial of Price's motion to suppress and motion for acquittal, it should vacate his sentence and remand for resentencing. At sentencing, Price objected to three sentencing enhancements under the Guidelines: the two-level enhancement for an offense involving three to seven firearms under U.S.S.G. § 2K2.1(b)(1)(A); the two-level stolen firearm enhancement under U.S.S.G. § 2K2.1(b)(4); and the two-level obstruction of justice enhancement under U.S.S.G. § 3C1.1. Sent'g Hr'g Tr. 7–17, A49–59. The district court overruled these objections, resulting in a Guidelines Range of 92 to 115 months, and sentenced Price to 92 months. Sent'g Hr'g Tr. 18, 41–42. Without these three enhancements, Price's properly calculated Guidelines Range is 51 to 63 months. *See* U.S.S.G. § 5A.

A. The district court erred in applying the two-level enhancement for more than three firearms pursuant to U.S.S.G. § 2K2.1(b)(1)(A).

While the Guidelines impose an enhancement if the defendant's felon-in-possession offense involved "three or more firearms," *see* U.S.S.G § 2K2.1(b)(1)(A), the district court erred in applying that enhancement in this case. Section 1B1.3(a)(2) of the Guidelines defines what conduct is relevant for this enhancement: any act "part of the same course of conduct or common

scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). The undisputed facts in this case are legally insufficient to meet this standard.

The district court applied the two-level enhancement based on the two charged firearms and one uncharged firearm. *See* U.S.S.G. § 2K2.1(b)(1)(A); Sent'g Hr'g Tr. 9, A51. The third uncharged firearm stemmed from an interaction between Price, his friend Reveles, and employees at Indy Trading Post on October 17th. Price and Reveles visited the Indy Trading Post together, and Reveles wanted to use the store's shooting range. As store employees handed firearms to Reveles and gave safety instructions, Price briefly held an unloaded rental firearm to check if it was safe, and then handed it back to an employee. *See* Trial Tr. 48–49, 126–27; 209–10. Over Price's objection, the district court held that this was sufficient to trigger this sentencing enhancement, because the uncharged firearm was "part of conduct that occurred during the commission of the offense in preparation for the offense." Sent'g Hr'g Tr. 9, A51. The court explained that three firearms "is a proper calculation. . . . though I think it unfairly, in my view, enhances the guideline range in his case." Sent'g Hr'g Tr. 40–41.

As detailed above, this Court should vacate or reverse Price's two charged firearm convictions, bringing the total firearm count below the enhancement's required three. But in any event, this enhancement cannot stand, because the district court erred in finding that the third uncharged firearm was part of the same "course of conduct" as Price's charged offenses. The Guidelines commentary focuses on three factors when determining if offenses are part of

the same course of conduct: "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." U.S.S.G. § 1B1.3 cmt. n.5(B)(ii); *United States v. Draheim*, 958 F.3d 651, 658–59 (7th Cir. 2020); *see also United States v. Amerson*, 886 F.3d 568, 574 (6th Cir. 2018). In this case, the weak evidence of regularity and similarity cannot be overcome by the offenses' temporal proximity.

Price's offenses "were similar only in the broadest terms: they were [] illegal gun possessions." *United States v. Bowens*, 938 F.3d 790, 799 (6th Cir. 2019). If Price's uncharged conduct is "similar" to his charged offenses, the meaning of that word has been generalized away. Briefly holding an unloaded rental firearm, intended for someone else and while at a store with that person, has almost no similarity to possessing a firearm or ammunition at home or in a car. Nor does merely occurring at the same location transform dissimilar acts into similar ones.

Moreover, the district court in this case found only three instances of unlawful gun possession—just over the "bare minimum" sufficient for regularity. *Amerson*, 886 F.3d at 574 (explaining that "regularity is 'completely absent'" where there are only two offenses) (citation omitted). Given the lack of similarly and regularity, the short time interval between offenses cannot save the district court's finding. Although this Court has stated that "the contemporaneous, or nearly contemporaneous, possession of uncharged firearms is . . . relevant conduct," *see, e.g., United States v. Santoro*, 159 F.3d 318, 321 (7th Cir. 1998) (quoting *United States v. Powell*, 50 F.3d 94, 104 (1st

Cir. 1995)), cases relying on this principle can be distinguished because they involve much stronger evidence of regularity and/or similarity.[8] *See, e.g.*, *United States v. Ghiassi*, 729 F.3d 690, 694 (7th Cir. 2013) (nine firearms); *United States v. Birk*, 453 F.3d 893, 896–97 (7th Cir. 2006) (four firearms that defendant illegally sold or planned to sell).

B. The district court erred in applying the two-level enhancement for possession of a stolen firearm pursuant to U.S.S.G. § 2K2.1(b)(4)(A).

The district court also erred in applying U.S.S.G. § 2K2.1(b)(4)(A)'s two-level enhancement for possession of a stolen firearm. The district court's application of this enhancement in this case presents a question of first-impression in the Seventh Circuit: whether *Rehaif v. United States*, 139 S. Ct. 2191 (2019), requires the government to establish that the defendant had knowledge that the firearm was stolen when seeking this enhancement.

At sentencing, Price objected to the imposition of the stolen firearm enhancement because he had no knowledge that the firearm at issue, the pistol underlying Count 2, was stolen. *See* Dkt. 99 at 2 (gov't memorandum arguing for this enhancement); Sent'g Hr'g Tr. 10, A52 (Price objection to this enhancement). While the government offered testimony at trial that this firearm was stolen, it did not establish or attempt to establish that Price knew it was stolen. Sent'g Hr'g Tr. 10–11, A52–53. The district court agreed with the

[8] To the extent that this line of cases cannot be distinguished, we respectfully ask this Court to reconsider its precedent in light of the Guideline's emphasis on similarity and regularity, not just timing. *See Amerson* 886 F.3d at 577–78 (criticizing *Santoro* as inconsistent with the Guidelines).

government that it need not establish knowledge and imposed the enhancement. *Id.* at 11, A53. The district court pointed to the Guidelines' application note, which states that the enhancement "applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen[.]" U.S.S.G. § 2K2.1(b)(4) cmt. n.8(B); *see* Sent'g Hr'g Tr. 11, A53.

Although the Seventh Circuit has previously held that U.S.S.G. § 2K2.1(b)(4)(A)'s stolen firearm enhancement does not contain a scienter requirement, both § 2K2.1(b)(4) and this Court's interpretations of it were issued before *Rehaif*. *See United States v. Salinas*, 462 F. App'x 635, 637 (7th Cir. 2012) (citing *United States v. Schnell*, 982 F.2d 216 (7th Cir.1992)). In *Rehaif*, the Supreme Court held—contrary to every court of appeals to consider the issue—that the government must prove the defendant knew of his status as a person prohibited from possessing firearms. 139 S. Ct. at 2195, 2200. As the Court explained in *Rehaif*, "[w]e have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question." *Id.* at 2197 (explaining that the purpose of a scienter requirement is to "help[ ] to separate wrongful from innocent acts."). Increasing Price's sentence, with no requirement that he knew the gun was stolen, is contrary to the underlying principle of *Rehaif*—that only culpable conduct warrants punishment. *Id.* This Court therefore should hold that, following *Rehaif*, the government must establish that the defendant knew the firearm he allegedly possessed was stolen in order for an additional penalty to attach. No such evidence is present

here, and the district court therefore erred in permitting this sentencing enhancement.

C. The district court erred in applying a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1.

Finally, the district court erred in applying the obstruction of justice sentencing enhancement. U.S.S.G. § 3C1.1 provides for a two-level enhancement if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the *instant offense of conviction*." U.S.S.G. § 3C1.1 (emphasis added). This Court has held that, when a district court is imposing the obstruction enhancement based on alleged perjury, "the district court should make a finding as to all of the factual predicates necessary for a finding of perjury: false testimony, materiality, and willful intent." *Johnson*, 612 F.3d at 893. The district court imposed this two-level enhancement based on Price's testimony on cross-examination that he had not held nor shot a firearm before the day of his arrest in this case. *See* Sent'g Hr'g Tr. 15–16, A57–58. Price testified at sentencing that he had been confused about what the government was asking, but the district court stated that "[b]ased on the information provided to the Court by the Defendant's prior criminal history, the Court believes that that testimony was false[.]" *Id.* at 16, A58.

The district court erred by not making a finding as to the materiality of the testimony at issue. Not all false testimony is material; as this Court has

explained, false testimony is "material when it [is] crucial to the question of guilt or innocence." *United States v. Arambula*, 238 F.3d 865, 868 (7th Cir. 2001). The district court did *not* find that Price's statement that he did not know about and had never seen the firearms at issue in Counts 2 or 3 was false. *See* Trial Tr. 213, 215–18. The district court instead found that Price's statement about not having handled guns was untruthful because his prior convictions involved firearms. *See* Sent'g Hr'g Tr. 16–17, A58–59. In other words, the district court found that Price's testimony was false because he omitted the incidents at issue in his prior firearm convictions. This Court has held that testimony about prior offenses in a § 922(g)(1) case is not material where, as here, the defendant has already stipulated that he is a felon. *See Johnson*, 612 F.3d at 895; Trial Tr. 167 (Price's prior felony stipulation). Because the district court only found that the testimony was false as it pertained to Price's prior convictions, it was not material for purposes of this enhancement.

The district court similarly failed in not making a finding regarding willfulness. Price testified below that he was "confused by the Government's line of questioning" and "never knew that those questions were in reference to what [he] ha[d] been charged with in the past." Sent'g Hr'g Tr. 11–13, A53–55. Because the Guidelines commentary explicitly recognizes that the obstruction of justice enhancement is not appropriate in cases where misleading testimony is the result of "confusion" or "mistake," *see, e.g.,* U.S.S.G. § 3C1.1 cmt. n.2.,

the district court erred by not making a finding as to whether Price willfully gave false testimony.

Given the sentencing errors in this case, this Court should vacate Price's conviction and remand for resentencing.[9]

CONCLUSION

For the foregoing reasons, Price respectfully requests that the Court: (1) vacate Price's conviction and reverse the denial of the motions to suppress; (2) or, in the alternative, reverse Price's conviction on Counts 2 and 3 of the superseding indictment; and (3) vacate Price's conviction and remand for resentencing.

Dated: January 29, 2021

Respectfully submitted,
MARK PRICE

s/ Sarah M. Konsky
Sarah M. Konsky
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Counsel for Defendant-Appellant

[9] Price also objected to the denial of the acceptance of responsibility sentencing adjustment. U.S.S.G. § 3E1.1. Consistent with this Court's precedent, the district court overruled this objection, reasoning that Price's alleged perjury prevented him from receiving the two-level decrease for acceptance of responsibility. Sent'g Hr'g Tr. 16–17, A58–59; *see also United States v. Anderson*, 259 F.3d 853, 862 (7th Cir. 2001). Because this Court should remand for resentencing on the obstruction of justice enhancement, it should also remand on the acceptance of responsibility adjustment.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with page limitation of Rule 32(a)(7)(A) of the Federal Rules of Appellate Procedure because the Brief contains 11,112 words excluding the parts the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements in Rules 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: January 29, 2021

s/Sarah M. Konsky
Sarah M. Konsky

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Sarah M. Konsky, an attorney, certify that all materials required by Circuit Rule 30(a) and (b) are included in Defendant-Appellant's required short appendix.

Dated: January 29, 2021

s/ Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on January 29, 2021, I caused the foregoing **Brief and Required Short Appendix of Defendant-Appellant Mark Price** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief and Required Short Appendix of Defendant-Appellant Mark Price** to be transmitted to the Court via UPS overnight delivery, delivery service prepaid within 7 days of that notice date.

Dated: January 29, 2021

s/Sarah M. Konsky
Sarah M. Konsky

INDEX OF REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT MARK PRICE

AO 245B (Rev. 09/19) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

Southern District of Indiana

UNITED STATES OF AMERICA

v.

MARK PRICE

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:18CR00348-001
USM Number: 16648-028

Kenneth L. Riggins
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) after a plea of not guilty 1, 2, 3

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of Ammunition	10/16/2018	1
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	10/17/2018	2
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	10/17/2018	3

The defendant is sentenced as provided in pages 2 through 6 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)

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

IT IS ORDERED that the defendant shall 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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

11/5/2020
Date of Imposition of Sentence:

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

A CERTIFIED TRUE COPY
Roger A.G. Sharpe, Clerk
U.S. District Court
Southern District of Indiana
BY _____
Deputy Clerk

Date: 11/9/2020

DEFENDANT: Mark Price
CASE NUMBER: 1:18CR00348-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **92 months on each of Counts 1, 2, and 3, to be served concurrently.**

☒The Court makes the following recommendations to the Bureau of Prisons: Participate in HVAC, barber and electrical training programs. Participate in parenting or life skills programs, as well as UNICOR jobs. The Court recommends designation at CI Big Spring; CI D. Ray James; CI McRae; CI Rivers; Adams County Correctional Center; or Ohio Correctional Institution.

☒The defendant is remanded to the custody of the United States Marshal.

☐The defendant shall surrender to the United States Marshal for this district:

☐ at

☐ as notified by the United States Marshal.

☐The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Mark Price
CASE NUMBER: 1:18CR00348-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years on each of Counts 1, 2, and 3, to be served concurrently.**

MANDATORY CONDITIONS

1. You shall not commit another federal, state, or local crime.
2. You shall not unlawfully possess a controlled substance.
3. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You shall cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You 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 supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the conditions listed below.

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the judicial district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.

2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.

4. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.

5. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.

6. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.

7. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.

8. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.

DEFENDANT: Mark Price
CASE NUMBER: 1:18CR00348-001

9. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.

10. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.

11. You shall submit to substance abuse testing to determine if you have used a prohibited substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.

12. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.

13. You shall not knowingly leave the federal judicial district where you are being supervised without the permission of the supervising court/probation officer.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I shall comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant Date

U.S. Probation Officer/Designated Witness Date

DEFENDANT: Mark Price
CASE NUMBER: 1:18CR00348-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$300.00		$1,000.00		

☐ The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case (AO245C)* 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.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Totals			

☐ 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).

☒ 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** 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 23, 1996.

DEFENDANT: Mark Price
CASE NUMBER: 1:18CR00348-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

C ☐ 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 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 ☐ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

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

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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	Corresponding Payee

☐ 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: one Smith & Wesson .40 caliber pistol; one Ruger, model Mini 14, .223 caliber Remington rifle; one GSG .22LR caliber pistol; and any ammunition seized.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 1:18-cr-0348-JMS-MPB
	)	
MARK PRICE,	)	
	)	
Defendant.	)	

ORDER

Presently pending before the Court is Defendant Mark Price's Motion to Suppress Evidence. [Filing No. 40.] Mr. Price has been indicted for one count of unlawful possession of ammunition by a convicted felon and two counts of unlawful possession of a firearm by a convicted felon, [Filing No. 43], and the trial in this matter is set for February 18, 2020, [Filing No. 56 at 2]. Mr. Price seeks to suppress evidence obtained after what he contends were unlawful searches and seizures in violation of his Fourth Amendment rights. [Filing No. 40.] The Motion to Suppress is now ripe for the Court's review. For the reasons detailed herein, the Court **DENIES** Mr. Price's Motion to Suppress and his request for a hearing on the matter.[1]

[1] Although Mr. Price requested that this matter be set for an evidentiary hearing, [Filing No. 40 at 4], the Court concludes that a hearing is unnecessary because the facts asserted in the parties' briefs regarding the circumstances of the search are not in dispute. *See United States v. Curlin*, 638 F.3d 562, 564 (7th Cir. 2011) (holding that district courts are required to conduct hearings on motions to suppress "only when a substantial claim is presented and there are disputed issues of material fact that will affect the outcome of the motion.").

I.
BACKGROUND[2]

On October 10, 2018, Mr. Price visited Indy Trading Post, a firearms and ammunition dealer, and placed a special order for a magazine of ammunition, stating that he wanted to use the shooting range once the order came in. [Filing No. 2 at 3.] After viewing Mr. Price's identification, staff at Indy Trading Post conducted an online public records search and discovered that Mr. Price had previous felony convictions. [Filing No. 2 at 3.] The staff then contacted Special Agent Brian Clancy of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). [Filing No. 2 at 3.]

On October 16, 2018, Mr. Price returned to Indy Trading Post, accompanied by a female companion. [Filing No. 2 at 3.] He told the staff that he wanted to pick up the magazine that he had ordered and purchase additional .40 caliber ammunition. [Filing No. 2 at 3.] A store clerk showed Mr. Price a box of .40 caliber ammunition, and Mr. Price took possession of the box and opened it to view the live rounds inside. [Filing No. 2 at 3.] Mr. Price then purchased the .40 caliber ammunition and a holster for his female companion and exited the store with the .40 caliber ammunition and the magazine he had ordered. [Filing No. 2 at 3-4.]

The following day, Mr. Price contacted Indy Trading Post and asked about using the firing range, and the staff contacted Agent Clancy to advise that Mr. Price would be returning. [Filing No. 2 at 4.] Later that day, Mr. Price arrived at Indy Trading Post, driving a Ford Escape and accompanied by a female companion. [Filing No. 2 at 4.] Mr. Price stated that he and his companion wanted to use the shooting range and advised that the magazine he had purchased the

[2] Because the facts presented in the parties' briefs are not in dispute, the Court will base its recitation of the relevant facts on those included in the Affidavit in Support of the Criminal Complaint, [Filing No. 2].

previous day was not the correct type of magazine that he had intended to order. [Filing No. 2 at 4.] Agent Clancy, who was on the scene in an undercover capacity, arrested Mr. Price for his possession of ammunition the previous day. [Filing No. 2 at 4.]

Agent Clancy then contacted parole officers with the Indiana Department of Corrections, because Mr. Price was on parole for a state conviction for unlawful possession of a firearm by a serious violent felon. [Filing No. 2 at 4.] Under the conditions of his parole, Mr. Price had agreed not to engage in any criminal conduct, not to possess or use drugs, and not to possess any firearms or weapons. [Filing No. 2 at 4-5; Filing No. 42-1 at 1.] He also agreed that he was legally in the custody of the Department of Corrections, that his parole officer could visit him at any reasonable time, and that his "person and residence or property under [his] control may be subject to reasonable search . . . if the [parole] officer or [Department of Corrections] official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole." [Filing No. 2 at 5; Filing No. 42-1 at 1.]

Three parole officers ("the Parole Officers") arrived at Indy Trading Post to conduct a compliance search of the Ford Escape that Mr. Price had been driving. [Filing No. 2 at 5.] One officer discovered a Smith & Wesson .40 caliber pistol in the center console, at which time he notified Agent Clancy of the firearm. [Filing No. 2 at 5-6.] Agent Clancy then obtained a search warrant for the vehicle, seized the pistol, and discovered a baggie of suspected marijuana located in a Clorox cleaning wipe container in the rear trunk area. [Filing No. 2 at 6.]

Agent Clancy and the Parole Officers then transported Mr. Price to his residence, where the Parole Officers conducted a compliance search. [Filing No. 2 at 6.] In a bedroom believed to be Mr. Price's, the Parole Officers located what they believed to be marijuana roaches and smelled what they believed to be the odor of burnt marijuana in an ash tray next to the bed. [Filing No. 2

at 6.] They also located a box of .40 caliber ammunition in the TV stand and observed mail addressed to Mr. Price. [Filing No. 2 at 6.] The Parole Officers then informed Agent Clancy of what they had found, and Agent Clancy obtained a warrant to search the residence, another vehicle on the property, and an outbuilding. [Filing No. 2 at 6-7.] During the subsequent search, Agent Clancy and the Parole Officers located the following items:

- a "drug note pad" listing prices and amounts;
- a bag to the holster Mr. Price purchased on October 16;
- the ammunition that Mr. Price purchased on October 16 and the receipt from Indy Trading Post;
- $1,038 in cash, including $470 that was hidden in a tin container inside a heating vent and $586 in a small box located on the same TV stand where the ammunition and receipt were found;
- two suspected marijuana roaches;
- a toolbox containing a firearm, firearm box, and assorted ammunition;
- a Ruger Mini 14 rifle; and
- mail addressed to Mr. Price at the address of the residence.

[Filing No. 2 at 7-8.]

II.
DISCUSSION

Mr. Price argues that the Parole Officers' searches of his vehicle and residence, as well as ATF's subsequent searches of those areas, were unlawful because the Parole Officers acted as a "stalking horse" for ATF. [Filing No. 41 at 6.] He argues that he had a reasonable expectation of privacy in his residence and in the vehicle, as the doors were locked, and the weapon was not in plain view. [Filing No. 41 at 7-8.] Mr. Price argues that the Parole Officers were merely an

investigative tool used by ATF Agents to evade the warrant and probable cause requirements of the Fourth Amendment. [Filing No. 41 at 10-11.]

The Government responds that the search was lawful, first arguing that the stalking horse theory is not widely recognized in law and the proper inquiry is to determine whether the Parole Officers' searches were reasonable under the totality of the circumstances. [Filing No. 42 at 4-6.] According to the Government, the search was reasonable because, after receiving information that Mr. Price had purchased ammunition, the Parole Officers had reasonable cause to believe that Mr. Price was in violation of his parole conditions. [Filing No. 42 at 6.] The Government also argues that, even if the stalking horse theory were applicable, the Parole Officers were acting within their proper authority and not as a stalking horse, because it was within the scope of their official duties to conduct compliance searches after receiving information that created a reasonable suspicion that Mr. Price was violating his parole. [Filing No. 42 at 6-7.] Finally, the Government argues that, even if the searches were improper, the inevitable discovery doctrine applies because: (1) at the time of Mr. Price's arrest, law enforcement had probable cause to believe that he was in possession of firearms and ammunition, and could have obtained a warrant on that basis; and (2) because Mr. Price was arrested, the vehicle would have been inventoried before being towed, and the items inside would have been discovered during the inventory search. [Filing No. 42 at 7.]

A review of the Supreme Court's Fourth Amendment jurisprudence concerning probationers and parolees will be helpful to understanding the parties' arguments and the ultimate result in this case. In *Griffin v. Wisconsin*, the Supreme Court considered whether a probation officer's warrantless search of a probationer's home violated the Fourth Amendment. 483 U.S. 868, 870 (1987). Pursuant to a Wisconsin regulation applying to all probationers, Mr. Griffin was subject to a search condition that allowed any probation officer to search his home without a

warrant, as long as there were "reasonable grounds" to believe that contraband was present. *Id*. at 870-71. The Court determined that the regulation satisfied the Fourth Amendment because the state's operation of a probation system presented "special needs" beyond normal law enforcement justifying departure from the usual warrant and probable cause requirements. *Id*. at 873-74. The Court considered that: (1) probationers do not enjoy the same freedoms as ordinary citizens, "permitting a degree of impingement upon privacy that would not be considered constitutional if applied to the public at large;" and (2) warrant or probable cause requirements would prevent probation officers from responding quickly to misconduct and "interven[ing] before a probationer does damage to himself or society," and thereby would reduce the deterrent effect of the probation arrangement. *Id*. at 874-80. The Court concluded that, because the regulation was valid, the search was valid, and it was "unnecessary to consider whether . . . *any* search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present." *Id*. at 880 (emphasis in original).

Following *Griffin*, some courts recognized that, while searches by probation officers are generally valid based on the state's "special needs" underlying the probation system, there is an exception where the probation officer acts as a "stalking horse" for police. *See, e.g.*, *United States v. Watts*, 67 F.3d 790, 793-94 (9th Cir. 1995), *cert. granted, judgment rev'd on other grounds*, 519 U.S. 148 (1997). The Ninth Circuit has explained this so-called "stalking horse theory" as follows:

> A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers. However, collaboration between a probation officer and police does not in itself render a probation search unlawful. The appropriate inquiry is whether the probation officer used the probation search to help police evade the Fourth Amendment's usual warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives. A probation officer does not act as a stalking horse if he initiates the search in the performance of his duties as a probation officer.

Id. at 794. The Seventh Circuit has never addressed this issue.

Then, in *United States v. Knights*, the Supreme Court addressed the question of "whether the Fourth Amendment limits searches pursuant to [a] probation condition to those with a 'probationary' purpose." 534 U.S. 112, 116 (2001). In that case, one of the conditions of Mr. Knights' probation was that he submit to the search of his person, property, and residence at any time, with or without a search warrant or "reasonable cause." *Id*. at 114. After becoming suspicious that Mr. Knights was involved in a string of arsons and vandalism, a detective—who was aware of the search condition—searched Mr. Knights' apartment without a warrant. *Id*. at 115. The Supreme Court rejected Mr. Knights' argument that "a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in *Griffin*—i.e., a 'special needs' search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions"—and instead concluded that the proper inquiry was whether the search was reasonable under the general Fourth Amendment approach of examining the totality of the circumstances, with the search condition constituting "a salient circumstance." *Id*. at 117-118.

As the *Knights* Court explained, the "touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id*. at 118-19 (internal quotation marks and citation omitted). The defendant's "status as a probationer subject to a search condition informs both sides of that balance." *Id*. at 119.

Specifically, the Court noted that probation is on the "continuum" of possible criminal punishments and therefore a probation condition may curtail the offender's individual freedoms,

just as incarceration does. *Id.* The probation condition requiring that Mr. Knights submit to searches without a warrant or reasonable cause, plus the fact that he was aware of the condition, "significantly diminished [his] reasonable expectation of privacy." *Id.* at 119-120. On the other hand, the Court noted that probationers are more likely to violate the law than ordinary citizens, and the state has an interest in apprehending violators of the law and protecting potential victims. *Id.* at 120-21. Ultimately, the Court held that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house," and summarized its reasoning as follows:

> The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. . . . When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

Id. at 121 (internal citations omitted).

Subsequently, in *Samson v. California*, the Supreme Court addressed "a variation of the question [it] left open in [*Knights*]—whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." 547 U.S. 843, 847 (2006). In that case, Mr. Samson, a parolee, was required to submit to searches without cause, and a police officer who was aware of his parolee status decided to search him based solely on that status, without any other grounds for suspicion. *Id.* at 846-47. First, the Court determined that parolees have even fewer expectations of privacy than probationers, because parole is closer on the "continuum" of punishments to incarceration than probation is. *Id.* at 850. The Court then reviewed California's

parole system—which, among other things, required that parolees submit to drug testing, refrain from associating with gang members, meet with parole officers, seek permission before travelling more than 50 miles from home, and refrain from criminal conduct and possession of firearms—and concluded that the "extent and reach of these conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone." *Id*. at 851-52. Based on these conditions, combined with the search condition, the Court concluded that Mr. Samson did not have *any* reasonable expectation of privacy. *Id*. at 852. However, the state had an "overwhelming interest" in supervising parolees, because they are more likely to commit future criminal offenses, which "warrant[ed] privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id*. at 853.

The Supreme Court has indicated that the "special needs" justification for a search addressed in *Griffin* is separate from the general Fourth Amendment reasonableness inquiry. *See Samson*, 547 U.S. at 852 n.4 ("Nor do we address whether California's parole search condition is justified as a special need under [*Griffin*], because our holding under general Fourth Amendment principles renders such an examination unnecessary."); *Knights*, 534 U.S. at 121 ("Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose."). In light of this distinction, several courts have rejected the stalking horse theory or expressed doubt as to its validity following *Knights* and *Samson*. *See United States v. Ickes*, 922 F.3d 708, 712 (6th Cir. 2019) ("[W]e conclude that the 'stalking horse' caveat, if it survives *Knights* at all, does not apply when a probationer is subject to a valid search provision and law-enforcement officers have a reasonable suspicion that the probationer is engaging in illegal activity."); *United States v. Sweeney*, 891 F.3d 232, 236 (6th Cir.), *cert. denied*, 139 S. Ct. 292 (2018) ("When the government relies on the 'special needs'

doctrine to justify a search, the stalking horse exception may still apply, but when the government relies on the totality-of-the-circumstances doctrine as articulated in *Samson*, it does not."); *United States v. Williams*, 417 F.3d 373, 377 (3d Cir. 2005) ("It is clear that the Supreme Court's more recent teaching in *Knights* precludes the viability of "stalking horse" claims in [the probationary search] context. 'Stalking horse' claims are necessarily premised on some notion of impermissible purpose, but *Knights* found that such inquiries into the purpose underlying a probationary search are themselves impermissible."); *United States v. Brown*, 346 F.3d 808, 810 (8th Cir. 2003) ("The government counterargues that [*Knights*] eliminates the stalking horse theory. We agree with the government."); *United States v. Reyes*, 283 F.3d 446, 463 (2d Cir. 2002) (concluding that the stalking horse "doctrine is not a valid defense in this Circuit"); *United States v. Stokes*, 292 F.3d 964, 967 (9th Cir. 2002) (rejecting the argument that "a probation search that was a subterfuge for a criminal investigation violated the Fourth Amendment" because "[t]he Supreme Court put a stop to this line of reasoning" in *Knights*).

Here, under *Knights* and *Samson*, the relevant question is whether the Parole Officers' search of Mr. Price's vehicle and residence were reasonable under the circumstances, balancing the degree to which they intruded upon Mr. Price's privacy against the degree to which they were necessary for the promotion of legitimate governmental interests. *See Knights*, 534 U.S. at 118-19. Mr. Price's expectation of privacy was diminished due to his status as a parolee, given that he was in the legal custody of the state and was subject to various conditions of supervision, including one permitting searches of his property based on less than probable cause. *See Samson*, 547 U.S. at 851-52. Although this expectation was not necessarily diminished to the extent that the defendants' expectations of privacy were in *Samson* and *Knights*—those conditions permitted

suspicionless searches, while Mr. Price's condition required "reasonable cause"—it was diminished nonetheless.

Furthermore, as *Samson* recognized, the state has an "overwhelming interest" in supervising parolees like Mr. Price. *See id.* at 853. The interest in favor of the state was stronger here than it was in either *Knights* or *Samson*, because Mr. Price was a parolee whereas Mr. Knights was a probationer, and there were circumstances indicating that Mr. Price had committed a crime whereas the search of Mr. Samson was not supported by any grounds for suspicion. Specifically, the Parole Officers were given information indicating that: (1) Mr. Price had purchased the .40 caliber ammunition and the magazine from Indy Trading Post on October 16, taking both items into his possession when he left; (2) Mr. Price arrived at Indy Trading Post to use the shooting range on October 17; and (3) Mr. Price had been arrested at the shooting range for his prior possession of ammunition. This information undoubtedly created a "sufficiently high probability that criminal conduct [was] occurring to make the intrusion on [Mr. Price's] privacy interest reasonable." *See Knights*, 534 U.S. at 121. Indeed, the Parole Officers knew for certain that Mr. Price had already committed the offense of unlawfully possessing ammunition and he was arrested while on his way to possess and use a firearm at the shooting range. Based on all of these circumstances, it was reasonable for the Parole Officers to search Mr. Price's residence and the property within his control, including the vehicle.

Under this analysis, the stalking horse theory has no application, the Court need not consider whether the search was based on "special needs," and the inquiry ends here. *See Samson*, 547 U.S. at 852 n.4; *Ickes*, 922 F.3d at 712; *Sweeney*, 891 F.3d at 236; *Williams*, 417 F.3d at 377; *Brown*, 346 F.3d at 810; *Stokes*, 292 F.3d at 967. Nevertheless, the Court notes that the Parole Officers, who were responding to information that Mr. Price had committed a crime and was in

the custody of federal authorities for doing so, were acting well within their supervisory authority in searching the vehicle and residence. Because they were acting pursuant to their own legitimate objective of determining whether Mr. Price had violated his parole conditions, they cannot be deemed a mere "stalking horse" for law enforcement. *See, e.g.*, *Watts*, 67 F.3d at 794. Furthermore, even if the Parole Officers had not been contacted, and ATF agents conducted the searches themselves, such searches would have been reasonable under the Fourth Amendment for the same reasons that the Parole Officers' searches were reasonable.[3]

III.
CONCLUSION

Based on the foregoing, the searches of Mr. Price's vehicle and residence did not violate the Fourth Amendment. His Motion to Suppress Evidence, [40], is **DENIED**.

Date: 10/18/2019

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

Distribution via CM/ECF to all counsel of record

[3] In light of the conclusion that the searches did not violate the Fourth Amendment, it is unnecessary for the Court to address the government's inevitable discovery argument.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. 1:18-cr-00348-JMS-MPB
	)	Indianapolis, Indiana
MARK PRICE,	)	Tuesday, February 18, 2020
	)	8:57 o'clock a.m.
Defendant.	)	Volume 1 of 2

Before the
HONORABLE CHIEF JUDGE JANE MAGNUS-STINSON

TRANSCRIPT OF JURY TRIAL, DAY 1

APPEARANCES:

FOR THE GOVERNMENT:	United States Attorney's Office By: Pamela Domash and Jayson W. McGrath 10 West Market Street, Suite 2100 Indianapolis, Indiana 46204
FOR THE DEFENDANT:	Attorney at Law By: Kenneth Riggins 1512 Delaware Street Indianapolis, Indiana 46204
ALSO PRESENT:	The Defendant in person.
COURT REPORTER:	Jean A. Knepley, RDR, CRR, CRC, FCRR 46 East Ohio Street, Room 309 Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPTION

among yourselves or with anybody else, and don't form or express an opinion until you have heard all the evidence, the arguments of the attorneys, and you have received the instructions from the Court. We will be in a brief recess.

THE CLERK: The court is in recess.

(Jury out, 1:58 p.m.)

MR. RIGGINS: Your Honor, if I could, at this time I would renew the motion to suppress that we previously filed.

THE COURT: I am reading my entry right now.

MR. RIGGINS: Okay. Response from the Government?

MS. DOMASH: Your Honor, first, I think it is premature because there are additional witnesses to testify, and additionally, the last witness did not testify, which is the basis of the motion was that parole came to the scene in order for law enforcement to circumvent a search warrant and law enforcement to simply direct parole to do a search of an area that they would not have otherwise done in order to circumvent probable cause for a search warrant. That is not what the testimony was and what happened in this case.

The testimony so far has been that parole came to the scene because law enforcement contacted them and told them that they had information that this Defendant was in violation of the law and that he had property under his control at that location, being a vehicle, and that under their authority, that gave them permission to search the vehicle. There has

been no testimony that they only searched the vehicle because law enforcement called them to the scene for the purpose of searching a vehicle.

THE COURT: Response?

MR. RIGGINS: Your Honor, we heard it differently. That is the best I can tell you. I heard this parole agent indicate that he was called to the scene for the purpose of searching that vehicle, thereby circumventing the ATF agent from going and getting a search warrant to actually search inside the vehicle. There was no probable cause to indicate that there was anything inside the vehicle.

THE COURT: Well, there certainly was a reason -- there was at least a reasonable suspicion, as the Court found, and I don't think there is anything wrong with the ATF and parole working together to ensure that somebody is either compliant with their conditions of parole or the law, which is probably one of the conditions of parole that they have to comply with as the law. So I -- for the same reason as indicated in the Court's earlier ruling on the motion to suppress, I don't think there is anything unconstitutional about the method by which the search was conducted.

MR. RIGGINS: Thank you, Your Honor.

THE COURT: We will be in a brief recess.

THE CLERK: All rise.

(Brief recess, 2:01 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. 1:18-cr-00348-JMS-MPB
	)	Indianapolis, Indiana
MARK PRICE,	)	Wednesday, February 19, 2020
	)	8:45 o'clock a.m.
Defendant.	)	Volume 2 of 2

Before the
HONORABLE CHIEF JUDGE JANE MAGNUS-STINSON

TRANSCRIPT OF JURY TRIAL, DAY 2

APPEARANCES:

FOR THE GOVERNMENT:	United States Attorney's Office By: Pamela S. Domash and Jayson W. McGrath 10 West Market Street, Suite 2100 Indianapolis, Indiana 46204
FOR THE DEFENDANT:	Attorney at Law By: Kenneth Lawrence Riggins 1512 Delaware Street Indianapolis, Indiana 46204
ALSO PRESENT:	The Defendant in person.
COURT REPORTER:	Jean A. Knepley, RDR, CRR, CRC, FCRR 46 East Ohio Street, Room 309 Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
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know, Mr. Martin, that she does not have to testify, that the parties have rested, and she is free to come into the courtroom if she wants to.

MR. MARTIN: Thank you, Your Honor.

THE COURT: She doesn't have to. Thank you.

MR. RIGGINS: Your Honor, I would move for Rule 29 as well.

THE COURT: Go ahead. You can do that at this time.

MR. RIGGINS: Your Honor, may I get a little closer to my paper?

THE COURT: Of course.

MR. RIGGINS: Your Honor, I understand as it relates to Count I, we move that the prosecution has not met its burden as it relates to the unlawful possession of the ammunition by Mr. Price. As you know, we have stipulated to two of the four elements and conceded them during the midst of the litigation. That was Elements 2 and 3. So that left only Elements 1 and 4, and if you look at it on its face, given the video, it does appear that Mr. Price is possessing ammunition in his hand at the store.

So that would mean that we would have to move on to the fourth element, which under the circumstances, we would argue that we heard from the expert witness under those circumstances, and the expert witness that the Government brought forth, we think is inadequate. He indicated that it

is a possibility that those bullets could have been made anywhere other than where he assumed that they were. He did not go the extra step in trying to solidify if, in fact, there was a serial batch that came from that particular manufacturer under those circumstances.

In the alternative as well, Your Honor, we would argue that more importantly, the conditional parole release agreement that was given to Mr. Price and that he had to sign and review with the parole officer talked about what we believe would be his civil rights. Now, we know in Indiana or at least I am unaware of it at this point in time, that there is any formal recognition by the state of Indiana restoring someone's civil rights. But there is an agreement that was given to Mr. Price and was gone over with Mr. Price in which during his parole release agreement, the document was signed, and we believe that this was the partial restoration of what would be his civil rights. If you will recall --

THE COURT: It would certainly help me if I had a copy of that document.

MR. RIGGINS: It is Defense 101.

THE COURT: It is not in my book.

THE CLERK: No. Here is the original.

THE COURT: Thank you very much. All right, go ahead, please.

MR. RIGGINS: If you take a look at that, we

contend, and we asked the parole officer while he was on the stand, did this serve as the rights that Mr. Price would be entitled to? And his answer was yes, that it were the rights that Mr. Price would be entitled to.

Under Paragraph 8, firearms and dangerous weapons, it clearly states that I understand that carrying, dealing in, or possessing firearms, explosive devices, or deadly weapons is a violation of my parole release agreement. Your Honor, we contend that that particular statement right there covers everything that, as it relates to firearms and dangerous weapons.

Now, there was no testimony that was given during the course of this trial that anything other than a firearm or was there anything else in that sentence or paragraph that would cover ammunition or bullets. Specifically, I asked the last parole officer who took the stand, is there anything on this page that says ammunition or bullets during cross-examination and his answer was no.

The prosecution didn't choose to bring any other witnesses forward that would go into greater detail as to how bullets would be covered or ammunition would be covered under those circumstances, which also brings us to another point, Your Honor. While we understand that federal law says that a convicted felon cannot possess ammunition, and ammunition is clearly defined as it is in our jury instructions. Under

these circumstances, we have to look and see what Indiana was doing.

Indiana did not define ammunition as something that a person who has a prior felony conviction should be not entitled to hold, and all they had to do in the plain language was to simply state "ammunition and/or bullets." And that is not covered, and we asked those questions during the course of our cross-examination.

We would ask this Court to, to agree with us in those positions, and we submitted the cases in advance, *Boyce* and also *Buchmeier* where it discussed these particular issues. And while this case is not exactly the same because it is about ammunition, it is about whether Mr. Price had rights restored to him after he had been released from prison.

It clearly, clearly states that firearms is something that he could not possess, and we are only talking about Count I under these circumstances as it relates to that. And we believe that this gives Mr. Price, even if, even if he is -- if they believe that he possessed the ammunition at this time, we believe that this nullifies it, saying that Mr. Price could not be held responsible for the ammunition portion of Count I.

THE COURT: Thank you. Ms. Domash.

MS. DOMASH: Your Honor, going to --

THE COURT: Start first with the notion of inadequate proof on Element 4. Thank you.

MS. DOMASH: Yes. First, as to Element 4, interstate nexus, the Government presented testimony from an expert witness, Special Agent Steven Tastle, who testified that he examined the ammunition and the firearms, and that pursuant to his examination, each one of those items was manufactured outside the state of Indiana and had traveled in interstate commerce. That is sufficient. His testimony is sufficient evidence to prove that element.

Obviously, the Defense is free to argue otherwise, but in the light most favorable to the Government, certainly, that element has been proven. As to --

THE COURT: Let me stop you there and say that I think that the issue of the sufficiency of the proof -- there is not an absence of evidence on the issue of interstate nexus. The issue is whether the jury credits that testimony, in the Court's view, being sufficient. So I think it is a matter of weight, and the Court will deny the motion based upon -- he did testify. He did testify also on cross.

There is a quote, possibility, but it is up for the jury to decide whether that quote, in the sense that he also said anything is possible, whether that amounts to reasonable doubt. I think that is a matter of argument and not for me to take the count away. Go ahead, please.

MS. DOMASH: Okay. As to Element 1, the knowing possession of the items, there has been ample evidence as to

the ammunition and the two firearms, video evidence of the Defendant possessing the ammunition, statements by the Defendant that we heard from in Tyler Hands that the Defendant was purchasing a magazine for his rifle, which was recovered at his residence.

That his .40 caliber firearm was going to be too much of a firearm for the woman he brought to the range, that firearms were recovered in the vehicle he drove there. He purchased ammunition in the caliber of that firearm, and all that and the ammunition was also recovered at his residence, along with a receipt from purchasing it. So the Defendant's knowing possession of those items have been proven, I believe.

Then, moving to the Defendant's argument as to the question of his civil rights being restored, the document that he relies on is his conditional parole release agreement. This agreement is not, as the case law that he relies upon, a document restoring any civil rights. In fact, this document, in and of itself expressly -- it never expressly restores any rights. It, in fact, it takes away most rights that people have, the right to travel freely, the right to drink alcohol, the right for law-abiding citizens to possess firearms, the right to visit jails or other agencies.

His home can be searched at any time by parole. None of these could be construed as a civil right; and additionally, simply because if the document doesn't state he can't possess

ammunition, it only states he can't possess firearms, it also states in Paragraph 7, he can't engage in criminal conduct prohibited by federal or state law or local ordinance. A felon in possession of ammunition is expressly prohibited by federal law. This is not a document that lists out every law in federal or state government. It also doesn't say you can't commit murder, but that is prohibited by state law. And I don't think anyone would think it can be construed to believe that because it doesn't expressly state you can't have it, that means you can't commit that crime.

So the Defendant has not, I believe, met his burden to show that any of his civil rights have been restored there or he had any reason to believe those civil rights had been restored. And I don't believe that that is a viable defense or a reason for a Rule 29.

THE COURT: Thank you. So would you respond, Mr. Riggins, to the point just made by Counsel that the restoration of rights defense would be a matter of it is your burden to prove in -- I think the *Burton* case --

MR. RIGGINS: Yes.

THE COURT: -- establishes that.

MR. RIGGINS: It does, Your Honor. In order for us to assert an affirmative defense, we have to show that Mr. Price clearly thought or believed that his rights had been restored, and because Indiana, that is the only document that

I am aware of in the state of Indiana where it outlines what a person who is on parole would have the opportunity to do and to engage in.

And we asked the parole officer on the stand if, in fact, that those were conditions of his rights, and that parole officer, Nathan Hester, I believe his name was, Nathaniel Hester, was the witness who said this was akin to Mr. Price's rights being restored. Now, Your Honor, as I pointed out before, the state law did not specifically delineate ammunition as being listed as one of the things that he cannot possess.

And as we went on further in the additional cases in the Seventh Circuit has a discussion about that. If we assert an affirmative defense, then, they have to come back and show that somehow this doesn't apply. We believe that this does apply, because this is the only opportunity that he received as it relates to a notification.

THE COURT: Okay, so a couple of things. We are here pursuant to the -- I want to pull up a different case. The exception that is contained in federal law -- and let me get to the cite. In order to invoke the restoration of rights defense to the prohibition against possessing a firearm, that is under -- get my cite right here, 18 United States Code, 921(a)(20), right? Okay.

So the restoration of rights is contained within a

statute who has had civil rights restored in order to qualify as a restoration of civil rights under the *Buchmeier* case, and they cite *United States v. Williams*. The Court held that three civil rights matter: The right to vote, the right to hold office, and the right to serve on juries.

The document, this agreement, Exhibit 101, mentions none of the big three, if you will. So none of those rights have been restored pursuant to this document; and as importantly, while there might be some restoration of rights under Indiana law by operation of statute, that would not happen until he is off parole. So he is on parole at the time of this crime. So in the Court's view, there is no possible way that he could have had his rights restored.

I would also note that the *Burton* case I cited a minute ago determined that that is an objective, not a subjective standard. So whether he believed his rights were restored or whether he believed he could possess ammunition in essence, in this case, is no more than a defense that ignorance of the law is his excuse. And we know that it is not because federal law prohibited the possession of ammunition.

So I think looking at the circuit precedent, I am looking at the *Buckmeier* case right now, *Buchmeier* case right now that is found at 581 F.3d 561. And then, the *Burton* case that -- I will find that cite. Is it *Burnett*, *Burnett*? Okay. The *Burnett* case, which is found at -- hold on, I am opening it.

It is 641 F.3d 894. That is the case that says it is an objective rather than a subjective standard.

So in this case, the Court finds there is no evidence that any rights had been restored to Mr. Price. He had more than one prior felony that was charged in the case, including the one for which he was on parole. So the absence of the term "ammunition" doesn't allow him to possess ammunition, given the fact that Paragraph 7 prohibits criminal conduct. So the Court will deny the motion on that basis as well. I think I walked through the whole thing.

MR. RIGGINS: As it relates to Count II, Your Honor --

THE COURT: Go ahead.

MR. RIGGINS: Count II is the possession of the weapon that was found inside the Ford Escape in the center console.

THE COURT: Yes.

MR. RIGGINS: We believe that there is no evidence that suggests in any way, form, or fashion that Mr. Price was aware of the fact that there was a handgun that was inside the center console. What we believe is critical under these circumstances is that Jurnee Reveles was the person who the Government could have brought forward to show whether they believed that she saw him with the weapon at that time inside the vehicle at any time or that she saw him ever open the

center console at that time. There is nothing to suggest that Mr. Price had any knowledge, at all, that that weapon was located inside the vehicle.

I would also point out if I could, Your Honor, that that vehicle was titled to Telisa Cockrell, and if we look at the first video that they showed us, we clearly saw that Miss Cockrell had control and was operating the vehicle the first time that they approached the store together on that occasion. I point out the fact that the Indy Trading Post witness, Mr. Hands, acknowledged that Mr. Price came into the store first, which we could see through the windows at their location and that Miss Cockrell was the person to come in second.

And you can see on the video that she was the one that was in complete control of that vehicle, which was the day before. It is highly likely since she is the person who owned that vehicle, controlled that vehicle, that that weapon is, in fact, her weapon and not his. And he had no -- there is nothing to suggest that he had any knowledge that that weapon was in the car at any time.

THE COURT: Thank You. Ms. Domash?

MS. DOMASH: Your Honor, we have the Defendant's own statement, testimony of his statements made to Tyler Hands stating that his .40 was going to be too much for Miss Reveles to handle. That is why he wanted to rent a firearm. We also

have him purchasing ammunition of the same caliber as that firearm, and the firearm was located in the center console of the car that he was driving and he was in possession of. And all that is more than sufficient evidence to prove him guilty.

THE COURT: That would be up to the jury to decide, but it is certainly more than sufficient evidence to allow the count to go to the jury for its consideration, the fact that she just -- the testimony.

MR. RIGGINS: Lastly, Your Honor, is Count III.

THE COURT: Yes.

MR. RIGGINS: What we would contend here is that the rifle was found not inside the residence where Mr. Price was coresiding with Miss Cockrell but that the weapon was actually found outside, inside a minivan, who we never found out who was the actual owner of that minivan or when they parked the minivan there and how long that the rifle had been located inside the rifle [SIC]. There is no knowledge at any time that has been presented to this jury to show that Mr. Price had any knowledge that that rifle was located at that location.

And while I missed saying it with the first handgun, I will certainly include it with the rifle as well, but there is no fingerprints or DNA evidence to connect him to that rifle as well that was located on the premises. It was not inside the premises but outside the premises and what appeared to be

behind the locked gate. We have no knowledge of who put it there, and we have no knowledge at this time of who owned that vehicle.

THE COURT: Thank you. Ms. Domash?

MS. DOMASH: Your Honor, again, we have testimony on statements this Defendant made repeatedly contacting Indy Trading Post, ordering a magazine for that rifle; specifically, discussing that rifle, telling an employee at Indy Trading Post that he tried putting the magazine in the rifle and it didn't fit. So there is -- the rifle was also located in a vehicle in which the car keys were next to the ammunition and receipt that he was viewed on video purchasing. So there is ample evidence to prove him guilty beyond a reasonable doubt and present this to the jury.

THE COURT: Again, that is a matter of argument in the Court's view, and the facts just elicited or just pointed out by the Government, in the Court's mind, then, undermine any notion that there is insufficient evidence for the jury to decide the case. It is up to the jury to decide the weight they give to the facts as each side will argue them. I believe there is sufficient evidence in the record to allow Count III to go to the jury as well. The motion with respect to each count is denied.

Anything further? And just for the record, we will treat that argument as though it were just made after the conclusion

of the Government's case.

MR. RIGGINS: Yes. Thank you, Your Honor.

THE COURT: So we, then, will be ready for me to read the first -- let's see, it will be the final jury instructions through Instruction 18, and then, I will -- and then, you will make argument. And then, I will read 19 through 23. Is that acceptable, Ms. Domash?

MS. DOMASH: Yes, Your Honor.

THE COURT: Mr. Riggins?

MR. RIGGINS: Yes, Your Honor.

THE COURT: What did we say, 45 for final argument? Did we say?

THE LAW CLERK: It was 30.

THE COURT: Thirty? Okay. Is that still acceptable to the Government?

MS. DOMASH: Yes, Your Honor.

THE COURT: To the Defense?

MR. RIGGINS: Yes, Your Honor.

THE COURT: Ms. Domash, how does the Government wish to split its time?

MS. DOMASH: Twenty and ten.

THE COURT: I will notify you, then, when you have used 15.

MS. DOMASH: Thank you.

THE COURT: And then, I will notify you when you

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 1:18-cr-00348-JMS-MPB
	)	
MARK PRICE,	)	
	)	
Defendant.	)	

ORDER

The Superseding Indictment in this case charged Defendant Mark Price with one count of Felon in Possession of Ammunition (Count 1) and two counts of Felon in Possession of a Firearm (Counts 2 and 3). [Filing No. 43.] A jury trial in this matter began on February 18, 2020, and at the close of the Government's case, Mr. Price moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a) on all three counts. [Filing No. 78.] The Court denied that motion. [Filing No. 78.] On February 19, 2020, after a two-day jury trial in this matter, the jury reached a unanimous guilty verdict on all counts, and the Court entered convictions consistent with the verdict. [Filing No. 78.] On February 25, 2020, Mr. Price filed a Motion for Judgment of Acquittal or Alternatively, for a New Trial, [Filing No. 83], which is now ripe for the Court's decision.

I.
STANDARDS OF REVIEW

A. Rule 29

Federal Rule of Criminal Procedure 29 provides that a defendant may move for a judgment of acquittal within 14 days after a guilty verdict or after the Court discharges the jury, whichever is later. It also provides that "[i]f the jury has returned a guilty verdict, the court may set aside the

verdict and enter an acquittal." Fed. R. Crim. P. 29(c)(2). In sum, Rule 29 "permits a defendant to move for a judgment of acquittal even after a guilty verdict is entered if he does not believe the evidence is sufficient to sustain a conviction." *United States v. Torres-Chaves*, 744 F.3d 988, 993 (7th Cir. 2014).

"When faced with a Rule 29 motion, a court asks 'whether, after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis omitted). The Court defers to the credibility determinations of the jury and "will over-turn a conviction on sufficiency-of-the-evidence grounds only if no rational jury could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hopper*, 934 F.3d 740, 754 (7th Cir. 2019) (quotation and citation omitted). "A defendant's burden in showing the evidence was insufficient to support a conviction is indeed a high one." *Id.* (citing *United States v. Rollins*, 544 F.3d 820, 835 (7th Cir. 2008)); *see also Torres-Chaves*, 744 F.3d at 993 (given the applicable standard, "[t]he movant faces a nearly insurmountable hurdle") (citation omitted)).

B. Rule 33

Federal Rule of Criminal Procedure 33 provides that a trial court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "A new trial is warranted 'where the evidence preponderates so heavily against the defendant that it would be a manifest injustice to let the guilty verdict stand.'" *United States v. Conley*, 875 F.3d 391, 399 (7th Cir. 2017) (quoting *United States v. Reed*, 875 F.2d 107, 114 (7th Cir. 1989)).

II.
DISCUSSION

In his Motion, Mr. Price argues that the Government did not introduce evidence sufficient for a rational jury to convict him of being a felon who knowingly possessed ammunition and firearms. [Filing No. 83.] Mr. Price makes specific arguments for each of the three counts, which the Court will address in turn.

A. Count 1

First, Mr. Price contends that he is not a prohibited person for purposes of Count 1 because his civil rights were partially restored after he was released from prison for his prior felony conviction(s) and his parole officer explained his rights in a meeting they had where Mr. Price signed a Conditional Parolee Release Agreement (the "Agreement"), which did not specifically state that Mr. Price was prohibited from possessing ammunition. [Filing No. 83 at 5.] Mr. Price relies on *United States v. Burnett*, 641 F.3d 894 (7th Cir. 2011), and other Seventh Circuit cases regarding restoration of rights, and argues that the Agreement was a formal way of advising him of his civil rights. [Filing No. 83 at 6.] Mr. Price argues that "the testimony of the parole officers coupled with Mr. Price's testimony clear[s] the hurdles to assert Mr. Price believed his civil rights were partially restored and that restoration included the right to possess ammunition." [Filing No. 83 at 8.]

In its response, the Government first distinguishes the cases on which Mr. Price relies, and then argues that Mr. Price failed to produce evidence showing that his rights were restored. [Filing No. 84 at 4.] The Government further contends that Mr. Price cannot rely on the Agreement because it could only apply to one of his two prior felony convictions, so he would still have one conviction that would provide the basis for a charge of Felon in Possession of Ammunition. [Filing

No. 84 at 4-5.] Further, the Government argues, the Agreement prohibits all criminal conduct, so Mr. Price's argument regarding the document's failure to mention the prohibition of possessing ammunition fails. [Filing No. 84 at 5.]

Mr. Price did not file a reply.

18 U.S.C. § 922(g) provides:

> It shall be unlawful for any person-- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(20) states that

> [w]hat constitutes a conviction of [a "crime punishable by imprisonment for a term exceeding one year"] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The Seventh Circuit has "held that a defendant has had his civil rights restored for the purposes of § 921(a)(20) when he has had restored his rights to vote, hold office, and serve on a jury." *United States v. Gillaum*, 372 F.3d 848, 860 (7th Cir. 2004) (citing *United States v. Williams*, 128 F.3d 1128, 1134 (7th Cir. 1997)). The Seventh Circuit has also recognized the principle that "a state may not employ language discharging a prisoner that will lull the individual into the misapprehension that civil rights have been restored to the degree that will permit him to possess firearms." *United States v. Vitrano*, 405 F.3d 506, 510 (7th Cir. 2005).

Mr. Price argues that the Agreement and his discussions with his parole officer regarding his rights led him to believe that his civil rights were partially restored, including the right to possess ammunition, and because the Agreement did not expressly state that Mr. Price was

prohibited from possessing ammunition, he should not be convicted of being a felon in possession of ammunition. [Filing No. 83 at 8.] This is "essentially an affirmative defense to a criminal charge under 18 U.S.C. § 922(g)(1), and therefore, "[i]t is a defendant's responsibility to raise this issue and to produce evidence showing that his civil rights have been restored before the matter may be presented to the jury for resolution." *United States v. Foster*, 652 F.3d 776, 791 (7th Cir. 2011).

The cases on which Mr. Price relies are distinguishable from the circumstances presented here because those cases involved defendants who received formal written notices that certain rights had been restored after their obligations to the respective departments of correction or probation departments had ceased. Here, Mr. Price was on parole when he received the Agreement and when he committed the instant offense. The Agreement does not address the rights to vote, hold public office, or serve on a jury (*i.e.*, the "big three" civil rights), so the Agreement does not constitute restoration of Mr. Price's civil rights for the purposes of 18 U.S.C. § 921(a)(20). *Williams*, 128 F.3d at 1134 ("We have held before that failure to restore the rights to vote, hold public office, or serve on a jury precludes a finding of sufficient restoration of rights."). Therefore, the Agreement's omission of express language regarding the prohibition of possessing ammunition does not affect Mr. Price's status as a prohibited person for the purposes of 18 U.S.C. § 922(g). Mr. Price has not presented any evidence that his civil rights were restored, by the Agreement or otherwise. Further, even if Mr. Price believed that the Agreement restored his civil rights, his subjective belief is insufficient because restoration is judged by an objective standard—"one that depends on the content of the communication." *Burnett*, 641 F.3d at 895-96. Finally, as noted by the Government, the Agreement provided that all criminal conduct was prohibited, so the lack of

an express prohibition of possession of ammunition does not mean that Mr. Price's conduct was acceptable or excusable.

For these reasons, Mr. Price's motion as to Count 1 is denied.

B. Count 2

Count 2 was based on the discovery of a pistol located in the center console of a vehicle Mr. Price was driving, which was owned by Telisa Cockrell, who lived with Mr. Price and is the mother of his children. [Filing No. 83 at 9.] Mr. Price drove the vehicle to the gun store with a passenger—not Ms. Cockrell—accompanying him, who was not called as a witness during the trial. [Filing No. 83 at 9.] Mr. Price argues that without the testimony of the passenger, "it seems highly unlikely that the government can show Mr. Price knew the firearm was inside the vehicle, or that he knowingly had the power and intention at a given time to exercise dominion and control over the pistol." [Filing No. 83 at 9-10.] Mr. Price argues that the passenger could have explained whether she observed Mr. Price place the pistol into the center console or open the center console, and therefore, whether he had knowledge that the pistol was in the vehicle. [Filing No. 83 at 9.]

In its response, the Government sets forth the evidence it presented at trial that it believes was sufficient to allow a rational jury to convict Mr. Price on Count 2. [Filing No. 84 at 5-6.] The Government also argues that there is nothing in the record that provides a basis for a new trial. [Filing No. 84 at 7.]

In order to support a conviction for felon in possession of a firearm, the Government must prove: (1) the defendant's status as a prohibited person (here, a person who has previously been convicted of a crime punishable by imprisonment for more than one year); (2) possession; (3) of a firearm or ammunition; and (4) jurisdiction ("in or affecting commerce"). *United States v.*

Jackson, 784 F. App'x. 946, 949 (7th Cir. 2019) (citing *Rehaif v. United States*, 139 S. Ct. 2191, 2195-96 (2019)). The parties stipulated that at the time of the offense, (1) Mr. Price had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and (2) Mr. Price knew that he had been convicted of a crime punishable by imprisonment for more than one year. [Filing No. 78-1 at 17; Filing No. 78-1 at 21.] The element of possession can be met by proving that the defendant had "constructive possession," which means the defendant "still ha[d] the power and intent to exercise control over the object," though the defendant lacked physical custody of the object. *Henderson v. U.S.*, 135 S. Ct. 1780, 1784 (2015). "Possession may be sole or joint. . . . An individual may possess a firearm even if other individuals may have access to a location where possession is alleged. Also, an individual may possess a firearm even if other individuals share the ability to exercise control over the firearm." *United States v. Thornton*, 463 F.3d 693, 696 (7th Cir. 2006). "Section 922(g) thus prevents a felon not only from holding his firearms himself but also from maintaining control over those guns in the hand of others." *Id.*

The Court finds that the Government presented sufficient evidence for a reasonable jury to conclude that Mr. Price possessed the .40 caliber pistol that is the subject of Count 2. While not intended to be an exhaustive summary of all of the evidence the Government presented to support the conviction, the Court finds that the following evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Mr. Price knowingly possessed the pistol: Mr. Price purchased ammunition for a .40 caliber pistol; during the purchase, he made statements about "his forty"; and, the pistol was in the center console of the vehicle he was driving when he was arrested. Although there was no evidence presented regarding Mr. Price holding the pistol, the evidence the Government presented was sufficient for a rational jury to conclude beyond a reasonable doubt that he constructively possessed the firearm. Accordingly, his motion as to Count 2 is denied.

C. Count 3

Count 3 was based on Mr. Price's possession of a .223 caliber rifle. Mr. Price contends that the Government failed to show the required nexus between Mr. Price and the rifle, because although the firearm was found on the property where he was residing, he did not have exclusive control over the property so he could not have constructively possessed the rifle. [Filing No. 83 at 11-12.] The rifle was located in a different vehicle, owned by Ms. Cockrell, which was parked on the property that Mr. Price shared with his children and Ms. Cockrell, and the rifle was wrapped up and not visible in the back seat of the vehicle. [Filing No. 83 at 10-11.] The rifle was checked for DNA and fingerprints, but neither was returned as positive to Mr. Price. [Filing No. 83 at 11.] Mr. Price also argues that his initial motion to suppress, [Filing No. 59], should have been granted because he believes "that the parole officers [who located the rifle] were used as investigative tools for ATF agents thereby not needing probable cause to get a warrant to search both the vehicle and his residence." [Filing No. 83 at 3.]

In its response, the Government sets forth the evidence it presented at trial that it believes was sufficient to allow a rational jury to convict Mr. Price on Count 3. [Filing No. 84 at 5-6.]

Similar to Count 2, the Court finds that a rational jury could conclude that Mr. Price constructively possessed the .223 caliber rifle that is the subject of Count 3. The Government presented evidence showing that Mr. Price ordered a special magazine for the rifle and, when he received the magazine, he contacted the gun store to complain that the magazine did not work. The rifle was discovered concealed in a vehicle to which Mr. Price had access, which was on the property where he resided. Also discovered were multiple rounds of .223 caliber ammunition in Mr. Price's home. Based on this evidence, which must be viewed in the light most favorable to

the Government, the Court finds that a rational jury could have found beyond a reasonable doubt that Mr. Price possessed the .223 rifle.

Although not discussed in detail, Mr. Price also raises the argument that his previous motion to suppress, [Filing No. 59], should have been granted because he believes "that the parole officers were used as investigative tools for ATF agents thereby not needing probable cause to get a warrant to search both the vehicle and his residence." [Filing No. 83 at 3.] The Court previously found that the parole officers had a reasonable belief that Mr. Price, who was on parole at the time of the search, had committed a crime and, therefore, it was reasonable for them to search Mr. Price's residence and property that was within his control, including the vehicle on the property. [Filing No. 59 at 11.] *See also Samson v. California*, 547 U.S. 843, 851-51 (2006) ("[P]arolees have severely diminished privacy expectations by virtue of their status alone."); *United States v. Caya*, 2020 WL 1887680, at *4 (7th Cir. Apr. 16, 2020) ("If, as *Samson* holds, a no-suspicion search of a parolee is constitutionally permissible, so too [a search]—predicated on reasonable suspicion—is constitutionally permissible."). Mr. Price has not demonstrated that this Court's prior ruling should be disturbed.

For these reasons, Mr. Price's motion as to Count 3 is denied.

III.
CONCLUSION

The Government presented sufficient evidence at trial such that a rational jury could conclude beyond a reasonable doubt that Mr. Price knowingly possessed ammunition and firearms. Because of that evidence, the Court finds that neither a judgment of acquittal nor a new trial is warranted. Mr. Price's Motion for Judgment of Acquittal or Alternatively, for a New Trial, [83], is **DENIED**.

Date: 5/4/2020

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

Distribution via ECF only to all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. 1:18-cr-00348-JMS-MPB
	)	Indianapolis, Indiana
MARK PRICE,	)	November 5, 2020
	)	8:59 o'clock a.m.
Defendant.	)	

Before the
HONORABLE CHIEF JUDGE JANE MAGNUS-STINSON

TRANSCRIPT OF SENTENCING HEARING

APPEARANCES:

FOR THE GOVERNMENT:	United States Attorney's Office By: Pamela S. Domash and Jayson W. McGrath 10 West Market Street, Suite 2100 Indianapolis, Indiana 46204
FOR THE DEFENDANT:	Attorney at Law By: Kenneth Lawrence Riggins 1512 North Delaware Street Indianapolis, Indiana 46202
ALSO PRESENT:	The Defendant in person.
COURT REPORTER:	Jean A. Knepley, RDR, CRR, CRC, FCRR 46 East Ohio Street, Room 309 Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPTION

THE COURT: Okay. The Court will accept the presentence report, then, as its findings of fact and will accept the report, for the record, under seal. In the event of any appeal, counsel will have access to the sealed report but not to the recommendation portion, which shall remain confidential.

Let's turn to the guideline calculation, then. Probation has calculated the base offense level for each of the three counts of 20; and then, probation has indicated at Paragraph 18 that because the offense involved at least three firearms but less than seven, two levels are added.

Paragraph 19, probation has added two levels for the offense involving a stolen firearm, and probation has added two levels for obstruction of justice.

All of those three additions are contested. So do you wish to be heard with respect to your Objection No. 2, Mr. Riggins, which relates to the more than -- or three to seven firearms?

MR. RIGGINS: Yes, Your Honor. There is not much I can add other than what I have already done in the report that I filed with the probation department. I would note that it indicated that there were three firearms, and as I noted, Miss Cockrell indicated to the police at that time that one firearm was hers, and he had no -- I don't know if she said he had no access to it, but it was completely her weapon. So that would

keep him from receiving the two additional points.

THE COURT: Thank you.

Miss Domash, do you wish to be heard?

MS. DOMASH: Yes, Your Honor. The Government responded to his objection in its sentencing memorandum.

THE COURT: I can't hear you.

MS. DOMASH: The Government has responded to this objection in its sentencing memorandum, which I know that the Court has reviewed. To briefly summarize, we believe this is correctly applied, and the Defendant did have possession of three or more firearms. First, the GSG, Model Firefly .22-caliber pistol is correctly applied. It was located in the toolbox in the shared bedroom, which also included multiple calibers of ammunition, including ammunition that belonged to the firearms that the Defendant has been convicted of possessing.

And in addition, the Defendant was viewed on video and by witness testimony as possessing an additional firearm at the Indy Trading Post on the date of the offense when he handled the firearm prior to his arrest. So more than three firearms were involved, and this enhancement is correct.

THE COURT: Do you want to reply, Mr. Riggins?

MR. RIGGINS: The only thing I would say, Your Honor, is that the handgun that was inside the Indy Trading Post was not a subject of this litigation. It was not a part of the

filing by the Government.

THE COURT: All right, thank you.

I think the key language here for the Court, and I turn to counsel, is that quote, the offense involved. This is clearly uncharged conduct, and I would ask you to share with me what authority, in your mind, supports that the offense involved these other weapons?

MS. DOMASH: Your Honor, I think that there is no case law I have to indicate to the Court. I think the offense involved is the Defendant is obviously illegal possession of both firearms and ammunition during the month of October in 2018 as charged, and during the course of the offense of possessing those firearms, he also had both actual and constructive possession of additional uncharged conduct.

These are not firearms that we're saying he possessed at some remote period in time, but they were in close proximity. The GSG firearm was in the same room as the ammunition that he was charged as possessing.

The handgun that he possessed at Indy Trading Post when he handled it was, as part of his conduct of going there to complain about his prior purchase, having just purchased ammunition the day before, and looking for the magazine for one of the firearms that he has been convicted of possessing. So it is part of the same course of conduct that includes the charged offenses; and therefore, we believe it should apply.

THE COURT: Mr. Riggins, you want to respond?

MR. RIGGINS: Your Honor, what I have already said is clearly the same thing, that those items, the store pistol that the Government is referring to is not a part of this offense. What they specifically indicated was the ammunition was the focus of the offense. There was no decision by the jury as it relates to that particular pistol as well.

There is nothing that he purchased at the store that indicates or relates to the pistol that was found in the toolbox as well. So that would indicate that that would not be a part of the offense charged, and so I would ask the Court to not award those two points.

THE COURT: All right, thank you.

The Court will award the two points, overruling the objection, not on the basis, however, of the Firefly but instead, on the basis of the pistol that was found on the video. Looking at Sentencing Guideline 1B1.3 about relevant conduct, the Court finds that the possession of that firearm on the video within the Indy Trading Post is part of conduct that occurred during the commission of the offense in preparation for the offense. And so, it is appropriately considered in this case.

With respect to the other firearm, I decline to find -- I am making these findings for the record. I decline to find it attributable to him because there is no indication

of an intent to exercise dominion and control, and it was a jointly held property. But I am just not making that inference based on this evidence today and based on the additional evidence that Miss Cockrell claimed that weapon.

With respect to Paragraph 19, that the offense involved a stolen firearm, response on that, Mr. Riggins?

MR. RIGGINS: I am trying to remember, Your Honor. I think the stolen firearm was --

THE COURT: It was the one in the vehicle.

MR. RIGGINS: -- it was the one in the vehicle, the rifle? I didn't delineate them out.

Again, Mr. Price indicated that he did not possess that, that particular firearm, and that was not a part of it. There is no way that he would know that that firearm would have been stolen or not, and that vehicle was not titled in his name.

THE COURT: All right, thank you.

Response, Ms. Domash?

MS. DOMASH: Thank you, Your Honor. The Defendant has been convicted of possession of that firearm by the jury in this case, and application note in the sentencing guidelines in 2K2.18(B) directly states that no knowledge of the firearm being stolen is required. Just the fact that the firearm was stolen is sufficient. So we need not prove that the Defendant had knowledge the firearm was stolen, but there was testimony

during trial that it was stolen. I think it is not contested that the firearm was stolen itself. He is just denying stolen or possession of that firearm. So as he was convicted of that possession of the firearm, the two level is appropriate.

THE COURT: It is clear from the application note knowledge or reason to believe that Subsection (b)(4) applies, regardless of whether the Defendant knew or had reason to believe that the firearm was stolen. Accordingly, because it was and that is not in dispute and he was convicted of possessing it, the two-level increase is appropriate, and the Court will overrule that objection.

With respect to Paragraph 22, this has to do with testimony at trial, and did you wish to be heard about that, Mr. Riggins?

MR. RIGGINS: Your Honor, as I indicated in my response to the Court, I stated that Mr. Price indicated that he was confused about the question and that, actually, Your Honor, I think that he is the best person who can explain the reason why he was confused as it related to the particular matter.

THE COURT: Thank you.

MR. RIGGINS: And that he was not trying to evade.

THE COURT: All right. Mr. Price, would you raise your right hand? Do you wish to testify, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

(Defendant sworn.)

THE COURT: All right. Go ahead, please.

THE DEFENDANT: Well, Your Honor, I would like to say that I have always treated your courtroom with respect where legal matters are taken seriously. I never clowned around when I took the stand. I testified truthfully, and that is what I did.

I never perjured under oath or otherwise about my actions with Miss Reveles on camera. I encourage the Court to view the footage up close or perhaps from behind to see that I never actually touched, grabbed, or corrected her grip with the handgun. I started to help, but once she corrected her grip from the coaching of Special Agent Brian Clancy, I backed off.

This issue with Miss Reveles and I was not the Government's concern in the PSR. I believe the only reason the Government cares to mention this less serious form of conduct is to simply guide the Court to enhance my offense level no matter what.

Later in my testimony, I did not perjure under oath or otherwise when the Government asked me the question of, have you ever held a firearm or the question of, that is the only time in your life you have ever held a firearm? And there was any legality in those questions as to what I have been charged with in the past, it should have been clearly stated. I

answered yes because of what my actions show me on camera doing, holding a firearm.

I never knew that those questions were in reference to what I have been charged with in the past. The Government never mentioned anything about my past, October 17, 2018, in that moment. I don't understand how the Government believed that the entirety of my testimony was false or that my criminal history betrays me when, in fact, I clearly admitted guilt to my, my past convictions in front of the jury after being asked about it. If my testimony seems to be inaccurate and causes my criminal history to betray me, it is simply because I was confused by the Government's line of questioning.

THE COURT: All right, thank you.

Ms. Domash?

MS. DOMASH: May I ask a question with clarification for the Defendant?

THE COURT: Yes.

MS. DOMASH: Okay.

MARK PRICE, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. DOMASH:

Q Mr. Price, you just stated when you were questioned -- or regarding the questioning regarding allegedly, in your words, correcting the grip of your friend at Indy Trading Post, you stated something about Special Agent Clancy. Can you clarify

that? I couldn't quite hear what you said.
A Well, what I remember, in the moment in the store is, Special Agent Clancy encourage me to help her hold the firearm straight.
Q So you're saying that Special Agent Clancy specifically directed you to assist her?
A Yes.
Q Do you recall exactly what he said to you?
A Not exactly, but I remember some coaching coming from him.
Q So your testimony today is that he was coaching you as to how to assist her in holding the firearm?
A Well, we was at the store picking out firearms for her to shoot in the range, and once I handed her the firearm, he was coaching.
Q Okay. And do you recall being in the -- you were in the courtroom during the entirety of the trial, correct?
A Can you repeat that?
Q You were in the courtroom during the entirety of the trial --
A Yes.
Q -- correct? And --
MS. DOMASH: Your Honor, strike that line of questioning. I have nothing further.
THE COURT: Thank you. Anything further with respect to argument, Mr. Riggins?

MR. RIGGINS: Nothing further, Your Honor.

(Witness excused.)

THE COURT: All right, thank you.

Two things the Court would observe with respect to that particular enhancement. I am looking at the transcript that is found at Docket 100, page 39, and this is what prompted the back and forth, and then, the situation about the nature of the conviction.

The Defendant was asked,

"If someone were to hand you a" loaded "pistol, could you tell me if it was" -- if it was "loaded; yes or no?"

"No.

"You would have no idea how to tell if a pistol was loaded?

"No.

"Do you know how to load a firearm?

"No.

"Do you know how a magazine works?

"No.

"Have you ever shot a firearm?

"I have not.

"Have you ever held a firearm?

"I have.

"When was that?

"October 17th.

"That is the only time in your life you have ever held a firearm?

"Yes."

Based on the information provided to the Court by the Defendant's prior criminal history, the Court believes that that testimony was false, and the Court will enhance the guideline with the obstruction of justice two-level enhancement.

Then, with respect to the acceptance of responsibility, you have indicated, Mr. Riggins, that Mr. Price contends he accepts responsibility. Do you wish to be heard on that?

MR. RIGGINS: Yes, Your Honor. I just indicated that Mr. Price had indicated that he intended to accept responsibility; that is, his reason to proceed to trial was to preserve his rights and to make sure that his, his suppression issue was presented to the Court.

THE COURT: Thank you.

Ms. Domash?

MS. DOMASH: Your Honor, the Government stands by its response that Mr. Price has not accepted responsibility. He continues to deny possession of the firearms in his objections. To the Court today, he perjured himself by testifying falsely during the trial. So I think, clearly, there is no acceptance of responsibility.

THE COURT: Thank you.

So the commentary provides to 3E1.1 acceptance of responsibility that, in determining whether a Defendant qualifies, appropriate considerations include truthfully admitting the conduct comprising the offense of commission and truthfully admitting or not falsely denying any additional relevant conduct.

And then, later on in that paragraph, this is Application Note 1(A). It provides, the Defendant who falsely denies, or frivolously contests, relevant conduct that the Court determines to be true has acted in a manner inconsistent with acceptance of responsibility.

I am not faulting the Defendant for raising a suppression motion. That is absolutely his right. I believe his conduct at trial is inconsistent with acceptance of responsibility, and the Court denies to apply that adjustment.

Accordingly, the Court concludes that the total offense level is 26. The second half of the guideline calculation is based upon the Defendant's criminal history. We start -- the first crime for which points are assessed is found at Paragraph 32, a 2009 conversion misdemeanor from Marion County.

The second count or crime, crimes for which points are assessed is the 2012 conviction for carrying a handgun without a license, an aggravated battery, for which three points are assessed.