No. 20-3191

In the
United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK PRICE,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 1:18-cr-00348 — Hon. Jane Magnus-Stinson, *Judge*.

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the parole searches of Price's car and home were reasonable under the totality of the circumstances, which included his status as a parolee, his contemporaneous arrest for violating federal law, and his parole condition permitting such warrantless searches.

2. Whether, in the alternative, the parole search was also an appropriate exercise of parole authority and not unreasonable under the dubious "stalking horse" theory Price advances.

3. Whether, in all events, suppression would be wrong given that law enforcement acted in good faith reliance on Supreme Court precedents, and the inevitable discovery and independent source doctrines apply.

4. Whether the evidence was sufficient to allow the jury to decide that Price possessed the gun charged in Count 2, where he was the last driver of the car where officers found the gun, he referred to the gun as "his," and he took additional actions linking himself to the gun.

5. Whether the evidence was sufficient to allow the jury to decide that Price possessed the gun charged in Count 3, where the gun was found in a car parked at his home, the car keys were in his TV stand, and he bought a magazine for the gun and referred to it as "his" firearm.

6. Whether the district court's decision to apply a multiple-firearms enhancement at sentencing was erroneous, where the facts linked Price to at least three relevant guns.

7. Whether the district court's decision to apply a stolen-firearms enhancement at sentencing was erroneous, where one of the guns was stolen.

8. Whether the district court's decision to apply an obstruction-of-justice enhancement at sentencing was plainly erroneous, in light of Price's perjury at trial.

INTRODUCTION

Mark Price shot and killed another man in 2011. After his release, he was convicted for unlawfully possessing a firearm in 2015. In 2018, while on parole for the latter crime, he went shopping for ammunition. The store clerk tipped off federal agents, who ultimately arrested Price.

One such agent called Price's parole officers, who were separately looking for Price at his home and work that day. The parole officers showed up at the gun shop and, given Price's obvious violation of a parole condition barring illegal activity, searched his car and later his home. When the parole officers discovered guns, the federal agents secured warrants for those locations and collected the contraband. All of that involved reasonable law enforcement conduct, including reasonable parole monitoring.

Aside from his challenge to those searches, Price also challenges the jury's verdicts convicting him for possessing two firearms. But he called both guns "his" and engaged in conduct showing that they were indeed his, making his challenges especially difficult.

Finally, Price says the district court should not have enhanced his sentence on various bases, but those arguments face the same difficulty as his Fourth Amendment and innocence claims: the facts are not on Price's side.

STATEMENT OF THE CASE

This appeal follows a trial of Mark Price resulting in convictions for illegal possession of ammunition and firearms.[1]

A Few Trips to the Gun Shop

On October 10, 2018, Price went to the Indy Trading Post, a firearms dealer on the south side of Indianapolis. (Tr. 28.) He placed an order for a Ruger rifle magazine and expressed interest in using the shooting range on the store's property. (*Id.*)

Tyler Hands, the clerk at the shop, took Price's ID, consistent with store policy. (*Id.*) Hands did not always check customers' backgrounds, but his interaction with Price raised "red flags," prompting him to look up Price's information on Indiana's court system web portal. (*Id.* at 29-30.)

Hands's search uncovered "some items . . . that just didn't sound good," including that Price had prior felony convictions. (*Id.* at 29-30.) He decided to wait to place the magazine order. (Tr. 31.) He then contacted the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and spoke to Special Agent Brian Clancy about Price. (*Id.* at 30-31.)

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[1] This brief makes the following references: (Tr. = Trial Transcript); (PSR = Presentence Investigation Report); (S. = Sentencing Hearing Transcript); (R. = District Court Docket Number); (A. Br. = Appellant's Brief).

Over the course of the days that followed, Price called Indy Trading Post multiple times to ask after the rifle magazine order. (*Id.* at 30-31.) Hands said Price seemed upset about how long it was taking. (*Id.* at 31.)

On October 16, Special Agent Clancy and other ATF agents went to the shop in an attempt to make contact with Price. (Tr. 122-23.) They stayed for much of the day, leaving at 4 p.m. (*Id.*)

The agents just missed him. He returned to the shop moments later, accompanied by a woman. (*Id.*) They drove a black Ford Escape. (*Id.* at 80.) Besides wanting to pick up the magazine he had ordered, Price also wanted to buy .40 caliber Smith & Wesson ammunition. (*Id.* at 32-33, 140.)

Price bought the ammo, and his friend picked out a holster for a .380 caliber pistol. (*Id.* at 32, 137.) They paid in cash and left the store. (*Id.* at 34.) After they left, Hands called Agent Clancy again to tell him about Price's visit to the store and his purchases. (*Id.* at 33, 34, 41, 123.) He also mentioned that Price planned to return to the shop the next day. (Tr. 124.)

At that point, Agent Clancy concluded that law enforcement had to intervene because Price had violated the law by possessing ammunition. (Tr. 124.) Clancy assembled his team for a covert operation at the Indy Trading Post. (*Id.*) He pretended to be a store clerk while two other team members hid in the back of the shop to prepare for an arrest. (*Id.* at 44, 124.)

Price arrived at around noon, again in the Escape and with the same friend as before. (Tr. 126.) At first, he complained that the magazine he had purchased did not match "his" rifle. (Tr. 42.) Then he indicated that he wanted to rent a firearm to use at the shooting range. (Tr. 126.) He needed to rent a gun because "his 40 was too much for" his friend. (Tr. 42.)

After Price and his friend signed the range agreement, Clancy took over (still undercover). (*Id.*) While Price and his friend were looking at rental guns to use at the range, Price handled one of the firearms. (Tr. 127.) He picked it up, checked it over, and brought it up to a shooting position. (Tr. 49, 127.)

Clancy used his phone to snap a photo of Price holding the gun. (Tr. 127.) Still undercover, he read Price the range rules and made sure he was not armed. (Tr. 128.) He then pretended to escort Price to the range but instead led him to the back room where the other ATF agents arrested him for possessing ammunition the day before. (Tr. 128-29.)

Simultaneous Parole Monitoring

Earlier in the investigation, Agent Clancy had contacted Price's state parole officers to confirm that he was a felon on parole and to advise them that he was investigating Price on a possible federal offense. (Tr. 122.) Price's conditions of parole included the following:

> 7. CRIMINAL CONDUCT – I will not engage in conduct prohibited by federal or state law or local ordinance.
> 8. FIREARMS AND DANGEROUS WEAPONS – I understand that carrying, dealing in, or possessing firearms, explosive devices or deadly weapons is a violation of my parole release agreement.
> 9. HOME VISITATION AND SEARCH – a) 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. b) I understand that I am legally in the custody of the Department of Correction 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.

(Tr. 62; R. 42, Ex. A.) Agent Clancy informed the parole team that Price "had been involved in procuring a magazine for a firearm and that, you know, for [parole], is possible criminal activity in violating his parole." (Tr. 104.)

Price was thus already on the parole officers' "list of tasks" the day of his arrest. (Tr. 55, 80, 104.) The violation of his parole agreement "trigger[ed] [them] to, then, be dispatched as a field team to go look into do a home search, check out his work, wherever [they could] find him." (*Id.*) The parole officers had already looked for Price at his place of work. (*Id.*)

They were on their way to his home "to conduct an unannounced visit" when Agent Clancy called to say that ATF had arrested Price and had his car keys. (Tr. 79, 104.) Clancy called because he "knew that they were actively looking for Mr. Price through previous discussions with them" and wanted to

"let them know that he was in custody . . . if they would like to come to Indy Trading Post." (Tr. 129; *see* Tr. 56.)

When the parole officers arrived, Clancy gave them the keys to the Escape (which he had obtained via a search incident to arrest), and they conducted a parole search of the car. (Tr. 129.) In the car, they found a .40 caliber Smith & Wesson pistol. (Tr. 130.) The gun was "cocked, loaded, and ready to fire." (Tr. 131.) The gun was also stolen. (*Id.*)

Upon discovering contraband, parole officers' "responsibility" is to "stop the search completely" and "bring in other law enforcement officials" to determine next steps. (Tr. 61.) When the parole officers told Agent Clancy about the gun, he sought and obtained a search warrant for the Escape. (Tr. 129.) After that search was complete, the parole officers indicated that they also wanted to conduct a parole search at Price's house. (Tr. 133.)

Clancy followed the parole officers. (*Id.*) They used Price's keys to open the front door after no one responded to a knock, and they took Price with them after conducting a safety sweep. (Tr. 89-90.) Clancy waited while they searched. (Tr. 90-91, 134.)

After the parole team discovered ammunition in the home, Clancy obtained a second search warrant. (Tr. 135.) During the search, agents retrieved the Smith & Wesson .40 caliber cartridges Price had purchased from Indy Trading post, along with his receipt for the ammo. (Tr. 140.)

Agents located other ammunition, as well as a Ruger Mini .223 caliber Remington rifle that was wrapped in a bag inside an Oldsmobile parked outside the house. (Tr. 145-46.) They also discovered other relevant items in the house, including a GSG Firefly .22LR caliber pistol, mail addressed to Price, the keys to the Oldsmobile, and a toolbox containing assorted ammunition. (Tr. 90-91, 140.)

In due course, Price was 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, all in violation of 18 U.S.C. § 922(g)(1). (R. 11, 43.)

Pretrial Proceedings and Trial

Prior to trial, Price filed a motion to suppress. (R. 40, 41.) He argued that the parole searches of his car and home were purportedly illegal "stalking horse" searches on behalf of federal agents. (R. 59, at 4.) The court denied the motion, finding that the searches were reasonable under the circumstances. (R. 59.)

The matter proceeded to trial, which lasted two days. (R. 77, 78.) The government called multiple members of the parole field team, as well as ATF agents and the clerk at Indy Trading Post. The testimony focused on Price's trips to the gun shop and the subsequent searches of his car and home.

When Price's attorney probed the first parole witness's recollection of his team's cooperation with ATF, the officer testified, "[W]e went to that location because [Agent] Clancy knew that Mr. Price was a parolee"; he then answered "yes" to the question, "He asked you to initiate the investigation?" (Tr. 70.)

Before waiting for other witnesses, Price renewed his motion to suppress. (Tr. 73.) The court denied the motion again:

> 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.

(Tr. 74.)

The rest of the trial evidence only strengthened the court's suppression ruling. This is how Agent Clancy described his communications with the parole team:

> Q. You called the parole officers to come to the scene --
> A. Is that a question?
> Q. -- at the Indy Trading Post; is that correct?
> A. I did call them, yes.
> Q. For what purpose did you call them to come to the scene?
> A. I knew they were actively looking for Mr. Price that day, and as I knew that he was on parole, they had a vested interest in locating him. So I contacted them when we took

> him into custody.
> Q. Did you ask them to search his vehicle?
> A. I did not directly ask them to search the vehicle. I asked them to the scene so they could do their job.
> Q. What was their job going to be?
> A. Their job is to follow the rules from the parole release agreement, and at that point, I provided them the keys to the vehicle.
> Q. That meant you wanted them to search the vehicle?
> A. I didn't directly tell them to search the vehicle, no.

(Tr. 153.) Separately, Clancy testified that the parole team wanted to search Price's home and that he followed them there. (Tr. 133-34.)

For their part, the parole officers testified that Clancy "asked" them to come to the gun shop. (Tr. 62, 70.) They also made it clear several times that they had already planned to find Price that day to determine if he was violating his parole terms because of criminal activity, (Tr. 55-56, 79-80, 82-83, 100), and that they conducted their searches based on their own authority and Price's parole violations, (Tr. 72, 104, 107-08). None testified that Clancy ordered or directed them to do anything (again, one said he "asked" them to investigate, (Tr. 70), but that did not match other testimony).

Price testified in his defense. (Tr. 199.) Following the close of evidence, he moved for acquittal. (Tr. 182); Fed. R. Crim. P. 29. He argued that the government had not proved the interstate commerce element of Count 1. (*Id.*) He also argued that his parole agreement effected a partial restoration

of his rights, thus negating an element of the charge. (Tr. 183-85.) The court rejected that motion. (Tr. 186, 190-91.)

Price then moved for acquittal on Count 2. He argued that the evidence failed to show he had any knowledge of the gun in the console of the Ford Escape, which was registered to another person. (Tr. 191-92.) The government responded by pointing to evidence tying him to the gun and the car. The court denied that motion too. (Tr. 193.)

Finally, Price moved for acquittal on Count 3, again arguing that the evidence was not sufficient to connect him to the gun at issue. (*Id.*) The government responded by pointing to Price's own statements and actions linking him to the rifle. (Tr. 194.) The court denied the motion, letting the jury decide Price's fate on that count as well. (*Id.*)

The jury found Price guilty on Counts 1 through 3. Following trial, Price filed a written renewal of his motion to set aside the verdict. (R. 83.) The court denied the motion. (R. 85.)

Sentencing

The matter proceeded to sentencing. (R. 103.) Price contested three of the potential enhancements under the Sentencing Guidelines.

The first concerned the multiple-firearms enhancement of U.S.S.G. § 2K2.1(b)(1)(A). After hearing from the parties, the court applied the enhancement:

> 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.

(S. 9-10.)

The second objection concerned the stolen-firearm enhancement of U.S.S.G. § 2K2.1(b)(4)(A). The Court applied that enhancement too:

> 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.

(S. 11.)

The court next addressed Price's objection to an obstruction of justice enhancement. *See* U.S.S.G. § 3C1.1. Price stated that he was "confused by the Government's line of questioning" at issue. (S. 12-13.) The court walked through the key trial testimony, in which Price denied ever having held or shot a firearm and testified that he did not know how to tell whether a gun was loaded. (S. 16-17.) The court applied the enhancement:

> 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.

(S. 16.)

Finally, the court addressed Price's argument that he was entitled to credit for accepting responsibility. The government noted that he "continues to deny possession of the firearms in his objections" and that he "perjured himself by testifying falsely during the trial." (S. 16.) The court declined to give Price the credit he requested. (S. 17.)

With an offense level of 26 and a criminal history category of IV, Price's advisory guidelines range was 92 to 115 months in prison. The court applied the 18 U.S.C. § 3553(a) factors to Price and his offenses, (S. 37-41), arriving at a sentence at the bottom of the range: 92 months in prison (the same sentence on each count, to run concurrently), to be followed by three years of supervised release. (S. 41, R. 105.)

This timely appeal followed. (R. 107.)

SUMMARY OF THE ARGUMENT

The searches of Price's car and home were reasonable. He was a violent parolee who was under arrest for an obvious violation of federal law, making a search appropriate under the usual Fourth Amendment balance. Plus, the searches were part of his parole officers' jobs, and federal agents reasonably secured warrants before obtaining the evidence at issue.

Price's hope to circumvent controlling Supreme Court precedents and resuscitate the "stalking horse" theory cannot succeed here. Where Price sees devious law enforcement scheming, the law and the facts show reasonable parole monitoring and cooperative investigating.

The jury had more than enough evidence to convict Price on Counts 2 and 3. As to both, he says he did not constructively possess the guns at issue. But he bought accessories for both guns and referred to them as "his," and both guns were found in locations over which he had control.

Price's challenges to various sentencing enhancements likewise fail. He possessed an uncharged gun during the conduct in this case; he lied under oath; and one of his guns was stolen. His arguments leave no dents in the district court's prudent findings and conclusions as to those enhancements.

The Court should affirm.

ARGUMENT

I. THE SEARCHES OF PRICE'S HOME AND THE CAR HE DROVE TO THE GUN SHOP WERE REASONABLE

A. Standard of Review

This Court reviews a district court's legal conclusions tied to the denial of a motion to suppress *de novo*. *United States v. Etchin*, 614 F.3d 726, 733 (7th Cir. 2010). Findings of fact are reviewed for clear error. *United States v. Cherry*, 920 F.3d 1126, 1132 (7th Cir. 2019).

B. Given Price's Status as a Parolee and His Illegal Activity, the Searches of The Car and Home Were Reasonable

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Still, there are "exceptions to the general rule that a warrant must be secured before a search is undertaken." *California v. Carney*, 471 U.S. 386, 390 (1985).

Here, parole officers searched Price's car and home without a warrant after learning from a federal agent that Price had violated a parole condition. Those searches rested firmly atop bedrock constitutional principles.

1. <u>The Searches Were Reasonable Under the Totality of the Circumstances</u>

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." *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (internal quotation marks and citation omitted). A defendant's status as a probationer or parolee who signed a search condition "informs both sides of that balance" and can support the reasonableness of even a suspicionless search. *Id.* at 119; *see Samson v. California*, 547 U.S. 843, 855-56 (2006).

Applying that balance here is straightforward. First, Price had a diminished expectation of privacy, given his status as a parolee. *See Samson*, 547 U.S. at 851-52. Price's specific privacy expectation may not have been identical to the defendants' expectations in *Samson* and *Knights*. Their release conditions permitted supicionless searches, while Price's agreement allowed searches based on "reasonable cause." (Tr. 62.) The fact remains, however, that his expectations were substantially lower than those of an ordinary citizen, *United States v. White*, 781 F.3d 858, 863-64 (7th Cir. 2015), or even an ordinary probationer, *Samson*, 547 U.S. at 850 ("parole is more akin to imprisonment than probation is to imprisonment").

On the other side of the balance, the State's interest was very strong. Stronger than in *Knights*, given Price's status as a parolee (who had committed violent crimes in the past). A "State has an overwhelming interest in supervising parolees because parolees are . . . more likely to commit future criminal offenses." *Samson*, 547 U.S. at 853 (alterations in original; internal

quotation marks omitted). That "overwhelming" interest was buttressed by the state's parole interest in "reducing recidivism" and "promoting reintegration." *Id.* Such interests justify "privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.*

Also stronger than in *Samson*. The search in *Samson* was not supported by any information. 547 U.S. at 846. Here, by contrast, the parole officers knew that federal agents had arrested Price, meaning he had violated his parole condition prohibiting illegal activity. (Tr. 55-56, 79-80, 82-83, 100.) In other words, the fact that Price was under arrest greatly increased the reasonableness of the searches—not the other way around, as Price seems to see it. *Knights*, 534 U.S. at 121.

On balance, the searches were therefore reasonable. In service of an overwhelming government interest, the parole searches in this case—which happened because Price committed a federal crime—were far from "arbitrary, capricious or harassing." *Samson*, 547 U.S. at 856.[2]

That conclusion rests on "ordinary Fourth Amendment analysis that considers all the circumstances of a search." *Id.* Accordingly, contrary to Price's entire suppression argument, "there is no basis for examining official

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[2] Indeed, as the district court noted, under these specific circumstances (a parolee with a violent gun crime on his record buying ammunition), it would have been reasonable for the ATF agents to conduct a search themselves. *Knights*, 534 U.S. at 121.

purpose" or "special needs." *Id.*; *Samson*, 547 U.S. at 852 n.4; *United States v. Ickes*, 922 F.3d 708, 712 (6th Cir. 2019); *see White*, 781 F.3d at 863-64 (applying the *Samson/Knights* balance in the face of challenge predicated on parole agreement).

Nothing in the facts of this case requires breaking new ground beyond the natural coverage of *Samson* and *Knights*. This Court should affirm.

2. Price's Contract and State Law Arguments Do Not Alter the Analysis

Price nonetheless works hard to break free from the natural application of *Samson* and *Knights* and return to an older body of caselaw. *Infra* Part I.C. To accomplish such a reverse-leapfrog, however, Price must first meaningfully distinguish his case from those more recent and more relevant decisions. That he cannot do.

Price first points to differences between his parole agreement and the search conditions in *Knights* and *Samson*. (A. Br. 20-21.) As an initial matter, as in *Samson*, the level of suspicion the officers possessed aligned with the privacy expectations articulated in the applicable agreement. In *Samson*, the support for the search tracked the permissiveness of the parole terms—it was suspicionless. 547 U.S. at 846. The same is true here. The parole officers had more than "reasonable cause" to search. (R. 42, Ex. A.)

Price thus focuses on a different aspect of his parole agreement, arguing that it "deliberately did not include federal agents among the acceptable actors authorized to conduct a warrantless search." (A. Br. 17.) The Second Circuit has rejected a nearly identical claim. *United States v. Newton*, 369 F.3d 659, 666-67 (2d Cir. 2004) (observing that "the duties and objectives of probation/parole officers and other law enforcement officials, although distinct, may frequently be 'intertwined' and responsibly require coordinated efforts"). This Court should do the same.

Whatever the merits of Price's *ad hominem* gloss on his privacy expectations, he is wrong to assert that the "warrantless search[]" here "exceed[ed] the scope of [his] parole agreement[]." (A. Br. 21.) In pertinent part, his agreement stated:

> 7. CRIMINAL CONDUCT – I will not engage in conduct prohibited by federal or state law or local ordinance.
> 8. FIREARMS AND DANGEROUS WEAPONS – I understand that carrying, dealing in, or possessing firearms, explosive devices or deadly weapons is a violation of my parole release agreement.
> 9. HOME VISITATION AND SEARCH – a) 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. b) I understand that I am legally in the custody of the Department of Correction 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.

(Tr. 62; R. 42, Ex. A.)

The parole search here complied with those terms. First, Price violated the condition in paragraph 7 prohibiting criminal conduct. Second, parole officers, not federal agents, conducted the warrantless search of his property, pursuant to paragraph 9, once they learned of Price's parole violation. The parole officers were doing their jobs—not searching would have amounted to a dereliction of their duty to detect new crimes by a parolee. Ind. Code §§ 11-13-3-6 & 11-13-3-7; *Haynes v. Zaporowski*, 521 F. App'x 24, 26 (2d Cir. 2013).

When they discovered contraband in his car and home, they turned the matter over to federal agents, which was standard practice. (Tr. 61, 109, 112.) Federal agents then searched the car and home after obtaining warrants to do so. (*Id.*) All of that conformed to Price's parole agreement and any reasonable expectations he may draw from its terms.[3]

Price also hopes to elevate at least one State precedent over *Samson* and *Knights*. (A. Br. 17 (discussing *State v. Vanderkolk*, 32 N.E.3d 775, 778 (Ind. 2015).) As this Court has explained, however, even where the "intricacies" of state law are relevant to a parolee's expectations of privacy,

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[3] A few courts have analyzed similar claims under a Fourth Amendment "consent" rubric. *United States v. Yeary*, 740 F.3d 569, 581-82 (11th Cir. 2014). Price does not make a consent argument, and it is difficult to envision how one could succeed given the facts and the terms of his parole contract. *Newton*, 369 F.3d at 668.

the overarching Fourth Amendment analysis ultimately depends on the *Samson/Knights* balance. *White*, 781 F.3d at 861.

Both federal law and reasonableness foreclose Price's spin on *Vanderkolk*. He cites the case in an effort to collapse the differences between probation and parole, but Price's "status as a parolee is the critical factor" under federal law. *White*, 781 F.3d at 861, 863. In other words, "parolees"—like Price—"'are on the continuum of state-imposed punishments' and thus have fewer expectations of privacy *in general*." *Id.* at 863 (quoting *Samson*, 547 U.S. at 850) (emphasis supplied). The existence of a parole search condition only "diminishes" those expectations "further." *Id.* That reasoning has force independent of the specific terms of Price's parole agreement. *See United States v. Huart*, 735 F.3d 972, 975 (7th Cir. 2013) (treating specific search terms as supplementing the *Knights/Samson* balance).

In any event, *Vanderkolk* at most held that parole searches should align with the terms of parole agreements. 32 N.E.3d at 778. The searches here did that. Accordingly, even if his parole agreement and State law could upend the usual *Knights/Samson* balance, Price's argument would fail because there was no "contravention [of] Indiana law," nor any conduct that rendered his agreement "null and ignorable." (A. Br. 25, 26); *cf. Huart*, 735 F.3d at 976 (reasoning that search complied with general Fourth Amendment

reasonableness principles as well as search rules at defendant's halfway-house).

Even taking account of State law and Price's reasonable parole expectations, the considerations that were salient in *White* (and *Samson* and *Knights*) are salient here and confirm the reasonableness of the search.

C. Price's "Stalking Horse" Theory Is Legally Shaky and Cannot Succeed on the Facts of This Case

Price's contract and state law arguments work toward a common goal. Although much of his discussion necessarily cites *Samson* and *Knights*, the spirit of his argument stems from *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and its progeny. (A. Br. 16-23.) As he sees it, "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*." (A. Br. 21.) His argument fails on the law and the facts.

To begin, under *Griffin*'s doctrinal framework, courts first examine whether a state search rule is reasonable and then analyze whether the facts of the case satisfied that rule. *See United States v. Fletcher*, 978 F.3d 1009, 1015 (6th Cir. 2020) (explaining the distinction between *Knights* and *Griffin*). Price does not suggest that the Indiana parole rules are unconstitutional, but he does argue that the search here deviated from those rules.

He says federal agents "use[d] state parole agents as their pawns to conduct warrantless searches" in this case. (A. Br. 18.) On the contrary, the parole searches followed the ordinary course of parole monitoring.

1. Price Relies on a Disfavored Theory

The legal landscape is not favorable to Price's argument. Put simply, "the 'stalking horse' caveat does not apply when a *parolee* is subject to a search provision and the search is reasonable under the totality of the circumstances." *United States v. Ickes*, 922 F.3d 708, 712 (6th Cir. 2019).

The Second Circuit, which rejected the "ill-defined theory" as "not a valid defense," explained the "stalking horse" concept in this way:

> 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 performance of his duties as a probation officer.

United States v. Reyes, 283 F.3d 446, 463 (2d Cir. 2002); *see also United States v. Sweeney*, 891 F.3d 232, 236 (6th Cir. 2018) (laying out background on the "stalking horse" theory, beginning with *Griffin*).

Several courts have rejected the stalking horse theory outright or expressed doubt as to its validity. *See Ickes*, 922 F.3d at 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. Williams*, 417 F.3d 373, 377 (3d Cir. 2005) ("'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. 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*).

In short, Price's desire to rekindle the pre-*Knight* embers of the stalking horse theory does not have much oxygen to support it.

2. The Searches Were Legitimate Exercises of Parole Authority, Not Attempts to Circumvent the Fourth Amendment

Even if a robust version of the stalking-horse theory existed—and even if Price could wriggle free from *Samson* and *Knights*—his appeal would still fail. That is because his argument depends on a mischaracterization of the

parole officers here as "pawns" who were "directed" or "ordered" by a federal agent to search his car and home "to circumvent the warrant requirement." (A. Br. 16, 18, 21.)

Price pins that argument on one parole officer's testimony. The officer stated, "[W]e went to that location because [Agent] Clancy knew that Mr. Price was a parolee" and then answered "yes" to the question, "He asked you to initiate the investigation?" (Tr. 70.)

Notwithstanding that utterance, the trial record does not support Price's assertion that Agent Clancy "directed" the parole team to do anything. Agent Clancy himself denied asking or directing the parole officers to search, stating "I didn't directly tell them to search the vehicle." (Tr. 153.) He "asked them to the scene so they could do their job." (*Id.*) That is consistent with the parole officers' testimony that Clancy "asked" them to come to the gun shop—which is not the same thing as ordering them to search. (Tr. 62, 69, 104.) Then they searched on their own authority. (Tr. 59, 72, 104.) Price also says the parole search of his home was on Clancy's orders. (A. Br. 22.) But again nothing in the testimony indicated a federal directive of that kind, (Tr. 86, 110), and Clancy testified that he "followed" the parole agents to the home because they "want[ed] to conduct a search" there. (Tr. 133-34).

Beyond that, Price's recitation of the facts ignores a broader body of evidence that refutes any inference that Clancy used the parole officers as

"pawns." First, the parole team was looking for Price before they learned of his federal arrest. (Tr. 77.) They planned to visit his home unannounced that day, (Tr. 79), and had already attempted to locate him at his place of work, (Tr. 104). When Agent Clancy called, they naturally changed their plan and headed to Indy Trading Post because they knew Price would be there waiting for them. (Tr. 105.)

At that point, the officers' reasons for parole monitoring had only grown. Price was under arrest—the clearest indication yet that he had violated his parole agreement, and all the prompt they needed to conduct the sort of search that is central to their law enforcement function. *United States v. Barner*, 666 F.3d 79, 85 (2d Cir. 2012).

That series of undisputed background facts renders Price's assertion that Agent Clancy "directed" or "ordered" the parole team to conduct a search wrong and beside the point. Agent Clancy was not the proximate cause of the search—Price's parole status and his conduct were the causes of the search.

Agent Clancy's decision to alert parole officers to Price's illegal conduct was not unreasonable. Nor was their decision, based on that information, to fulfill their statutory duties by searching his car and home.

D. Suppression Would Not Advance the Purposes of the Exclusionary Rule but Would Rather Chill Good-Faith Cooperation Among Law Enforcement Entities

Even assuming *arguendo* that some sort of constitutional violation occurred here, the good faith exception to the exclusionary rule should save the evidence from suppression. *United States v. Leon*, 468 U.S. 897, 905 (1984). As the Supreme Court has observed:

> Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort. For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Davis v. United States, 564 U.S. 229, 237 (2011) (citations and internal quotation marks omitted). Thus, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 238 (citations and internal quotations marks omitted); *Herring v. United States*, 555 U.S. 135, 141-46 (2009).

Two layers of good faith are present here. First, the parole officers acted in good faith reliance on binding precedents. *Davis*, 564 U.S. at 239; *Herring*, 555 U.S. at 147-48. *Samson* and *Knights* applied the Fourth

Amendment to circumstances similar in all salient respects. *White*, 781 F.3d at 863-64. Contrary to Price's citation of a single line of testimony, the record does not suggest that they disregarded those precedents. Rather, they relied on well-established law in good faith.

Second, law enforcement also acted in good faith reliance on a search warrant. *United States v. Lickers*, 928 F.3d 609, 618-19 (7th Cir. 2019); *United States v. Searcy*, 664 F.3d 1119, 1124 (7th Cir. 2011). Agent Clancy's decision "to obtain a warrant is *prima facie* evidence that he . . . was acting in good faith." *Searcy*, 664 F.3d at 1124. Price could rebut that presumption if he could show: "(1) that the issuing judge abandoned his or her detached and neutral role, (2) the officers were dishonest or reckless in preparing the affidavit, or (3) the warrant was so lacking in probable cause as to render the officer's belief in its existence entirely unreasonable." *Id.* He cannot meet that burden.

Broader principles underscore why suppression would be inappropriate here. The state and federal law enforcement officers in this case were working together in a normal way, not engaging in devious conduct. The "objectives and duties of probation officers and law enforcement personnel are unavoidably parallel and are frequently intertwined." *Reyes*, 283 F.3d at 463.

Indeed, if this Court were to accept Price's view as the law, it could chill future (reasonable) coordination. Doing so would create two distinct legal

standards for searches in joint investigations: a lower standard for parole officers (here, reasonable cause) and a higher standard for law enforcement officers (a warrant based on probable cause). Parole officers would not be able to share, and law enforcement would be disinclined to accept, the fruits of perfectly legal warrantless parole searches.

The result of suppression here would be to erect an artificial wall between law enforcement and parole officers and an artificial double standard that would be contrary to *Knights*, *Samson*, and common sense. That is another reason the Court should reject Price's claims.

E. The Inevitable Discovery and Independent Source Doctrines Also Undermine Price's Arguments

The inevitable discovery and independent source doctrines add to the reasons suppression would be improper here.[4] The former "allows the government to use evidence that it obtained illegally but would have obtained legally in any event." *United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004) (citing *Murray v. United States*, 487 U.S. 533, 539 (1988)). The latter "allows the government to use evidence that it obtained both illegally and legally, as when evidence first found in an illegal search is later rediscovered in a legal one." *Id.* (citing *Murray*, 487 U.S. at 537). For either, the

[4] This Court has noted the overlap between these two "doctrines that are so similar that we're not sure which one rules this case." *United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004).

government bears a preponderance-of-evidence burden. *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012); *United States v. Gravens*, 129 F.3d 974, 982 (7th Cir. 1997).

Federal agents had arrested Price on probable cause that he committed a federal crime. (Tr. 104.) His status as a parolee made a search at that point reasonable even without a warrant and even by those agents. Plus, the arrest, and the various circumstances surrounding it, would have supplied the probable cause necessary to secure a warrant. As Price acknowledges, "[i]t would have been reasonable and practicable for Agent Clancy . . . to seek a warrant for the search of the Ford Escape and for Price's residence." (A. Br. 25.)

Plus, the agents could reasonably have conducted a warrantless automobile search at the Indy Trading Post. *United States v. Smith*, 989 F.3d 575, 581 (7th Cir. 2021). Absent Price's arrest, it is also more likely than not that his parole officers would eventually have caught up with him that day, conducted a compliance search, and discovered at least some of his contraband. That reality undermines Price's argument even further.

II. THE EVIDENCE WAS SUFFICIENT TO ALLOW A RATIONAL JURY TO CONVICT PRICE FOR POSSESSING "HIS" GUNS

A. Standard of Review

Price faces "an uphill battle in making out a sufficiency of the evidence claim." *United States v. Christian*, 342 F.3d 744, 750 (7th Cir. 2003). This Court "review[s] a trial court's ruling on a Rule 29 motion[] *de novo*, asking only 'whether evidence exists from which any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.'" *United States v. Johnson*, 874 F.3d 990, 998 (7th Cir. 2017) (quoting *United States v. Doody*, 600 F.3d 752, 754 (7th Cir. 2010)).[5] Reversal is "rare" because this Court "defer[s] heavily to the jury's findings and reviews evidence in the light most favorable to the government." *Id.* (citing *Doody*, 600 F.3d at 754).

This "is a 'heavy' burden—indeed a 'nearly insurmountable' one." *United States v. Jett*, 908 F.3d 252, 273 (7th Cir. 2018) (quoting *United States v. Maldonado*, 893 F.3d 480, 484 (7th Cir. 2018)); *see also Johnson*, 874 F.3d at 998 (citing *United States v. Tucker*, 737 F.3d 1090, 1092 (7th Cir. 2013)).

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[5] Price does not mention Federal Rule of Criminal Procedure 33 in his argument and has thus waived any reliance on that rule. Under Rule 33, 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). To the extent it remains relevant here, this Court reviews the denial of a Rule 33 motion for an abuse of discretion. *United States v. Fluornoy*, 842 F.3d 524, 528 (7th Cir. 2016).

B. The Evidence on Counts 2 and 3 Was Sufficient to Leave the Jury's Decision in Place[6]

To convict Price on Counts 2 and 3—felon in possession charges, *see* 18 U.S.C. § 922(g)—the jury had to find: (1) that Price was a prohibited person because he had previously been convicted of a crime punishable by imprisonment for more than one year, and that he knew of that status; (2) that he possessed (3) a firearm or ammunition; and (4) that interstate-commerce jurisdiction existed. *United States v. Jackson*, 784 F. App'x 946, 949 (7th Cir. 2019) (citing *Rehaif v. United States*, 139 S. Ct. 2191 (2019)); *see United States v. Trigg*, 963 F.3d 710, 714 (7th Cir. 2020).

Price does not contest the first, third, or fourth elements of either charge. He focuses on the second element, arguing that no evidence showed he possessed the two firearms. (A. Br. 30.)

On the contrary, Price constructively possessed the guns at issue. *United States v. Katz*, 582 F.3d 749, 752 (7th Cir. 2009). The government can establish constructive possession by "demonstrating that the defendant

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[6] Price does not challenge Count 1 here but "preserves" such a challenge "for subsequent appeal," while acknowledging that this argument is "foreclosed by circuit precedent." (A. Br. 28 n.5.) Although he then proceeds to half-advance an argument against Circuit precedent, the government will take him at his word that he lodges no claim relating to Count 1. If the Court determines that he should make the argument in this appeal (and that the Court intends to reconsider its relevant precedents, *see* Cir. Rule 40(e)), the government respectfully requests that the Court ask the parties for supplemental briefing on the issue.

knowingly had both the power and the intention to exercise dominion and control over the object, either directly or through others." *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012).

Where, as here, "a defendant shares a living space with others, the proof requires a more exacting approach because a court must be careful to separate true possessors from mere bystanders." *United States v. Lawrence*, 788 F.3d 234, 240 (7th Cir. 2015). Showing "exclusive control" can establish the necessary "nexus." *Griffin*, 684 F.3d at 695-96. The government can also prove constructive possession by coupling "a substantial connection to the location where contraband was seized," *Griffin*, 684 F.3d at 695-96, with "evidence of some other factor—including connection with [the impermissible item], proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise," *United States v. Morris*, 576 F.3d 661, 668 (7th Cir. 2009) (quotation omitted).

As to both Count 2 and Count 3, the evidence showed Price's clear connections to the guns' locations, as well as additional facts that tied him to the guns themselves. The evidence at trial easily permitted the jury to "connect[] the links in the logical chain" and confirm his guilt. *United States v. Garcia*, 919 F.3d 489, 499 (7th Cir. 2019).

<u>Count 2</u>: The gun underlying Count 2 was a .40 caliber pistol tucked away in the center console of the Ford Escape Price he drove to Indy Trading

Post the day of his arrest. (Tr. 287, 294; R. 43, at 2.) He downplays his connection to the Escape, stressing that the console was closed, and that other people also had access to the car. (A. Br. 31.)

But as the driver of the Escape, Price's connection to the car was at least as substantial as the defendant's in *Morris*. There, the defendant had been seen driving the car "in the days prior to the raid" and "was the vehicle's last known driver." *Id.* at 670. That was enough to establish constructive possession of the firearm inside the car, despite the facts "that the car was not registered in [his] name, that other people occasionally had access to the vehicle, and that there were no fingerprints found on . . . the gun." *Id.* The same analysis applies here.

Price's connection to the gun was just as clear as his connection to the car. *Morris*, a drug trafficking case, phrased the typical "plus factors" in a manner suited to its context. 576 F.3d at 668. At least two of *Morris*'s concepts are easily transferable.

First, the evidence here showed a clear "connection with" the gun. *Id.* For one thing, that the console was "closed" hardly undercuts the conviction. On the contrary, the fact that the gun was locked and loaded and right next to Price as he drove lends further support to the conviction because it underscores his connection to the firearm.

Another way to establish the necessary connection "is by demonstrating some conduct that links the individual to the illegal items." *Lawrence*, 788 F.3d at 240. The linking conduct here was straightforward: Price purchased ammunition that matched a .40 caliber Smith & Wesson pistol. (Tr. 33.) Indeed, Price does not contest his conviction on Count 1 (which concerned .40 caliber Smith & Wesson ammo).

The jury also saw and heard about the receipt for that purchase. The receipt, listing .40 caliber Smith & Wesson ammunition, was in a "nightstand with a TV on it" in the master bedroom in Price's home, along with the ammo itself. (Tr. 91, 138-41.) For any rational juror, Price's "connections to" the gun kept adding up. *Lawrence*, 788 F.3d at 238, 240; *United States v. Alanis*, 265 F.3d 576, 592 (7th Cir. 2001).

Price also made a "statement indicating involvement" in the possession of the gun. *Morris*, 576 F.3d at 668. Specifically, when he was at Indy Trading Post the day of his arrest, he told the clerk he wanted to rent a gun because "his forty" was "too much" for his girlfriend. (Tr. 44.) Price says that reference to a .40 caliber firearm was not sufficient because he could have been referring to a different gun. (A. Br. 31.) But he has never pointed to an alternative candidate (sensibly, given that he would be admitting a similar violation of the law with respect to such a gun, if it existed and was "his").

He tries to analogize this case to *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012). But the proof and theory of the case here are not comparable to *Griffin*. The "nexus" there was the defendant's "failure to separate himself" from guns in his parents' home. 684 F.3d at 698. The other best evidence in *Griffin* tying the defendant to the charged guns was testimony from a less-than-credible witness about other purported guns that were never found. *Id.* at 699. In other words, the alternative gun candidates had been identified in *Griffin*, whereas Price can point to nothing in the record suggesting that "his forty" that was "too much" for his friend to use at the shooting range was a gun other than the one in the car.

Beyond the conceptual flaws in Price's *Griffin* analogy, a broader reality distinguishes this case from that one. "[T]here was no circumstantial evidence connecting the defendant to the firearm in *Griffin*." *United States v. Davis*, 896 F.3d 784, 791 (7th Cir. 2018). Here, by contrast, the evidence established possession via multiple links between Price and the pistol.

<u>Count 3</u>: Count 3 concerned the .223 caliber Ruger rifle officers found in an Oldsmobile parked at Price's home. (R. 43, at 2.) Price says the evidence merely showed his "access" to the gun, not his "possession" of it. (A. br. 32.) That is incorrect.

First, Price's connection with the home where the Oldsmobile was parked cannot be questioned. The address was the one listed on his parole

records as his residence. (Tr. 62, 87-88, 110.) That is why the parole officers went to that home to conduct a parole search. (Tr. 110, 134.) Inside the home, officers confirmed his connection to the location when they found mail with his name on it. (Tr. 90, 136.)

That is not all. Officers found the key to the Oldsmobile in the same TV stand that also contained Price's Indy Trading Post receipt and the .40 caliber ammunition he had purchased. (Tr. 140-41.) That proximity to Price's personal items showed more than mere "access" to the gun's location. (A. Br. 32); *United States v. Reed*, 744 F.3d 519, 526 (7th Cir. 2014).

The evidence tied Price even more directly to the gun itself. The strongest "plus factor" tying Price to the rifle was his attempt to buy a matching magazine. (Tr. 28.) This case began when Price went to Indy Trading Post to order a magazine for a .223 caliber Ruger rifle. (Tr. 29.)

Price then called the shop multiple times in the days that followed asking about the order. (Tr. 30-31.) He returned to the store to check on the status of the magazine. (Tr. 32.) And he complained that a magazine "shell" the clerk gave him did not fit "his firearm," a clear reference to the rifle associated with his earlier magazine order. (Tr. 42, 44.)

On appeal, Price tries to discount that evidence by suggesting that the magazine could have been for a different Ruger rifle. (A. Br. 32.) Again, it is

not clear what other rifle that could be. For all of these reasons, this case is a far cry from *Griffin*. 684 F.3d at 699.

Certainly, it was reasonable for the jury to conclude that the magazine that Price requested, which matched the rifle in the car on his property that officers opened with keys in his TV stand, established constructive possession. The evidence showed far more than Price's "access" to the gun—it showed his intent to use the gun, along with the matching magazine.

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In short, Price was no "mere bystander" with "mere proximity" to the firearms at issue. The jury's decisions to convict Price for possessing "his" .40 caliber pistol and "his" rifle were rational. (Tr. 42, 44.)

III. THE DISTRICT COURT PROPERLY APPLIED VARIOUS SENTENCING ENHANCEMENTS

A. Standard of Review

This Court reviews a district court's interpretation of the Sentencing Guidelines *de novo*. *United States v. Grzegorczyk*, 800 F.3d 402, 405 (7th Cir. 2015) (citing *United States v. Harper*, 766 F.3d 741, 744 (7th Cir. 2014)).

Factual findings tied to such the district court's application of the Guidelines are reviewed for clear error. *United States v. Leiskunas*, 656 F.3d 732, 739 (7th Cir. 2011); *United States v. Black*, 636 F.3d 893, 899 (7th Cir. 2011).

With respect to any issue not raised below—specifically, the new version of Price's obstruction-enhancement argument—review is for plain error. "The sentencing in the district court is the main event. The parties prepare and identify the issues they wish to address." *United States v. Lewis*, 823 F.3d 1075, 1083 (7th Cir. 2016) (finding waiver of issues first raised on appeal). Raising this twist on his argument for the first time on appeal, Price "must show (1) an error . . .; (2) that the error was 'plain—that is to say, clear or obvious;' (3) that the error affected his substantial rights; and (4) that the error 'seriously affects the fairness, integrity or public reputation of the judicial proceedings.'" *United States v. Thomas*, 897 F.3d 807, 812, 818 (7th Cir. 2018) (quoting *Molina-Martinez v. United States*, 578 U.S. __, 136 S. Ct. 1338, 1343 (2016)).

B. The Facts and Applicable Law Warranted a Multiple-Firearms Enhancement

The Sentencing Guidelines impose an enhancement if a defendant's felon-in-possession offense involved "three or more firearms." U.S.S.G § 2K2.1(b)(1)(A). Price was charged with possessing two firearms, and at least one more was relevant. The enhancement was therefore appropriate.

The Count 2 and Count 3 guns are not the subject of reasonable dispute. *Supra* Part II. The focus of this argument is the third gun—the one Price briefly possessed at Indy Trading Post. (Tr. 127); *see United States v.*

Matthews, 520 F.3d 806, 810-11 (7th Cir. 2008) (noting that even "fleeting" possession can be culpable).[7]

That gun is relevant if it was "part of the same course of conduct or common scheme or plan" as his possession of the .40 caliber pistol or the .223 caliber Ruger rifle (or even the .40 caliber ammunition). U.S.S.G. § 1B1.3(a)(2). Offenses are part of the same course of conduct "if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id.* § 1B1.3, cmt. n.5(B)(ii). In analyzing the connection between offenses, the Court considers three factors: "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.* "When one of [these] factors is absent, a stronger presence of at least one of the other factors is required." *Id.*

During the course of the crime charged in Count 2, Indy Trading Post surveillance video showed Price possessing another gun. (Tr. 35-36.) That was same day he drove to the shop with the .40 caliber pistol in the console of the car. (*Id.*) And he was at the same shop where, in the days before, he had

[7] The district court did not rely on an additional gun, but the government maintains it could have. That GSG Firefly .22LR pistol was located in a toolbox that contained assorted ammunition, including ammunition for Price's Ruger Mini Rifle. The firearm was in the same room as the ammunition charged in Count 1.

purchased the ammunition that was the subject of Count 1 and had spent several days trying to obtain a magazine for the rifle that was the subject of Count 3.

Possessing the gun at Indy Trading Post "during" the commission of another offense was relevant conduct. (S. 9.) In *United States v. Santoro*, 159 F.3d 318, 321 (7th Cir. 1998), this Court held that a defendant's uncharged gun possession was part of the same course of conduct as his offense of conviction (illegal gun possession) because the two possessions occurred within a six- to nine-month period. *Id.*

Here, Price's possessions were nearly simultaneous: he left one gun in the car, went in the shop, and handled the other gun. Applying *Santoro* and other binding precedents, that is sufficient to affirm. *Id.* (citing *United States v. Powell*, 50 F.3d 94, 104 (1st Cir. 1995)); *see United States v. Jones*, 635 F.3d 909, 918-19 (7th Cir. 2011) (gun found in the "same place" at the "same time" constituted relevant conduct); *United States v. Wallace*, 280 F.3d 781, 785 (7th Cir. 2002) (uncharged possession of gun four weeks after charges possession of gun was part of the same course of conduct).

Price acknowledges the force of this Court's precedent, (A. Br. 36), but says an out-of-circuit case should convince this Court to distinguish *Santoro* or even overrule it, (A. Br. 37 & n.8 (citing *United States v. Amerson*, 886

F.3d 568 (6th Cir. 2018)). Setting aside that overruling Circuit precedent is a big request, *see* Cir. Rule 40(e), *Amerson* does not really help his argument.

In *Amerson*, the Sixth Circuit declined to follow *Santoro*. 886 F.3d at 578. In doing so, *Amerson* reasoned that the "six- to nine-month period" between possessions in *Santoro* was too big of a gap, without more, to meet the course-of-conduct standard. *Id.* at 577. At the same time, however, *Amerson* reinforced the view that "near-contemporaneous possession of weapons" alone is typically sufficient on its own. *Id.* at 578. And *Amerson* cited *Powell* (which underpinned *Santoro*)—where the gun possession intervals were nearly identical to Price's case—approvingly.

Put another way, under *Santoro*, *Powell*, *Amerson*, and this Court's other precedents, "near-contemporaneous" possession of an uncharged gun is sufficient for the § 2K2.1(b)(1)(A) enhancement to apply. Even if that were not enough, the relevance of the uncharged gun here transcends mere coincidence: Price possessed the uncharged gun because "his forty" (the Count 2 gun, which he left in the car) was "too big" for his friend, and Price bought gun accessories tied to the .223 caliber rifle and the .40 caliber pistol at the same shop where he possessed the uncharged gun.

The district court correctly applied the enhancement.

C. The Facts and Applicable Law Warranted a Stolen-Firearm Enhancement

Price also contests the application of U.S.S.G. § 2K2.1(b)(4)(A)'s two-level enhancement for possessing a stolen firearm. (A. Br. 37.) According to him, he did not know the firearm was stolen, so the enhancement was "contrary to the underlying principle of *Rehaif*—that only culpable conduct warrants punishment." (*Id.* at 38.)

Price acknowledges that his argument is contrary to precedent. This Court has held that § 2K2.1(b)(4)(A)'s stolen firearm enhancement does not contain a scienter requirement. *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)). Indeed, courts "have uniformly upheld § 2K2.1(b)(4)(A)'s application where the defendant's offense involved a stolen firearm, even where the defendant did not know the firearm used was stolen." *United States v. Gibson*, 817 F. App'x 202, 205 (6th Cir. 2020) (unpublished) (collecting cases). That precedent is on solid footing: Price does not deny that U.S.S.G. § 2K2.1, appl. n. 8(B) does not require knowledge that a firearm was stolen.

Rehaif does not change matters. That decision established a *mens rea* requirement for convictions under 18 U.S.C. § 922(g), a statute without an express *mens rea* element. 139 S. Ct. at 2200. The Court invoked "the

presumption in favor of scienter even when Congress does not specify any scienter in the statutory text." *Id.* at 2195.

According to Price, the same presumption should apply to the text of § 2K2.1(b)(4), which he says is also silent on the issue of *mens rea*. But, when it comes to the existence of a *mens rea* element, statutes and the Sentencing Guidelines are "fundamentally distinct." *United States v. Murphy*, 96 F.3d 846, 848–49 (6th Cir. 1996). The *mens rea* presumption "deals only with the requisite intention for conviction of a crime," and thus should not "include sentencing enhancements within its scope." *United States v. Palos*, 978 F.3d 373, 377-78 (6th Cir. 2020) (discussing *Staples v. United States*, 511 U.S. 600, 619 (1994)).

Drawing such a distinction between statutes and Guideline enhancements is logical. As the Supreme Court has observed, "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Dean v. United States*, 556 U.S. 568, 575 (2009).

Indeed, as this Court has explained, the *mens rea* requirement in 18 U.S.C. § 922(g) "simply reflects Congress' desire not to punish ordinary, unwitting purchasers or users of firearms who would have no reason to inquire so closely into the condition of a gun." *Schnell*, 982 F.2d at 220. But a felon who knowingly purchases a firearm "is not engaging in 'apparently innocent conduct,' whether or not he knows that the gun is stolen or altered."

Id. at 221 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Accordingly, the presence of a scienter requirement in § 922(g), as determined by the Court in *Rehaif*, is not helpful to Price. *United States v. Harris*, 822 F. App'x 172, 174 & n.2 (4th Cir. 2020) (unpublished) (*Rehaif* "does not apply to sentence enhancements, which are imposed only after the defendant has been convicted of unlawful conduct.")

Price does not dispute that the firearm was stolen, and his *Rehaif* argument is misguided. The enhancement applies.

D. Given the Facts and Applicable Law, the Obstruction of Justice Enhancement Was Appropriate, Not Plainly Erroneous

Price also contends that the district court erred in applying the obstruction of justice sentencing enhancement. (A. Br. 39-40.) His claim cannot succeed, certainly not under plain error review.

Below, he argued only that he did not provide false testimony and was merely confused. (*See generally* R. 98, 138.) Now, he still says he was confused but argues primarily that the "district court erred by not making a finding as to the materiality of the testimony at issue." (A. Br. 39.) As to the latter part of his argument, plain error review applies because he did not give the district court an opportunity to address that contention below. *Thomas*, 897 F.3d at 812.

First, the confusion question. True enough, 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. Price says the reversible error is that the court made no finding on that question—it is not clear whether he means to say he was, in fact, confused. (A. Br. 41.)

He cannot show error, plain or otherwise. Surveillance video depicted Price handling a firearm at Indy Trading Post. (Tr. 35, 127.) Related to that surveillance, Price later testified falsely as follows:

> Q: If someone were to hand you a pistol, could you tell me if it was loaded; yes or no?
> A: No.
> Q: You would have no idea how to tell if a pistol was loaded?
> A: No.
> Q: Do you know how to load a firearm?
> A: No.
> Q: Do you know how a magazine works?
> A: No.
> Q: Have you ever shot a firearm?
> A: I have not.
> Q: Have you ever held a firearm?
> A: I have.
> Q: When was that?
> A: October 17th.
> Q: That is the only time in your life you have ever held a firearm?
> A: Yes.

(Tr. 235-36.)

The testimony was obviously false, and willfully so. Setting aside the guns central to Counts 2 and 3, Price was convicted of aggravated battery for shooting and killing another person—something that requires holding a

loaded firearm. (PSR ¶ 34.) After that conviction, Price was separately convicted for possessing a firearm. (PSR ¶ 35.) Nothing about the line of questioning or how it related to Price's past was confusing in any way.

The testimony was also material. To demonstrate Price's guilt on Counts 2 and 3, the government had to show that he possessed a firearm and that he was convicted felon. *Jackson*, 784 F. App'x at 949. His testimony was "material" because it concerned his "guilt or innocence" in ways pertinent to both of those elements. *United States v. Arambula*, 238 F.3d 865, 868 (7th Cir. 2001).

As the district court observed, his perjury was material to the felony-history element of the § 922(g) charges. (S. 16.) Although the parties stipulated to that element, a court need not bless a defendant's perjurious attempts to undermine or unwind a stipulation. In other words, Price may have hoped the jury would accept his (false) testimony over the parties' dry stipulation, and it was fair to treat his testimony that way when assessing the obstruction enhancement.

That the court did not announce its decision as a "finding" of materiality was neither an error nor something that affected Price's "substantial rights." *United States v. Dridi*, 952 F.3d 893, 900-01 (7th Cir. 2020). Furthermore, Price cannot plausibly claim an effect on his substantial rights given the additional reason the falsehoods were material.

Specifically, his perjury was also material to the possession element of § 922(g). In the subject testimony, he attempted to convey that he had never possessed or loaded or handled a firearm before that moment on October 17. Earlier in the trial, the evidence on Counts 2 and 3 had already indicated that Price possessed two guns, one loaded, before that day. For example, as to Count 3, the Indy Trading Post clerk testified that Price (before October 17) described his irritation at being unable to fit a rifle accessory to "his" rifle. How he could have attempted to fit the "shell" to the Ruger rifle without holding it is a mystery. (Tr. 42.) The evidence had also already indicated that the "loaded" .40 caliber pistol in the Ford Escape was "his." (Tr. 44, 130.)

Price's false testimony that he had not held a gun and would not know if a gun was loaded was part of an attempt to negate material evidence showing he had possessed a loaded pistol and tried to load a rifle. He told those specific untruths to the jury because they were material to his guilt or innocence. The district court's decision to apply the obstruction enhancement thus made good sense.

The court committed no error, plain or otherwise, in applying the obstruction enhancement. Certainly, the district court's decision was not one that "seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343. The Court should affirm.

CONCLUSION

For the reasons stated above, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE IN ACCORDANCE WITH CIRCUIT RULE 32

The foregoing BRIEF FOR THE UNITED STATES complies with the type volume limitations required under Circuit Rule 32 of the United States Court of Appeals for the Seventh Circuit in that there are not more than 14,000 words and that there are 12,922 words typed in Microsoft Word word-processing this 9th day of April, 2021.

s/ Bob Wood
Bob Wood
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CERTIFICATE OF SERVICE

I certify that on April 9, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system to the following:

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