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

REPLY BRIEF OF DEFENDANT-APPELLANT MARK PRICE

May 3, 2021

Sarah M. Konsky
Counsel of Record
David A. Strauss
Brenna Ledvora (Ill. Sup. Ct. R. 711 License Number 2020LS00470)
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC
AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190
konsky@uchicago.edu
Counsel for Defendant-Appellant

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INTRODUCTION

In 2018, a federal agent instructed state parole officers to conduct two searches of Mark Price. Neither of those searches would have been constitutional if the federal agent had conducted them himself. After federal agents arrested Price for purchasing ammunition at Indy Trading Post, Federal Agent Brian Clancy called state parole officers to the scene, handed them the keys to the car Price had driven, and asked them to initiate an investigation of the vehicle. Once that search was finished, Agency Clancy asked the parole officers to conduct yet another search, this time of Price's home—which they did, with Agency Clancy waiting outside.

These searches violated the Fourth Amendment. It is unconstitutional for a federal agent to use state parole officers as pawns to conduct searches that he could not legally conduct. Moreover, these searches were unreasonable under the totality of the circumstances. The fruits of these unconstitutional stalking horse searches—the firearms underlying Counts 2 and 3—should have been suppressed. Though the government halfheartedly argues that some mixture of the good-faith exception, inevitable discovery, and independent source applies, most of these arguments are waived, and all lack merit.

Even if the evidence had been properly admitted, it was insufficient to sustain the convictions on Counts 2 and 3.[1] The evidence at trial simply demonstrated access to shared locations and cannot support a finding of

[1]Price continues to preserve for subsequent appeal his objection to his Count 1 conviction for possession of ammunition. Opening Br. 28 n.5.

constructive possession. Nor can the government save the district court's erroneous application of three sentencing enhancements. This Court should vacate Price's conviction and remand for resentencing.

ARGUMENT

I. The searches in this case violated the Fourth Amendment.

A. The government conducted unconstitutional stalking horse searches.

This case presents the quintessential stalking horse violation. This Circuit, like other circuits, has long treated it as axiomatic 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).

That is precisely what occurred here. On two separate occasions, Agent Clancy used a group of state parole officers as pawns to carry out searches that he could not have legally conducted: the search of the car that Price drove to Indy Trading Post (but which belonged to his significant other) and the warrantless search of Price and his significant other's shared home. *See* Opening Br. 21–23. Clancy was not authorized by Price's parole agreement to conduct a search, *see* Dkt. 42-1, did not have probable cause to conduct a warrantless car search at Indy Trading Post, *see* Section III.B.2, and did not obtain a warrant before orchestrating the search of Price's home, *see* Trial Tr. 134–35. Clancy could have chosen to comply with the requirements of the Fourth Amendment himself; instead, he enlisted the state parole officers in

order to "circumvent the rigors of the [F]ourth [A]mendment." *United States v. Cardona*, 903 F.2d 60, 65 (1st Cir. 1990). Many courts, for many years, have recognized that such behavior is per se unconstitutional. *See, e.g.*, *id.* ("The law will not allow a parole officer to serve as a cat's paw for the police.") (collecting cases).

The government claims that the stalking horse principle is "[l]egally [s]haky," and that "[t]he legal landscape is not favorable" to that principle. Gov't Br. 24–25. The government's tentative language reflects the weakness of its position. Contrary to what the government suggests, neither *United States v. Knights*, 534 U.S. 112 (2001), nor *Samson v. California*, 547 U.S. 843 (2006), authorizes the kind of evasive action that Agent Clancy took in this case. Nor do the courts of appeals cases that the government cites.

Neither *Knights* nor *Samson* presented a stalking horse scenario. In neither case did an officer, himself prohibited by the Fourth Amendment from conducting a search, instead conduct that search by enlisting other officers in order to avoid the Fourth Amendment's requirements. In both cases—unlike here—only one officer was involved, and the probation or parole condition allowed that officer to conduct the search in question. *See Samson*, 547 U.S. at 846–47; *Knights*, 534 U.S. at 115. In fact, the conditions in those cases allowed suspicionless searches by *any* law enforcement officer at any time. *Samson*, 547 U.S. at 852; *Knights*, 534 U.S. at 114. The question in *Knights* and *Samson* was whether those conditions violated the Fourth Amendment—something that is not at issue here. In this case, the parole condition specifically did *not* allow

Agency Clancy, a federal law enforcement officer, to conduct a search—as Agent Clancy himself evidently recognized. *See* Dkt. 42-1 (parole conditions allowed certain state officials, specifically Price's "supervising officer" or "authorized official of the Department of Correction," to conduct "reasonable search[es]").

The government relies on cases from other circuits stating that the constitutionality of a search under the Fourth Amendment does not turn on the officer's subjective intent, including whether the officer's purpose was related to the needs of the probationary system. *See United States v. Sweeney*, 891 F.3d 232, 236 (6th Cir. 2018). But this argument misses the point. The reason for prohibiting the federal government from using state officers as pawns—a reason that is "obvious" to many courts—is that "[t]o permit concerted effort among officials in an attempt . . . to circumvent [a defendant's] fourth amendment rights cannot be done." *Smith v. Rhay*, 419 F.2d 160, 162–63 (9th Cir. 1969); *see United States v. Hallman*, 365 F.2d 289, 291–92 (3d Cir. 1966). A stalking horse search occurs when a law enforcement officer cannot legally conduct a search of a probationer or parolee and instead directs a probation agent or parole agent to do so. This is an objective inquiry into the facts of the search, not an inquiry into any officer's subjective state of mind. Contrary to the government's suggestion, it does not require "examining [a search's] official purpose," *Knights*, 534 U.S. at 122.

In fact, it is not clear that any of the cases cited by the government articulates an actual stalking horse violation. Some of the cases dealt with

search conditions like those in *Knights* and *Samson*, which permitted individuals to be searched by both corrections agents and law enforcement officers. *See Sweeney*, 891 F.3d at 235–37; *United States v. Ickes*, 922 F.3d 708, 710–12 (6th Cir. 2019). The other cases involved searches that were initiated by the corrections agents without direction from other law enforcement officers. *See United States v. Williams*, 417 F.3d 373, 375 (3d Cir. 2005) (parole officer "McElhinny, her supervisor and another parole agent began the search about 2 p.m." without the presence of other law enforcement and without their instruction or knowledge); *United States v. Stokes*, 292 F.3d 964, 966 (9th Cir. 2002) (probation officer "Blazer asked that the police locate Stokes and contact Blazer when they had"); *United States v. Brown*, 346 F.3d 808, 810 (8th Cir. 2003) (after hearing about an informant's tips and believing that Brown had provided her with a fake address, probation officer "Allison decided to conduct a home probationary search"); *United States v. Reyes*, 283 F.3d 446, 452 (2d Cir. 2002) (the probation office had a general policy to "notify the DEA upon exiting [probationer]'s home[s]" whenever "a probation officer observed drugs in plain view").

Once the government's misapprehension of the law is corrected, all that remains is its assertion that Price has "mischaracteriz[ed]" facts. Gov't Br. 26–27. That, too, is wrong. The record makes clear that Agent Clancy was using the parole officers as pawns for his warrantless searches at every point. *See* Opening Br. 21–23. Clancy initiated the investigation of Price, informed the parole officers of the investigation, and went undercover at the Indy Trading

Post. Trial Tr. 121–22, 124–25, 128–29. Clancy then called Price's parole officers to the scene, handed them the car keys, and asked them to "initiate the investigation" of the car, at which point the parole officers conducted the search. *See id.* 129, 69–70, 108.

Likewise, Agent Clancy orchestrated the warrantless search of Price's house. The government's contention that the parole officers "want[ed] to conduct a search" and that Clancy merely "followed" the agents to Price's home does not reflect the parole officers' testimony. *Id.* 133–34. After the parole officers finished searching Price's vehicle, they were "asked to go to, to the location of [Price]'s address," *id.* 62, to conduct another search. Clancy, or a member of his team, was the only person who could have plausibly ordered the parole officers to travel to Price's home.

The government also points to the parole officers' plan to "visit" Price on the day of his arrest as evidence that Agent Clancy did not use the officers as his pawns. Gov't Br. 27–28; Trial Tr. 77. But the officers conspicuously did not say that they planned, on their own initiative, to conduct an unconsented search of Price's house even if he was not there. In fact, while the parole agents had Price on their "list for [] visits for that afternoon," either at his home or at his work, he was not "a priority." Trial Tr. 77, 104. The searches were, quite obviously, the product of Clancy's intervention.

Because Clancy used the parole agents as his pawns to execute warrantless searches that he was prohibited from conducting himself, these classic stalking horse searches violate the Fourth Amendment.

B. The searches were unreasonable intrusions upon Price's expectation of privacy.

The searches were also unreasonable under the totality of the circumstances. As Price explained in his opening brief, under this Court's precedent, his expectation of privacy is shaped by his parole agreement and Indiana law. *See* Opening Br. 16–17; *United States v. White*, 781 F.3d 858, 861 (7th Cir. 2015). Weighing Price's expectation of privacy against the interests promoted by the warrantless searches orchestrated by Agent Clancy, the searches were unreasonable under the balancing test prescribed by *Samson* and *Knights*. *See* Opening Br. 23–28; *Knights*, 534 U.S. at 118–19.

The government asserts that Price improperly "elevate[s]" state law over "the *Samson/Knights* balance" and that Price's "status as a parolee" is the "critical factor" to consider. *See* Gov't Br. 22–23 (citation omitted). This is mistaken. Parole, and the consequences of being a parolee, are creations of state law. State law, and the extent to which it deprives a parolee or probationer of freedom, determines the degree to which a parolee or probationer's expectation of privacy is diminished. *Knights* and *Samson* upheld the limits on expectations of privacy that the states had imposed in those cases; those cases did not suggest, and could not plausibly suggest, that parolees are subject to additional restraints beyond what the state chooses to impose. *See Knights*, 534 U.S. at 119 ("[A] court granting probation *may* impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.") (emphasis added); *see also Samson*, 547 U.S. at 847. The district court itself recognized this point when it determined that

Price (a parolee) had a greater expectation of privacy than both Samson (a parolee) *and* Knights (a probationer) due to differences in their release conditions: Price's agreement only authorized searches with "reasonable cause" by his "supervising officer" or "authorized [corrections] official," while Samson's and Knights' agreements permitted suspicionless searches by *any* law enforcement officer. Dkt. 42-1; Dkt. 59 at 10–11, A16–17.

This Court's decision in *United States v. White*, 781 F.3d 858 (7th Cir. 2015), is particularly clear on this point: a parolee's "legitimate expectations of privacy . . . is shaped by the state law that governed [the defendant's] terms of parole." *Id.* at 861 (citation omitted). For that reason, in *White*, the Court carefully "trace[d]" "some intricacies of Illinois law" in determining whether a parolee's Fourth Amendment rights had been violated. *Id.* Thus, directly contrary to the government's assertion here, in *White*, the parole conditions, not the defendant's parolee status, was the crucial component of the analysis. The government's reliance on *United States v. Huart*, 735 F.3d 972 (7th Cir. 2013), is similarly mistaken. *Huart* held that the defendant had no expectation of privacy in his cell phone not only because he was "an inmate" at a halfway house, but specifically because the halfway house's rules did not permit cell phones and allowed any phone to be searched and confiscated. *See id.* at 975–76. Price's expectation of privacy—despite his parolee status—was therefore greater than that of the defendants in *Knights*, *Samson*, *White*, or *Huart*, who were all subject to blanket search conditions.

Indiana law only bolsters this conclusion. Indiana law not only collapses privacy expectations between probationers and parolees, but also holds that searches not expressly addressed by the parole agreement are impermissible. *See State v. Vanderkolk*, 32 N.E.3d 775, 779–80, 778 (Ind. 2015). The government contends that the searches conducted by the parole agents did not infringe Price's privacy because they "align[ed] with the terms of [his] parole agreement[]," Gov't Br. 23, but this ignores what actually happened. The parole officers did not initiate the searches, and there is no reason to think that, had Agent Clancy not intervened, they would have conducted the searches. They were a mere conduit for Agent Clancy to conduct searches that were impermissible under Price's parole agreement.[2] Given Price's parole agreement, the searches intruded upon Price's reasonable expectation of privacy.

On the other side of the balance, any governmental interests promoted by the search did not outweigh the intrusion on Price's privacy rights. *See* Opening Br. 25–26. As the government acknowledges, *see* Gov't Br. 18, this side is also "inform[ed]" by the "search condition." *Knights*, 534 U.S. at 113. Price's search condition did not allow the government to engage in these stalking horse searches. And the government mistakenly overestimates the value of parolee information in light of Price's immobilization. *See* Opening Br. 25–26; Gov't Br. 19.

[2]These facts also demonstrate the government's error in asserting that "[t]he Second Circuit has rejected a nearly identical claim." Gov't Br. 21. In *United States v. Newton*, 369 F.3d 659 (2d Cir. 2004), there was no stalking horse violation. Parole officers alone decided to search the defendant and contacted the police for back-up; there was "little police involvement" in the situation. *Id.* at 663–64, 668.

Given Price's reasonable expectation of privacy against warrantless, stalking horse searches by federal agents, and the government's lesser interests, the searches were unreasonable under *Knights* and *Samson*.

II. The fruits of the unconstitutional searches of Price must be suppressed.

The fruits of these illegal searches must be suppressed. The pistol underlying Count 2 was obtained during the illegal car search at Indy Trading Post. The rifle underlying Count 3 was the fruit of a poisonous tree: immediately after parole officers found ammunition during an illegal, warrantless home search, Agent Clancy sought a warrant, the same officers resumed their search, and they found a rifle. Opening Br. 6–7. *See Gentry v. Sevier*, 597 F.3d 838, 850 (7th Cir. 2010).

The government cannot rely on any exceptions to the exclusionary rule. Most of these arguments are waived and all lack merit.

A. The government has waived several of its arguments.

In the district court, the government chose to argue only that there was no Fourth Amendment violation and that inevitable discovery applied because the officers would have obtained warrants. *See* Dkt. 42; Trial Tr. 73–74. This did not preserve the numerous new theories of admissibility that the government now raises. *See, e.g.*, *United States v. Kelly*, 772 F.3d 1072, 1078–79 (7th Cir. 2014) (defendant did not preserve his challenge to the warrant based on lack of probable cause where he relied on lack of particularity below). The government has therefore waived the good-faith exception, independent source, and its new bases for inevitable discovery.

Even if this Court believes that these new arguments were forfeited, rather than waived, the government cannot prevail.[3] Federal Rule of Criminal Procedure 12(c)(3) requires a party to demonstrate "good cause" before a forfeited suppression argument can be reviewed under plain error. *See Kelly,* 772 F.3d at 1079–80 & n.4; *United States v. Daniels*, 803 F.3d 335, 351–52 (7th Cir. 2015).[4] There is no good cause because there was "no reason why [the government's] trial counsel could not have broadened his argument" below. *United States v. Murdock*, 491 F.3d 694, 698 (7th Cir. 2007). And, because none of these exceptions apply, there was no error—let alone plain error—in not relying on the exceptions.

B. The government cannot rely on the good-faith exception.

Though the government never mentioned the good-faith exception below, it now contends that there are "[t]wo layers of good faith." Both arguments misapply Supreme Court precedent. First, the *Davis* good-faith exception only applies when officers conduct an illegal search "in reliance on binding appellate precedent." *Davis v. United States,* 564 U.S. 229, 241 (2011); *see United States v. Berrios*, 990 F.3d 528, 532–533 (7th Cir. 2021) (explaining that *Davis* does not apply to "mistaken efforts to *extend* controlling precedents" or "unsettled

[3]Waiver is "a deliberate decision not to present a ground for relief" and precludes appellate review, whereas "forfeiture generally reflects an oversight" and is normally reviewed for plain error. *United States v. Webster*, 775 F.3d 897, 902 (7th Cir. 2015).

[4]Rule 12's amendments relocated the good cause requirement from 12(e) to 12(c)(3), but did not change the applicable standard. *Daniels*, 803 F.3d at 352. It does not appear that this Court has decided whether Rule 12(c)(3) applies to the government's untimely arguments against suppression. Because the government did not—and cannot—show good cause *or* plain error, its argument fails regardless.

law") (citation omitted). There was no binding precedent to support the searches in this case. The government points only to *White*, 781 F.3d at 863–64, but as we have explained, *White*, like *Knights* and *Samson*, does not support the government's position. In fact, this Court has never retreated from its explicit embrace of the stalking horse theory. S*ee Coleman*, 22 F.3d at 129. The government cites out-of-circuit precedent, *see* Gov't Br. 28, 21–22, 25–26, 30, but the fact remains that there was no "binding appellate precedent [that] specifically *authorize*[*d*]" the officers' searches in this case. *Davis,* 564 U.S. at 241.

Second, the government cannot rely on *United States v. Leon*, 468 U.S. 897 (1984). Though the decision to obtain a warrant ordinarily creates a presumption of good faith, *see id.* at 905, the officers in this case tainted the warrants with their own unconstitutional searches: "evidence discovered pursuant to a warrant will be inadmissible if the warrant was secured from a judicial officer through the use of illegally acquired information." *United States v. Oakley*, 944 F.2d 384, 386 (7th Cir. 1991).

A partially tainted warrant may still support a search if the "untainted information, considered by itself, establishes probable cause for the warrant to issue." *United States v. Gray*, 410 F.3d 338, 344 (7th Cir. 2005) (quoting *Oakley*, 944 F.2d at 386). But because the government failed to raise this issue below, and thus failed to enter the warrants into the record, this Court cannot evaluate the tainted warrants. Nor do the undisputed facts demonstrate good faith: Agent Clancy twice directed illegal searches, discovered contraband, and

immediately applied for a warrant. Officers cannot in good faith rely on warrants that they themselves tainted with illegality. *Cf. United States v. Lickers*, 928 F.3d 609, 617 (7th Cir. 2019) (applying the good-faith exception where federal officers relied on a federal warrant that was based on the fruits of a prior state court warrant later determined to lack probable cause).

C. The government cannot meet its burden of proving inevitable discovery or an independent source.

1. The tainted warrants are not an independent source.

The independent source rule "applies when the evidence actually has been discovered by lawful means." *United States v. Markling*, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993).[5] In the district court the government relied only on inevitable discovery, not independent source, so this argument is waived. Dkt. 42-1.

In this Court, the government's argument is unclear, but to the extent the government claims that the warranted searches were independent sources, the argument fails. When examining warrants obtained after illegal searches, this Court asks: "did the illegally obtained evidence affect the magistrate's decision to issue the warrant?" and "did the illegally obtained evidence affect the government's decision to apply for the warrant?" *United States v. Huskisson*, 926 F.3d 369, 374 (7th Cir. 2019).

[5]The government purposefully conflates the independent source and inevitable discovery doctrines in its brief on appeal. *See* Gov't Br. 31–32. But this Court has explained that while the "doctrines are closely related, they are not the same." *Markling*, 7 F.3d at 1318 n.1. We have attempted to discern which argument the government is making.

The district court made no findings supporting the government, and the government cannot answer either question in its favor. Dkt. 59 at 12 n.3; A18 n.3. The government never entered the warrants or any supporting affidavit into the record and therefore cannot carry its burden of proving that there was probable cause without the illegal evidence. *See Markling*, 7 F.3d at 1316. Nor did the government establish that Agent Clancy "would have applied for a warrant if he had not searched [Price's vehicle and home]." *Id.* at 1317. In any event, because Agent Clancy sought the warrants *immediately* after discovering contraband, the only inference is that the illegally obtained evidence tainted the decision to seek a warrant.

2. The officers would not have inevitably obtained the firearms through lawful means.

Similarly, the government cannot establish inevitable discovery, which "applies where evidence is not actually discovered by lawful means, but inevitably would have been." *Markling*, 7 F.3d at 1318 n.1. The government seems to argue that inevitable discovery applies because parole officers would have conducted compliance searches and Clancy would have conducted a car search and obtain warrants. Gov't Br. 32.

The compliance and automobile search arguments are waived. In the district court, the government only argued that "law enforcement had probable cause *to obtain search warrants*" and that the vehicle "would have been

inventoried." Dkt. 42 at 7 (emphasis added).[6] As a consequence, the district court did not make findings on the hypothetical compliance search or automobile search, including whether probable cause existed.

In any event, there is no need to speculate about whether Clancy would have searched the car at Indy Trading Post; we know that he chose not to do so—instead handing the keys to the parole officers—apparently because he understood that he lacked probable cause that evidence was in the car. The government blandly asserts that probable cause existed because of Price's arrest and the "various circumstances surrounding it." Gov't Br. 32. Price's touching a rental firearm in the store on the day of the search certainly did not establish that there would be evidence in the car; nor did his arrest for buying ammunition the *previous* day. The government cites only one case in support of its argument, but it involved substantially stronger evidence that contraband was in the defendant's car. *See United States v. Smith*, 989 F.3d 575, 579, 582 (7th Cir. 2021) (officers scheduled a controlled buy and, on that day, "observed [defendant] driving as if to avoid surveillance while en route to the scheduled transaction").

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[6]The government did not raise the inventory search argument on appeal, and it is therefore waived. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). The government also has not argued that Clancy could have searched the car incident to Price's arrest, presumably because the government recognized that a search of the car incident to arrest could not be justified under *Arizona v. Gant*, 556 U.S. 332 (2009): after his arrest, Price remained in the back of the store "for hours," Trial Tr. 213-14, so he could not have "access[ed] the interior of the vehicle," *Gant*, 556 U.S. at 335; and it was not "reasonable to believe that evidence of the offense of arrest"—the possession of ammunition he had purchased the day *before*—"might be found in the vehicle." *Id.*

Nor has the government shown that the parole officers would have independently found the firearms. Nothing in the record suggests that, absent Agent Clancy's intervention, the parole officers would have gone to Indy Trading Post and searched the Ford—the parole officers were not even aware of that car. Trial Tr. 68, 83. And while the officers testified that Price was on their "list for that day," he "wasn't a priority." *Id.* 55, 77. Even if the officers had searched Price's home, the government does not prove how thorough that search would have been or whether the parked Oldsmobile containing the rifle would have been searched.

Finally, the government did not meet its burden that Agent Clancy would have obtained warrants for the car and home, because it only argues that there was probable cause. Gov't Br. 32. As explained, there was not probable cause that contraband was in the car. Moreover, it is not enough to show "only that [the government] *could* have obtained a warrant"—the government must show "that it *would* have obtained a warrant." *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012). The district court did not make this finding, and nowhere—not in its response brief, the briefing below, or at trial—did the government attempt to demonstrate this. Nor could it: the investigation and searches were—from the very beginning—intertwined with the parole officers. There was no independent chain of events where Clancy would have obtained warrants rather than rely on the stalking horse searches. The government has failed to prove inevitable discovery.

III. The evidence was not sufficient to establish constructive possession of the firearms in Counts 2 and 3.

As Price established in his opening brief, the evidence at trial was not sufficient to establish that Price constructively possessed these firearms. *See* Opening Br. 28–34. The government's case continues to improperly rest on Price's access to firearms found in locations owned by his girlfriend and to which his girlfriend also had access, rather than on the required nexus "between the defendant and both the property *and* the contraband." *United States v. Davis*, 896 F.3d 784, 790 (7th Cir. 2018).

The government relies on *United States v. Morris*, 576 F.3d 661 (7th Cir. 2009), to defend Count 2, but in *Morris*, the defendant was "on multiple occasions" seen driving the car, *id.* at 669–70, and on the day officers searched the car, Morris had been "alone in the car," *id.* at 664. Moreover, as the government acknowledges, *Morris* was a "drug trafficking case"—officers observed Morris engage in multiple drug transactions out of his car. Gov't Br. 36; *Morris*, 576 F. 3d at 671–72. *See United States v. Schmitt*, 770 F.3d 524, 534 (7th Cir. 2014) (evidence of drug dealing helps establish constructive possession of a firearm because it provides motive). By contrast, Price had only been seen driving the car once, he was not alone, and there was no evidence of drug dealing.

The evidence for Count 2 is in fact more similar to *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012), where this Court held that there was insufficient evidence to find constructive possession. Though the government relies on a store employee's testimony that Price mentioned "his forty," it does

not explain how this is different from the rejected testimony in *Griffin,* where the witness testified that the defendant told him that the defendant's father purchased "some of the shotguns for the defendant" and that "the two handguns belonged to the defendant and were hidden behind the stove." 684 F.3d at 694. The government argues that because Price did not point to another "forty," the reference must be to the firearm in the car. *See* Gov't Br. 37–38. But the testimony in *Griffin* was rejected because the witness did not identify the specific firearm for which the defendant was convicted. *See* 684 F.3d at 699. The same is true of the "forty" and the government's other proposed nexus, the ammunition for a .40 caliber pistol. In neither case does the government demonstrate that the proposed nexus was specifically for the firearm underlying Count 2.

The government's defense of Count 3 is even weaker. The rifle was found inside the parked Oldsmobile, and Price testified—without contradiction—that his significant other, Cockrell, owned the vehicle. Trial Tr. 216. Nonetheless, the government asserts that Price was connected to a drawer in the bedroom, which has a connection to keys to the Oldsmobile, which then has a connection to the rifle. Gov't Br. 39–40. At most, this convoluted chain of connections suggests that Price *may* have had access to Cockrell's car parked on shared property. Constructive possession requires more than that. *See, e.g.*, *United States v. Reed*, 744 F.3d 519, 526 (7th Cir. 2014); Opening Br. 33 (listing cases), 32 n.6.

Nor can the government establish a direct connection between the rifle and Price. The government emphasizes Price's actions surrounding the purchase of a magazine for a rifle, then argues that testimony from the same store employee referenced in the government's discussion about Count 2 also establishes Price's ownership of that rifle. But the testimony does not purport to establish Price's ownership; the employee's reference to "his firearm" was merely the employee's shorthand assumption, not based on any actual knowledge. *See* Trial Tr. 42. And, just like the government's proposed nexus to the .40 pistol, connections to an unidentified rifle cannot support the conviction for the firearm underlying Count 3.

IV. The district court committed multiple sentencing errors.

Finally, no matter how this Court resolves the other questions presented, it should vacate Price's sentence and remand for resentencing, due to the district court's erroneous application of three different sentencing enhancements. *See* Opening Br. 34.

A. Briefly touching an unloaded, rental firearm is not relevant conduct for the multiple-firearms enhancement.

The uncharged firearm that Price briefly touched at Indy Trading Post is not "relevant conduct" for U.S.S.G. § 1B1.3's three or more firearms enhancement.[7] *See* Opening Br. 34–37. The government agrees that in applying

[7]The government has waived any reliance on the GSG Firefly pistol found the bedroom. *See* Gov't Br. 42 n.7. On appeal, the government presented only "[a] skeletal 'argument,' really nothing more than an assertion," which "does not preserve a claim." *Dunkel*, 927 F.2d at 956. The government's three-sentence, bare-bones footnote lacks any legal authority, standard of review, or argument for this Court to consider. It is therefore waived. *See, e.g.*, *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910,

this enhancement, the Court must consider the "similarly," "regularity," and "time interval between the offenses." Gov't Br. 42 (citing § 1B1.3, cmt. n.5(B)(ii)). But the government's analysis does not argue regularity, and its similarity argument misses the mark.

The government admits that Price only "briefly" "handled" the firearm at Indy Trading Post. Gov't Br. 41, 43. Though a "fleeting" touch can legally constitute firearm possession, *see id.* 42, not all possessions are factually similar. Price's momentarily holding an unloaded rental firearm intended for his friend while at a store is *not* similar to personal possession of a firearm stored on one's property. Despite the government's claim that "near-contemporaneous possession" of a firearm alone "typically" suffices for § 1B1.3, *see* Gov't Br. 44, the Seventh Circuit cases cited by the government contain greater evidence of similarity. The possession in those cases was personal possession of firearms on the defendant's person or stored on his property, not the fleeting touch of a rental firearm intended for someone else. *See United States v. Jones*, 635 F.3d 909, 918–19 (7th Cir. 2011) (nine firearms found in the defendant's bedroom and connected to his drug dealing); *United States v. Wallace*, 280 F.3d 781, 783, 785 (7th Cir. 2002) (two firearms that officers

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924 (7th Cir. 2012).

In any event, the district court's factual findings were not clearly erroneous. The court below made "findings for the record" that the firearm was not "attributable to [Price] because there [was] no indication of an intent to exercise dominion and control [by Price]." Sent'g Hr'g Tr. 9–10, A51–52. It based this finding on the evidence the government presented at sentencing and on "the additional evidence that [his girlfriend] Miss Cockrell claimed that weapon." *Id.* 10, A52.

observed or found on the defendant's person); *United States v. Santoro*, 159 F.3d 318, 320 (7th Cir. 1998) (defendant admitted to being drug dealer, possessing nine millimeter and .380 firearms "for protection," and receiving a rifle that he later traded for drugs).

Contrary to the government's position, *United States v. Amerson*, 886 F.3d 568 (6th Cir. 2018), and *United States v. Powell*, 50 F.3d 94 (1st Cir. 1995), also do not support a finding of relevant conduct in this case. In *Amerson*, the Sixth Circuit explained that "the temporal proximity in *Powell* was strong enough to overcome a lack of regularity." 886 F.3d at 577–78. But *Powell* also had similar personal possessions (two firearms found in the defendant's apartment and one that he personally brought to a shoot-out), unlike the present case. 50 F.3d at 97–98, 103. In this case, with limited similarity and regularity, reliance on simultaneous conduct alone contravenes the Guidelines' instructions. *See United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020) (temporal proximity alone could not overcome dissimilarity between drug offenses for relevant conduct finding).

B. *Rehaif* bars the application of the stolen firearm enhancement.

The government is also wrong that *Rehaif v. United States*, 139 S. Ct. 2191 (2019), does not apply to the requirements of § 2K2.1(b)(4)(A)'s stolen firearm enhancement. While *Rehaif* concerned 18 U.S.C. § 922(g), that statute parallels the stolen firearm sentencing enhancement: both punish defendants for possession of a firearm, and both lack an explicit scienter requirement in the text. Prior to *Rehaif,* both were understood not to require proof of

knowledge of the status element of the offense. But *Rehaif* upended that well-settled understanding. 139 S. Ct. at 2195, 2200. This Court has acknowledged that *Rehaif* "upset what was once a seemingly settled question of federal law." *United States v. Williams*, 946 F.3d 968, 970 (7th Cir. 2020); *United States v. Maez*, 960 F.3d 949, 957 (7th Cir. 2020). The government tries to limit the impact of its defeat in *Rehaif*, but such a dramatic departure from settled understandings requires reevaluation of closely analogous contexts like § 2K2.1(b)(4)(A).[8]

The government says that statutes and Sentencing Guidelines are "fundamentally distinct," Gov't Br. 46, but courts have stated that when "interpreting the Sentencing Guidelines, the traditional canons of statutory interpretation apply." *See, e.g.*, *United States v. Sands*, 948 F.3d 709, 713 (6th Cir. 2020) (citation omitted). The Court in *Rehaif* relied on "the ordinary presumption in favor of scienter" in its statutory interpretation in criminal cases, 139 S. Ct. at 2195; that presumption is "typically" overcome only in the case of "statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." *Id.* at 2197. Section 2K2.1(b)(4)(A) is not such a provision.

[8]The government relies (Gov't Br. 45) on *United States v. Salinas*, 462 F. App'x 635 (7th Cir. 2012), and U.S.S.G. § 2K2.1, appl. n. 8(B), but both, of course, pre-date the major change brought about by *Rehaif*.

The government presented no evidence that Price knew the firearm he allegedly possessed was stolen. His sentence should not have been increased on that basis.

C. The obstruction of justice enhancement was improperly applied.

The government's threshold contention that the obstruction of justice enhancement must be reviewed for plain error is simply wrong. This Court holds that clear error, not plain error, applies to a district court's failure to make perjury findings where the defendant objected to the obstruction of justice enhancement but not to the adequacy of the findings. *United States v. Freitag*, 230 F.3d 1019, 1026 & n.7 (7th Cir. 2000).

The remainder of the government's argument is similarly mistaken. The district court was required to establish "the factual predicates for a finding of perjury (false testimony, materiality, and willful intent)." *United States v. Seward*, 272 F.3d 831, 838 (7th Cir. 2001). Though the government acknowledges that the district court failed to make willfulness and materiality findings, *see* Gov't Br. 49, it misunderstands the scope of this Court's review. This Court asks whether the sentencing court "created a record that allowed this court to determine that [the sentencing] court specifically found the defendant lied about a material issue." *United States v. Johnson*, 612 F.3d 889, 894 (7th Cir. 2010). Because the record does not demonstrate this, the district court's failure is reversible—not harmless—error. *See* Opening Br. 39–40; *Johnson*, 612 F.3d at 894 ("When it is not clear that the district court made the

appropriate findings, [] the sentence must be vacated and remanded for resentencing.").

Nonetheless, the government argues afresh that Price's testimony about his prior offenses was material, claiming without support that "[Price] told those specific untruths to the jury because they were material to his guilt or innocence." Gov't Br. 50. While the government may believe that, the record does not show that the district court did. As the government concedes, the district court at most found that Price's testimony "was material to the felony-history element of the § 922(g) charges," an issue that was not submitted to the jury. Gov't Br. 49. The record does not show that the district court found Price made false statements about not possessing the firearms at issue in Counts 2 and 3, *only* about the firearms in his prior convictions. This does not establish materiality. *See Johnson*, 612 F.3d at 895 (testimony about prior offenses is not material when the defendant has already stipulated that he is a felon).

Nor did the district court make the appropriate willfulness finding. The government concedes, as it must, that the obstruction of justice enhancement is "not appropriate" when the testimony is the result of confusion, as Price testified below. Gov't Br. 48. The district judge did not make any findings that she disbelieved Price's statements about being confused. The government makes the conclusory statement that "[n]othing about the line of questioning" was "confusing" and that the testimony was "obviously false" and "willful[]," but the district court—not the government—must make the necessary findings. *See*

Gov't Br. 48–49. The record demonstrates that the district court did not. This Court should remand for resentencing.

CONCLUSION

For the foregoing reasons and for those stated in his opening brief, Mr. 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.

Respectfully submitted,
MARK PRICE

s/ Sarah M. Konsky

Dated: May 3, 2021

Sarah M. Konsky
Counsel of Record
David A. Strauss
Brenna Ledvora (Ill. Sup. Ct. R. 711 License Number 2020LS00470)
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC
AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190
konsky@uchicago.edu
Counsel for Defendant-Appellant

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

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because, according to the word count function of Microsoft Word 2016, this Brief contains 6,534 words excluding the parts of 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: May 3, 2021

s/Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on May 3, 2021, I caused the foregoing **Reply Brief 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 **Reply Brief 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: May 3, 2021

s/Sarah M. Konsky
Sarah M. Konsky