No. 11-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CORY L. GRIFFIN,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Wisconsin
The Honorable Judge Rudolph T. Randa
Case No. 08-CR-195

BRIEF OF DEFENDANT-APPELLANT CORY L. GRIFFIN

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Cory L. Griffin, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: CORY L. GRIFFIN.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O. Schrup (attorney of record), Ryan Moorman (senior law student), and Jin Yoo (senior law student), of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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DISCLOSURE STATEMENT (CONTINUED)

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

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Wisconsin, Milwaukee Division, had jurisdiction over Cory Griffin's prosecution pursuant to 18 U.S.C. § 3231 (2006), which states that "the district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Griffin was charged in a second superseding indictment with one count of knowing possession of firearms and ammunition as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (A1–2.)[1]

The government indicted Griffin on July 22, 2008, and he was eventually tried before a jury. After a two-day trial, the jury returned a verdict of guilty on November 10, 2009. (A8–9.) Griffin filed a motion for acquittal and new trial, which the district court denied. (A10–11.)

The district court entered judgment on the verdict on April 20, 2011, and sentenced Griffin to sixty months in prison followed by three years of supervised release with credit for time served and to run concurrently with his state sentence. (A13–14.) Griffin filed a timely notice of appeal on April 25, 2011. (R. 107, Notice of Appeal at 1.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction over "all final decisions of the district courts of the United States" to its courts of appeal.

[1] Citations to the attached appendix are designated as (A__). Trial transcripts are cited as (Tr. __), record citations as (R. __), and exhibits as (Ex. __).

STATEMENT OF THE ISSUES

I. Whether a felon-in-possession conviction can be sustained under a constructive-possession theory when the government established neither a nexus between the contraband and the defendant nor any other affirmative evidence of the defendant's intent to control the contraband.

II. Whether the district court improperly instructed the jury, thus prejudicing the defendant and lowering the government's burden to prove the requisite *mens rea* of intent, when it unnecessarily defined the term knowingly but failed to define the term intent.

III. Whether the government made improper remarks during its closing argument by using Griffin's prior criminal record as propensity evidence and by appealing to the jury's sense of law and order.

STATEMENT OF THE CASE

The government filed its original indictment on July 22, 2008, and charged Griffin with two counts of intentional possession of firearms as a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (R. 1, Indictment at 1–4.) It then filed a superseding indictment on July 21, 2009, charging Griffin with three counts of being a felon in possession of a firearm based on the same events but now separating the various guns and ammunition into the multiple counts. (R. 46, Superseding Indictment at 1–3.) Defense counsel moved to dismiss the superseding indictment on multiplicity grounds. (R. 52, Def.'s Mot. to Dismiss Superseding Indictment on Basis of Multiplicity.) On the basis of the magistrate judge's recommendation, the government consolidated all of the guns and ammunition into a single count and filed its second superseding indictment on August 18, 2009. (R. 56, Recommendation to Dismiss Superseding Indictment on Basis of Multiplicity); (A1–2).

In the wake of his arrest, an administrative law judge held a parole-revocation hearing to determine whether Griffin should be incarcerated for violating the conditions of his release. One condition of that release was that Griffin "shall not purchase, possess, own or carry any firearm or any weapon. . . ." (A41–42.) Despite this document and testimony from both the arresting officer, Michael Wawrzyniakowski, and Griffin's parole officer, LaTasha Perry, both of whom also testified in Griffin's subsequent federal trial, the administrative law judge held that the state did not prove that Griffin possessed firearms or ammunition. (Tr. 155.)

Notwithstanding this ruling, the government decided to pursue its felon-in-possession charge against Griffin. (A1–2.)

The two-day jury trial commenced on November 9, 2009. Griffin moved for a judgment of acquittal at the close of the government's case, which the district court denied. (A17–20.) Of the ten guns and five batches of ammunition that the government charged, the jury found Griffin guilty only of possessing one of the shotguns and two batches of the ammunition. (A8–9.)

The defendant moved for a judgment of acquittal notwithstanding the verdict. (A37.) The district court deferred its ruling, recognizing the seriousness of "this kind of issue" and "this kind of verdict" and asking for additional briefing so that it could "make a greater effort at considering that motion." (A36.) Griffin subsequently filed a motion for acquittal or new trial on September 24, 2010. (R. 95, Def.'s Renewed Mot. for Acquittal or New Trial.) In its ruling after that briefing, the district court offered no reasoning or rationale for its denial of Griffin's motion. (A10–11.)

The district court sentenced Griffin to sixty months' imprisonment and three years' supervised release, and it entered judgment on the verdict on April 20, 2011. (A13–14.) Griffin filed a timely notice of appeal. (R. 107, Notice of Appeal at 1.)

STATEMENT OF FACTS

In April 2008 Appellant-Defendant Cory Griffin was released from prison and moved in with his parents in their family home. (Tr. 231.) Griffin intended to use the home as a temporary residence while he searched for work and restarted his life. (Tr. 231–32, 239, 245.) Griffin's probation officer, LaTasha Perry, was required to approve his post-release residence before he left prison. (Tr. 144.) She spoke to Griffin's father in advance of his release and confirmed that it would be a suitable place for Griffin to live. (Tr. 146.) Approximately two weeks after Griffin moved in, Perry conducted a follow-up visit at the Griffin home to "see if the residence [was] appropriate" and to ensure "[n]o contraband and things like that [were] laying in open areas." (Tr. 143–44, 147.) She concluded at the end of her visit that the home was an appropriate residence and that it continued to meet the conditions of Griffin's supervised release. (Tr. 143–44, 151–52.)

About a week later, a ten-officer Milwaukee S.W.A.T. team executed a no-knock search warrant against Chauncy Griffin, Griffin's brother. (Tr. 30–32, 69, 131.) Although it is unclear from the testimony whether Chauncy actually lived in the home, police recovered ten firearms, five sets of ammunition, and some of Griffin's personal items. (A43–45; Tr. 65–66.) The firearms and ammunition belonged to Phil Griffin, the defendant's father and avid hunter, and Phil's three hunting friends. (Tr. 202–03.) The men had hunted together nearly every weekend for the past thirty-three years (Tr. 198–99, 202–03); in fact, Phil kept several rabbit-retrieving beagles as pets for this purpose (Tr. 198).

Specifically, police found two hand guns and ammunition behind Griffin's parents' headboard (Ex. 6, Smith and Wesson Gun; Ex. 10, Sturm Ruger Vaquero Model Gun; Tr. 37–38, 41–42), three long guns in the parents' closet (Ex. 13, Remington Shotgun; Ex. 14, Westernfield Shotgun; Ex. 15, Sears Roebuck Rifle; Tr. 44–46), ammunition in their night stand (Ex. 18, 30 rounds of 0.22 caliber Federal Brand Ammunition; Tr. 48), two sets of ammunition in bags on the stairs between the first and second floor of the residence (Ex. 21, Remington Shotgun Shells; Ex. 22, Federal Brand Shotgun Shells; Tr. 50–51), a long gun behind the door in the kitchen that leads to the basement (Ex. 25, American Gun Company Shotgun; Tr. 54), and four long guns behind the kitchen refrigerator (Ex. 28, Savage Arms Shotgun; Ex. 29, New Haven Shotgun; Ex. 30, Mossberg Shotgun; Ex. 31, Browning Shotgun; Tr. 56–58). Police also seized two packets of mail sent to Griffin's prison address in the downstairs bedroom and a photo album containing two pages of pictures with Griffin in them. (Tr. 61–64.)

Police had previously determined that Griffin had a felony conviction, and so they arrested him after they completed the search of his parents' house related to the warrant for Chauncy. (Tr. 93, 100.) Even though the police did not find weapons in Griffin's bedroom or his DNA or fingerprints on any of the guns and ammunition that they recovered from other parts of the house, the government still indicted him in a one-count indictment with being a felon in possession of a firearm or ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (A1–2; Tr. 77,

80–84.) Chauncy Griffin was charged with a non-gun offense, but it was eventually dropped. (Tr. 214.)

After the search Perry sought to revoke Griffin's probation before an administrative law judge. (Tr. 154.) Griffin freely acknowledged that as a condition of his release he could not "purchase, possess, own, or carry any firearm or any weapon" without prior approval from his probation officer. (Tr. 141, 144, 244–45.) Although Perry stated that as a general matter if someone "under [her] supervision discovers that there's a gun in a place where they're living," that person should notify her immediately, (Tr. 141), she never informed Griffin of this expectation. *See* (Tr. 141–42.) Moreover, she only "briefly" talked to Griffin's father about firearms more than a month before Griffin's release from prison, but Griffin and his father never spoke about this conversation. (Tr. 145, Tr. 211–12, 231–32.) At the revocation hearing Officer Michael Wawrzyniakowski, the lead officer in the search, described the search of the Griffins' home, the discovery of the guns and ammunition, and Griffin's residence there. (Tr. 154–55.) After hearing the evidence, the administrative law judge determined Griffin did not possess a firearm and refused to revoke his probation. (Tr. 155.)

Meanwhile, the government prepared for trial. To that end, it secured another witness: recurrent jailhouse informant Mario Walker, who stepped forward to tell the government about a conversation he had with Griffin at the Milwaukee County Jail where Griffin was incarcerated after the search. (Tr. 165–66, 170.) He readily agreed to testify on behalf of the government at both the grand jury and

trial because, by his own account, "[g]uns don't kill people . . . [p]eople kill with guns." (Tr. 163.) Walker claimed that he was neither promised leniency nor expected the government to help with his then-pending drug charge, although that charge was dismissed in the wake of his grand jury testimony.[2] (Tr. 163, 173.) Walker recounted that Griffin had confessed to him that "two of the firearms were hidden in the back of an appliance," that his father bought the shotguns for him, and that two handguns hidden behind the stove belonged to him. (Tr. 166–68.) Griffin also testified that he and Walker had spoken at jail, but he categorically denied telling Walker that he owned the guns. (Tr. 235–36.) Griffin surmised that Walker could have had seen the police reports, photographs, and other information related to his case because inmates, who were all kept together in one large room with their belongings, often shared their legal files and brainstormed with other inmates about their cases. (Tr. 234–35.) Griffin looked at his legal papers with others "all the time." (Tr. 234.)

In addition to Walker, the government offered Perry and Officer Wawrzyniakowski as witnesses. During their testimonies, both Wawrzyniakowski and Perry mentioned either the fact or nature of Griffin's criminal record. (Tr. 92–93) (Wawrzyniakowski stating police "recognized [Griffin] from before" and conducted two background checks and determined that Griffin had committed a felony); (Tr. 135) (Perry stating she supervised "felony drug offenders").

[2] Walker, however, had previously told the grand jury that "[i]f I gotta [sic] do this, I deserve to, you know, really get my charge dismissed. That's how I feel, because I have a family." (Tr. 174–75.)

Other than Walker, no government witness ever testified that Griffin owned the guns or ammunition. The government itself repeatedly referred to the long guns as belonging to Griffin's father, and only credited Walker's testimony as establishing the handguns' ownership. (Tr. 208, 216, 266.) At the end of the government's case-in-chief, the defense moved for acquittal based on insufficient evidence, which the district court denied. (Tr. 185–88.)

Griffin took the stand in his own defense. Although he figured his father was still a hunter, he denied ever intending to control any weapons and testified that he never spoke to his family about their possible presence in the home. (Tr. 230–32, 244.) He also expressed his excitement and willingness to consent to a buccal swab so that he could show investigators that none of his DNA was on the weapons. (Tr. 237.) On cross, he testified that he was confident that residing in the same house with his father would not constitute possession or violate his probation. (Tr. 244–45.) He alluded to the administrative law judge's decision that confirmed this belief. (Tr. 244–45.) Moreover, Griffin testified that if his probation prohibited him from living in a home containing firearms, he would have talked to his father about his hunting history in order to ensure he complied with the conditions of his release. (Tr. 245.) He emphasized that his understanding of those conditions of his release admonishing him not to "own, purchase, possess, or carry" any weapons was simply that there not be guns on his person or in his room. (Tr. 245.)

The district court wholly accepted the government's proposed jury instructions with just two exceptions. First, it accepted the government's definition

of constructive possession, which stated, *inter alia*, that "[p]ossession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others," but added the defense's qualification about residency alone being insufficient. (A6.) Second, it accepted the defense's cautionary instruction about the testimony of Mario Walker. (R. 77, Court's Jury Instruction at 15.) In addition, the government requested, and the court accepted, a supplemental instruction defining the *mens rea* "knowingly." (A7.) The court did not instruct the jury on the definition of intent.

During closing argument, the government presented a theory of constructive possession. (A21.) It argued that the firearms' proximity to Griffin and their alleged visibility demonstrated Griffin knew he had the power to control the weapons in the home. (A22.) In its effort to prove the intent element of the theory, it argued that Griffin's knowledge of his probation and his failure to inform Perry of the firearms demonstrated his intent to exercise control. (A22–23.) Then, while urging the jury to use its common sense, he rhetorically asked, over defense objection, "what does your common sense tell you about a person with a serious criminal record, who knows he's not supposed to be around firearms or ammunition, who knows that his father has firearms that have been returned to him, but who nonetheless chooses to be around not just one or two of them." (A24.) He supplemented these arguments with the testimony of Mario Walker. (A25.)

In his rebuttal, the prosecutor argued that he and the jury composed "we the people" that form our government. (A26.) And as the people, they make the country's laws, and it is their collective duty to enforce those laws. (A27.) Moreover, he argued that while the jury can protect the government from overreaching, it should also "protect the community from someone who refused to obey the laws that everybody, all of us, have to abide by." (A27.)

The jury ultimately returned a guilty verdict by finding that Griffin only possessed the shotgun behind the kitchen door and the two bags of shotgun shells on the stairway between the first and second floor. (A8–9.) Griffin was sentenced to sixty months in prison. (A13–14.)

SUMMARY OF THE ARGUMENT

Cory Griffin had just been released from prison into his parents' home when a ten-person S.W.A.T. team executed a search warrant for his brother. Finding Griffin's father's collection of hunting weapons, but not his brother, police opted to arrest Griffin instead. Despite Griffin's insistence on his innocence, his eager willingness to provide buccal swabs for a DNA analysis that he believed would exonerate him, and an administrative law judge's refusal to find that he possessed these guns or to revoke his probation, federal prosecutors steadfastly pursued their felon-in-possession charges. When Griffin insisted on going to trial and putting the government to its reasonable-doubt burden, the government filled the gaps in its case with a series of improper evidence, remarks, and instructions. In the end, though, the evidence simply did not satisfy the government's burden of proving Griffin's guilt beyond a reasonable doubt. This Court should either reverse Griffin's conviction or vacate the conviction and remand the case for a new trial for three reasons.

First, there was insufficient evidence to convict Griffin of intentionally possessing the firearm or ammunition on which he was convicted. The government proceeded on a constructive-possession theory, but it could neither establish his intent through a nexus connecting him to the firearms nor offer other satisfactory circumstantial evidence of Griffin's intent. Second and relatedly, the jury instructions confusingly failed to apprise the jury of its need to separately find that Griffin intended to possess firearms or ammunition. By gratuitously defining the

term knowingly while failing to define the term intent the instructions unduly emphasized Griffin's knowledge and unmistakably implied that the jury could convict on just a finding that Griffin knew about the guns and knew he could control them. Finally, during closing arguments the government asked the jury to make a propensity inference about Griffin's intent to commit the present crime based on his prior criminal record and, moreover, asked the jury during closing to protect the community from Griffin through its verdict. These remarks were founded on improperly elicited testimony and prejudiced Griffin by denying him of his right to a fair trial.

ARGUMENT

I. There was insufficient evidence to convict Griffin of constructively possessing a firearm or ammunition.

The government's evidence fell short of proving beyond a reasonable doubt the sole issue in this felon-in-possession case: that Griffin constructively possessed a firearm or ammunition. 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2006); *see Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 500 (7th Cir. 2008) (listing the statute's elements); *United States v. Jackson*, 103 F.3d 561, 567 (7th Cir. 1996) (setting forth the government's burden); *see also* (Tr. 29, 181) (stipulating that Griffin committed a felony before April 30, 2008, and that the guns seized from his parents' home travelled in interstate commerce). The government's constructive-possession theory required it to establish Griffin's intent to control the firearm through either: (1) a nexus connecting Griffin to the contraband; or (2) other affirmative evidence from which the jury could infer Griffin's intent to possess it. It failed to meet its burden because none of its evidence connected Griffin to the firearms or ammunition, beyond mere residency and, perhaps, awareness of the guns, which are insufficient in a joint-residency case to show a nexus. Nor did the three pieces of affirmative evidence on which the government relied to prove Griffin's intent actually satisfy its burden. Accordingly, this Court should vacate Griffin's conviction and remand for a judgment of acquittal.

Although it is true that the appellant carries a heavy burden in attacking the sufficiency of the evidence, this Court will reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact

could have found that the government proved the essential elements of the crime beyond a reasonable doubt. *United States v. Smith*, 576 F.3d 681, 686 (7th Cir. 2009); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury may rely on inferences, but where a jury's factual findings are based on speculation, this Court will deem the jury's conclusion improper. *United States v. Katz*, 582 F.3d 749, 752 (7th Cir. 2009) (reversing a felon-in-possession conviction on sufficiency grounds because, although the fingerprints on the firearm indicated the defendant possessed the gun at some point, the jury could only speculate as to whether that occurred before or after his felony conviction).

A. The government's evidence was insufficient because it failed to establish a nexus between Griffin and the contraband.

The government failed to meet its burden because it did not provide evidence that supported a nexus between Griffin and the contraband. To convict a defendant under a constructive-possession theory, the government must "demonstrate[] that the defendant knowingly had the power *and* intention to exercise dominion and control over the object, either directly or through others, thus establishing a nexus between himself and the object." *Katz*, 582 F.3d at 752 (emphasis added). In joint-residency cases like this one, the government must "provide evidence supporting a nexus between the weapon and the defendant"; that is, it must provide specific evidence that establishes a "connection or link" between the defendant and the contraband. *Id.*; *Black's Law Dictionary* (9th ed. 2009) (defining nexus); *see United States v. Walls*, 225 F.3d 858, 867 (7th Cir. 2000) (vacating a constructive-possession conviction because the jury instruction "failed to adequately apprise the

jury of the need to find intent"); *see also Katz*, 582 F.3d at 752 (noting that the government can only skip the nexus requirement in cases of exclusive residency because the defendant's *exclusive* control allows the jury to infer knowledge and intent to control the objects within the premises).

To that end, neither control over the surrounding areas nor proximity to and awareness of the contraband are singly sufficient to sustain a verdict. *See Katz*, 582 F.3d at 752 ("Mere proximity to the object, mere presence on the property where it is located, or mere association, without more, with the person who does control the object or property on which it is found, is insufficient to support a finding of possession."); *United States v. Chairez*, 33 F.3d 823, 825 (7th Cir. 1994) (citing *United States v. Soto,* 779 F.2d 558, 560 (9th Cir. 1986) ("mere presence . . . does not establish possession" and "proximity of a weapon . . . goes only to its accessibility, not to the dominion or control")).

In determining whether a nexus exists, courts look for a plus-factor that ties the defendant to the item. *See United States v. Walker*, 545 F.3d 1081, 1088 (D.C. Cir. 2008) (stating that its articulation of the nexus requirement in felon-in-possession cases requires, for instance, "[p]roximity to a weapon, coupled with some other factor such as connection with a gun, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise") (internal quotation marks omitted). Indeed, in each of this Court's cases where it found constructive possession in the joint-residency context, something more than mere residency and potential knowledge was present.

Typically this plus-factor involves intermingling of the contraband with the defendant's belongings or evidence that the defendant formerly possessed the item. Such evidence can permit the jury to conclude the defendant intended to control the contraband. *See United States v. Irby*, 558 F.3d 651, 654 (7th Cir. 2009) (there was physical evidence linking the defendant to the bedroom where a commingled stash of crack and marijuana were found and testimony indicated that the marijuana he sold outside of the house came from that stash, in addition to residence); *United States v. Bustamante*, 493 F.3d 879, 883, 889 (7th Cir. 2007) (the gun was recovered in a man's jacket in a bedroom that the defendant shared with a female, in addition to residence); *United States v. Alanis*, 265 F.3d 576, 592 (7th Cir. 2001) (noting the gun was found in a nightstand next to the defendant's bed with his eyeglasses, clothing, and wallet nearby, in addition to residence); *United States v. Hopson*, 184 F.3d 634, 636 (7th Cir. 1999) (noting that the police found the guns among the defendant's things, in addition to evidence that the defendant spent significant time at the house); *United States v. Kitchen*, 57 F.3d 516, 519–21 (7th Cir. 1995) (gun found in the defendant's bedroom, in addition to residence).

In other cases, the plus-factor can be shown by an identity of conduct or motive, which again allows the jury to conclude that the defendant not only knew and was around the contraband, but that he actually intended to control it. *United States v. Kelly*, 519 F.3d 355, 362 (7th Cir. 2008) (the drugs packaged at the apartment were packaged in the same manner as those found on the defendant's person at the original scene and the defendant referred to the gun and the drugs as

belonging to him, in addition to residence); *United States v. Morris*, 349 F.3d 1009, 1014 (7th Cir. 2003) (in addition to finding the guns in the house where the defendant was located, the defendant confessed several times to being in possession of the weapons); *United States v. Quilling*, 261 F.3d 707, 710–13 (7th Cir. 2001) (gun was discovered in one-bedroom residence that defendant shared with another man and ammunition matched ammunition previously recovered from defendant, in addition to residence); *see also United States v. Rivera*, 844 F.2d 916, 926 (2d Cir. 1988) (the apartment was the center of a drug operation, which gave defendant a motive to possess the gun in question because weapons are the "tools of the narcotics trade").

Finally, the plus-factor can be shown by evidence that indicates the defendant directed others to use the contraband. *United States v. Lloyd*, 71 F.3d 1256, 1267 (7th Cir. 1995) (evidence that the defendant employed the services of two youths as bodyguards and instructed them to use the gun, in addition to residence).

In contrast to these "plus-factors," cases also recognize a "minus-factor" that weakens the inference of intent and requires the government to prove more to establish the requisite nexus. The minus-factor can be gleaned from two strands of existing constructive-possession authority. First, when no other residents account for the contraband, the firearm's presence on the premises begins to provide a basis for the jury to conclude that the defendant brought the firearm into the home, lowering the degree to which the government has to connect the defendant to the

contraband. *See United States v. Coffee*, 434 F.3d 887, 896 (6th Cir. 2006) (sustaining a conviction, in part, because the co-occupant denied possession); *Rivera*, 844 F.2d at 926 (sustaining a conviction, in part, because none of the other residents were familiar with firearms). If this is true, then so is the inverse: when a co-occupant fully accounts for the contraband, the inference that the defendant brought the contraband in or intends to use it is weakened.[3]

Second, courts have rejected "guilt-by-association" inferences in constructive-possession cases in the non-residency context. *United States v. Windom*, 19 F.3d 1190, 1201 (7th Cir. 1994) (no constructive possession of drugs in a backpack where the only evidence was the defendant's simultaneous occupancy of the home; to establish a nexus, the government would have had to show the defendant's money came from a previous police-controlled drug purchase, that the money was the defendant's share, and then show that the controlled-buy drugs came from the backpack); *see United States v. Grubbs*, 506 F.3d 434, 437, 440–41 (6th Cir. 2007) (insufficient evidence where gun was discovered in defendant's parents' home in brother's bedroom, where brother stated he owned the gun and the only other evidence against defendant was neighbor's testimony that the defendant had previously possessed a gun that matched the recovered gun's description); *compare United States v. Chairez*, 33 F.3d 823, 825–26 (7th Cir. 1994) (no evidence other than the gun was under the defendant's seat in a car), *with United States v.*

[3] To be sure, there may be cases in which someone accounts for the contraband, but that evidence is disputed by other testimony or evidence. In such cases, this Court credits the government's version of the evidence. In Griffin's case, however, the undisputed evidence showed that Griffin's father and his father's hunting friend accounted for the gun and ammunition that served as the basis for Griffin's conviction.

Hampton, 585 F.3d 1033, 1041 (7th Cir. 2009) (although "proximity to the object alone is not enough" the government "established a nexus between the gun and [the defendant] through witness testimony that [the defendant] was holding a gun before he entered the Jeep"), *and United States v. Stevens*, 453 F.3d 963, 966–67 (7th Cir. 2006) (evidence defendant leaned over and put gun under passenger seat as officers approached car).

Considering these principles in tandem shows that when, as in this case, another resident's continuous, (Tr. 198–203) (testimony of Phil Griffin's hunting history and gun ownership), documented, (A46, Receipt of Seven Guns Taken from Phil Griffin; Tr. 201–04) (inventorying the guns in 2004), and uncontroverted (Tr. 208, 216, 242) (government's characterization of the long guns as Phil Griffin's) legal possession explains the firearm's presence in the home, mere presence and awareness of the firearms is nothing more than guilt by association and provides no evidence that the defendant intended to exercise control over the contraband.[4] When the record clearly establishes why the gun was in the home, additional evidence clearly tying the defendant to the contraband is required. *See, e.g.*, *Bustamante*, 493 F.3d at 889 (defendant claimed gun was girlfriend's, who also lived in the house, and she had firearms license, but gun was found "wrapped inside of a man's jacket" and "no other male lived [there]"); *Alanis*, 265 F.3d at 582 (defendant asserted gun was wife's, but it was located next to the defendant's bed in a

[4] That is not to say that ownership is dispositive either way, for this Court has recognized that in some cases a defendant may possess contraband without being its rightful owner or possess it jointly with others. *See United States v. Rawlings*, 341 F.3d 657, 658–59 (7th Cir. 2003); *Kitchen*, 57 F.3d at 521. Rather, established ownership by another merely requires the government to unequivocally prove the defendant's connection to the contraband.

nightstand with his glasses and wallet); *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993) (defendant claimed wife owned gun, but it was found under men's clothing in the master bedroom).

In Griffin's case, all of the plus-factors were missing, but the minus-factor was present. Griffin's belongings were not intermingled with the guns, there was no separate evidence of identity or motive, and there is no evidence that he instructed others to possess the weapons on his behalf. Additionally, Phil Griffin legally possessed the shotgun and ammunition for which Griffin was convicted, and he had legally stored them in his home for years leading up to the incident that served as the basis for the charges in this case. (Tr. 198–204.) Phil's commanding, purposeful, and legal ownership of these weapons and ammunition undercuts any inference of a nexus, and the government needed to do more to prove Griffin guilty beyond a reasonable doubt. Yet, taking the evidence in the light most favorable to it, the government only showed Griffin's proximity to the weapons and awareness of them, both of which are insufficient to sustain his conviction.

B. The government's affirmative evidence also did not prove Griffin's intent.

Not only did the government fail to establish a nexus between Griffin and the guns and ammunition that would have permitted an intent inference, the affirmative evidence that it offered failed to prove Griffin's intent beyond a reasonable doubt. The government offered four pieces of evidence that it claimed provided "clue[s]" to "evaluate [the intent] issue" (A22–23): (1) Latasha Perry's testimony about Griffin's probation; (2) Griffin's mother's statement that they lived

in a rough neighborhood; (3) the testimony of Mario Walker; and (4) the government's argument that Griffin had a "serious criminal record."[5] As discussed below, however, none of this evidence considered separately or taken together, proves Griffin's intent.

As a threshold matter, because none of this evidence relates to the two sets of ammunition for which Griffin was convicted, the evidence is only sufficient to sustain Griffin's conviction if it demonstrates his intent to control the shotgun behind the kitchen door. Like its effort to prove a nexus, no rational juror could believe that this evidence affirmatively established Griffin's intent.

1. LaTasha Perry's testimony fails to establish Griffin's intent to possess the firearm.

There is nothing in Perry's testimony from which a reasonable juror could infer Griffin's intent to exercise dominion and control over the firearms. First, that Perry briefly spoke to Griffin's father about guns and stated that Griffin "couldn't be around any drugs[,] alcohol, [or] firearms" (Tr. 145) is irrelevant to a finding, let alone to establishing beyond a reasonable doubt, that Griffin himself intended to control the weapons. For this evidence to have any persuasive force regarding intent would require the jury to first make the impermissible speculative jump that Griffin's father told the defendant about this conversation. *See, e.g.*, *Piaskowski v.*

[5] As discussed below, see Section III *infra*, the prosecutor erroneously relied on Griffin's prior convictions to establish his intent to possess the firearms in this case because doing so asked the jury to make an improper propensity inference. As such, it cannot serve as the basis for Griffin's conviction. In any event, this evidence alone cannot establish Griffin's intent, particularly when none of his prior crimes were firearms offenses. Moreover, it would conflate two elements of the offense—a prior felony conviction is an element that is distinct from possession—and thus lower the government's burden of proving each element.

Bett, 256 F.3d 687 (7th Cir. 2001) (insufficient evidence where the jury could only speculate to the meaning of the statements made by the defendant). Yet both Phil Griffin and Griffin testified that no such conversation occurred. (Tr. 211–12, 244–45.)

Next, Perry's testimony regarding Griffin's probation does not establish intent. These conditions do nothing more than restate the § 922(g)(1) requirements. Significantly, though, the conditions of probation do not proscribe living in a home where firearms are present. Nor do they define the term "possess" in a way that would allow a parolee to understand that it encompassed conduct beyond the common dictionary definition of the term: to "have and hold as property" or "to seize and take control of" an object. *See* (Tr. 141) (reciting the conditions of probation); *Merriam-Webster*, http://www.merriam-webster.com/dictionary/possess. Because Perry failed to inform Griffin that residence in a home that contains firearms constitutes "possession," Griffin's awareness of that term says nothing about his intent to control the shotgun. Griffin himself affirmed that this was his understanding. He stated that "if [the probation rules] specific[ally stated] you may not reside in a home with ammunition, that's a totally different rule,[but] own, carry, possess, or purchase really didn't fall under that category to me." Indeed, "that's why a revocation hearing was given on my behalf in this, and [an] Administrative Law Judge saw fit that I was not in possession [of firearms or ammunition]." (Tr. 244–45.)

In apparent recognition of these evidentiary shortcomings, after the government asked Perry about her specific communications with Griffin and his father, the prosecution then generally queried "if *someone* under your supervision discovers there's a gun in a place where they're living, what is the correct thing they should do." (Tr. 141) (emphasis added). Perry answered "[*a*] *person* should notify their agent . . . so that the Agent can place *that person* in a different residence." (Tr. 141) (emphasis added). Conspicuously absent from this testimony is any reference to Griffin. In fact, the government never asked Perry whether she told Griffin of this duty (Tr. 141–42), and Griffin affirmatively testified that he was not aware of it (Tr. 244–45). Regardless, even if the jury disbelieved Griffin, the jury could not reasonably infer without engaging in improper speculation that any such conversation actually took place. Thus, Perry's testimony does not connect Griffin to the weapons, and it does not permit a jury to infer Griffin's intent to control his father's firearms.

2. Griffin's mother's characterization of their neighborhood as "a little bit rough" does not establish Griffin's intent.

The government flagged Griffin's mother's testimony that the "area of town where [they live] in is a little bit rough" (Tr. 220) as further evidence of Griffin's intent to control the firearm (A23). Allowing the government to substitute crime statistics of the defendant's neighborhood as a proxy for the defendant's intent, however, would eliminate the government's burden of proving the *mens rea* element. This is particularly true when many, if not most, of the defendants charged with the crime of felon in possession of a firearm live precisely in these

kinds of neighborhoods. *See* David L. Bazelon, *Morality of the Criminal Law*, 49 S. Cal. L. Rev. 383, 403 (1976) (stating that almost all violent crime is committed by the disadvantaged). That the government felt the need to resort to this kind of testimony underscores the weakness of its intent evidence even before the jury acquitted Griffin on nine of the ten firearms for which he was indicted.

3. Mario Walker's testimony does not establish Griffin's intent.

The government's final piece of evidence was the testimony of perennial jailhouse informant Mario Walker. Walker's testimony was so flimsy and contradictory that it arguably qualifies as "unbelievable on its face," a ground to reject it as a matter of law. *See United States v. Emerson*, 128 F.3d 557, 561 (7th Cir. 1997) (testimony is incredible when it is "unbelievable on its face, physically impossible for the witness to observe, or contrary to the laws of nature"); *compare* (Tr. 167) ("[Griffin] didn't say nothing [else] about the handguns . . . . [h]e just said where they were hid at"), *with* (Tr. 167) (later stating he said "the handguns were his"); *compare* (Tr. 167–68) (testifying the handguns were behind the stove), *with* (Tr. 34, 37–38, 41–42) (indicating the only handguns were behind the parents' headboard); *compare also* (Tr. 163) (stating he testified "[b]ecause guns don't kill people, people kill. Guns don't kill people. People kill guns—people kill with guns"), *with* (Tr. 174–75) (stating his "[pending drug charge] is minor because it's only 1.5 grams of marijuana and I'm feeling like . . . [i]f I gotta [sic] do this, I deserve to, you know, really get my charge dismissed . . . because I have a family. . . [a]nd the marijuana I was smoking . . . I wasn't selling or nothing").

This Court, however, need not discard Walker's testimony in order to overturn Griffin's conviction; it should simply credit the jury's findings in this case. *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000) ("It is the function of the jury to evaluate the credibility of witnesses and to weigh the evidence."). In reviewing the sufficiency of the evidence, this Court should preserve the jury's rejection of Walker's testimony because it refused to convict Griffin on any of the guns that formed the basis of Walker's testimony. *See* (A8–9) (finding unanimity only as to the shotgun behind the kitchen door and the ammunition on the steps).

Specifically, Walker's testimony extended to only two potential sets of guns: the handguns found behind the parents' headboard and the shotguns recovered from behind the refrigerator (the only guns found behind an "appliance" as Walker testified). Had the jury credited Walker at all, it would have convicted Griffin of at least one of these firearms, but Griffin's conviction did not rest on any of these weapons. *See* (A8–9.) Sustaining a verdict based on this testimony, then, would undermine this jury's credibility finding.

Although inconsistencies in the jury's verdict are not independent bases for reversal, *see United States v. Askew*, 403 F.3d 496, 501 (7th Cir. 2005) (inconsistency within a single count); *United States v. Patterson*, 348 F.3d 218, 224 (7th Cir. 2003), *abrogated on other grounds by Simpson v. United States*, 376 F.3d 679 (7th Cir. 2004) (between co-defendants); *United States v. Torres*, 809 F.2d 429, 431–32 (7th Cir. 1987) (across counts); *see also United States v. Powell*, 469 U.S. 57, 61 (1984), the Supreme Court has emphasized that a criminal defendant is still

"afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67; *see also Askew*, 403 F.3d at 501 (same).

Powell requires sufficiency review to serve as a bulwark against cases that potentially present compound errors. In short, if under *Powell* maintaining the sanctity of the verdict precludes inquiry into what appears to be an obvious legal error, then what appears to be an obvious credibility determination also should remain intact. *See Powell*, 469 U.S. at 67; *see also United States v. Johnson*, 437 F.3d 665, 675 (7th Cir. 2006) ("[T]his Court will not upset the jury's credibility determination . . . ."). If this Court questions a credibility determination while simultaneously refusing to question other errors, it will insulate from appeal any leniency-seeking jailhouse informant's testimony that the defendant confessed to the crime, thus eviscerating *Powell*'s protection. Given the jury's rejection of Walker, this Court should credit that finding and review the remaining evidence to determine if the government proved Griffin's intent.

Finally, even if this Court credits Walker's testimony, it only proves Griffin's intent to control the handguns or shotguns behind the refrigerator. Indeed, this was the government's understanding and use of the testimony. *See* (A25) (in closing, the prosecutor stated Walker "told you that the handguns recovered from the upstairs bedroom" were Griffin's and later stated that Walker's testimony establishes that "the Defendant knew the [long and hand] guns were there, that they were available to him, and that the handguns were his"); (Tr. 208, 216, 242)

(during cross examination of Phil Griffin, prosecutor referred to the seized long guns as "your firearms" or Phil Griffin's shotguns). Therefore, fully crediting Walker's testimony would still fail to establish beyond a reasonable doubt that Griffin intended to control the shotgun behind the kitchen door for which he was convicted.

None of the additional pieces of evidence affirmatively established Griffin's intent to exercise dominion and control over the shotgun behind the kitchen door or the ammunition on the steps beyond a reasonable doubt, as the government was required to demonstrate under its theory of constructive possession.

II. The jury instructions failed to apprise the jury of its need to separately find Griffin's intent.

This Court should vacate Griffin's conviction and remand for a new trial because the jury instructions failed to adequately apprise the jury of its need to separately find Griffin's intent. Because the defendant did not object to the district court's knowledge instruction or the absence of a separate intent instruction, this Court reviews the issue for plain error. *See United States v. Ross*, 77 F.3d 1525, 1536–37 (7th Cir. 1996). Courts find plain error when: (1) there was an actual error; (2) that was plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993); *United States v. Canady*, 578 F.3d 665, 670 (7th Cir. 2009). That test is amply satisfied in this case.

A new trial is warranted "[w]hen jury instructions, taken as a whole, give the jury a misleading impression or inadequate understanding of the law," thus

prejudicing the defendant. *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (quoting *Carvel Corp. v. Diversified Mgmt. Grp.*, 930 F.2d 228, 232 (2d Cir. 1991) (internal quotation marks omitted)). It is the district court's responsibility to ensure that the jury is fully informed with clear and coherent instructions. *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946) (reversing defendant's conviction as plain error when improper jury instruction lowered the government's burden because the trial judge failed to give the jury clear guidance on the relevant legal standards). Erroneous jury instructions infringe upon a jury's fact-finding role and directly impact the fairness of trial. *See Sandstrom v. Montana*, 442 U.S. 510, 514–16 (1979). The district court must, therefore, accurately define the essential elements of the offense as well as the corresponding *mens rea* and ensure that the charges are not misleading. *United States v. Durades*, 929 F.2d 1160, 1167 (7th Cir. 1991); *United States v. Pope*, 561 F.2d 663, 670 (6th Cir. 1977) (reversing the defendant's conviction because failure to instruct that "intent to distribute" was an essential element of the crime charged constituted a reversible error not cured by language in instruction).

In this case the district court committed plain error when it inadequately and incorrectly instructed the jury. *Olano*, 507 U.S. at 732–33 (defining an error as "[d]eviation from a legal rule"). The jury instructions were erroneous because they: (1) misled the jury by unduly emphasizing knowledge while simultaneously omitting the intent requirement; and (2) improperly altered an element of the offense and lowered the Government's burden to prove Griffin's requisite *mens rea*.

Thus, a reasonable juror could have concluded from these instructions that Griffin's knowledge of the firearms or ammunition alone was sufficient to support a conviction.

Although this Court has not ruled on this question, the Second Circuit has in a remarkably similar case. *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973). In *Clark*, the defendant was convicted of possessing drugs with intent to distribute. *Clark*, 475 F.2d at 242. The Second Circuit reversed as plain error the district court's failure to distinguish intent and knowledge, which in turn created confusing jury instructions. *Id.* at 248, 250. As a result, the appellate court concluded that the jury likely convicted the defendant on the lesser *mens rea* of knowledge. *Id.* at 248 ("lump[ing the *mentes reae*] together" confused or "le[ft] an erroneous impression in the minds of the jury").

Like the drug convictions in *Clark*, a conviction for constructive possession of firearms requires both knowledge and intent. *Walls*, 225 F.3d at 867 (reversing defendant's conviction because the jury instruction "failed to adequately apprise the jury of the need to find intent") (internal citations omitted). This Court's pattern instruction includes both concepts. *See* Seventh Circuit Pattern Criminal Federal Jury Instructions for 18 U.S.C. § 922(g) ("Possession may exist . . . when a person . . . *knowingly* has the power *and intention* to exercise direction or control over it.") (emphasis added). Two problems arise, however, when a trial court provides a supplemental, but unnecessary, jury instruction on the definition of "knowingly" while failing to provide one for "intent." First, the district court unduly emphasizes

the knowledge element while obviating the intent element.

Second, this problem is compounded by the grammatical construction of the pattern instruction which places the term "knowingly" up front as an adverb that can then be read as modifying the rest of the sentence. As the Supreme Court has noted, the "most natural grammatical reading" of a clause beginning with a *mens-rea* adverb is that the adverb modifies all of the acts that follow. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) (noting "knowingly" modifies the latter term "corruptly persuades" in the same sentence even though "corruptly persuades" does not immediately follow "knowingly"). In the present instruction, therefore, "knowingly has" applies to the remainder of the sentence. Thus, "knowingly has . . . the intention," is most naturally understood as "knowingly intends." This rises to plain error when this instruction is combined with a supplemental instruction defining knowingly and when one that defines intent is missing, because the jury is confused as to whether intent is required. Thus, the district court either should not have provided the separate definition of "knowingly" at all or provided the separate definition of "intent" at the same time. The instructions as given, however, created an erroneous impression that mere knowledge, rather than intent, was sufficient to support a finding of guilt.

The district court's error also affected Griffin's substantial rights because it likely affected the outcome of the trial. *Olano*, 507 U.S. at 734. The effect of this error is obvious in the jury's verdict. Griffin was convicted of possessing: (1) a shotgun located behind the kitchen door; and (2) two batches of shotgun shells that

were found on the stairway leading to the second floor. (A8–9.) Each of these items was located in a common area of the home and was fairly visible. Notably, the jury did not convict Griffin of possessing any of the items found in his parents' bedroom, located in the basement, or secreted behind the refrigerator in the kitchen. As defense counsel pointed out, the jury appeared to convict Griffin only on the firearm and ammunition that was most visible. *See* (A37.) Thus, in reaching its verdict, the jury ostensibly failed to follow the law that required it to find Griffin's intent to possess. In other words, the jury's verdict reflects a belief that Griffin was culpable for the firearms for which he had knowledge—that is, the contraband that Griffin "knowingly had the power . . . to exercise discretion and control over." It did not convict him based on a separate finding of his intent.

Finally, the district court's error affected the fairness, integrity, or public reputation of the judicial proceeding. The Supreme Court has repeatedly emphasized that proof of a criminal charge beyond a reasonable doubt is constitutionally required because of the "vital role" that the standard plays in American criminal law. *In re Winship*, 397 U.S. 358, 362–63 (1970). Therefore, courts have reversed convictions when an erroneous jury instruction improperly lowered the government's burden of proving an element beyond a reasonable doubt. *See Sandstrom v. Montana*, 442 U.S. 510, 519 (1979) (reversing the defendant's conviction because a reasonable juror may have given an erroneous jury instruction an interpretation that is constitutionally impermissible); *Clark*, 475 F.2d at 248, 250 (reversing the defendant's conviction in part because "knowledge" and "intent"

were confusingly lumped together thereby essentially eliminating an element of the offense charged). In the present case, the confusing jury instruction improperly lowered the government's burden of proving Griffin's intent beyond a reasonable doubt. Because of the constitutional implications arising from this error, allowing Griffin's conviction to stand would affect the fairness and integrity of the justice system.

III. The government made improper remarks during its closing argument that affected the outcome of the trial.

This Court should vacate Griffin's conviction and remand for a new trial because the government made improper remarks that affected the outcome of the trial. Review of a prosecutorial misconduct claim follows a two-step framework. *Darden v. Wainwright*, 477 U.S. 168, 180–81 (1986). First, the Court examines the conduct in isolation to determine if it was improper. *United States v. Gilbertson*, 435 F.3d 790, 796 (7th Cir. 2006). If deemed improper, the Court then decides if the conduct prejudiced the defendant by conducting a factor analysis*, id.* at 796–97, and by examining the record as a whole to determine if the conduct so infected the trial with unfairness as to make the conviction a denial of due process, *United States v. Morgan*, 113 F.3d 85, 90 (7th Cir. 1997). Those factors include: "(1) whether the prosecutor misstated the evidence; (2) whether the remarks implicated specific rights of the accused; (3) whether the defense invited the response; (4) the trial court's instructions; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut." *Gilbertson*, 435 F.3d at 796–97. Prejudice exists if the improper conduct likely affected the jury's decision-making. *Morgan*, 113

F.3d at 89. Even inadvertent remarks may be prejudicial because the question concerns the trial's fairness not the prosecutor's culpability. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

A. The government made an improper propensity inference that prejudiced Griffin.

The government argued to the jury that it should find that Griffin intended to possess the weapons because of his previous convictions. The government asked the jury: "And what does your common sense tell you about a person with a serious criminal record. . . ."? (A24.) According to the government, common sense indicated that Griffin "meant very much to be around these guns and this ammunition." (A24.) Despite defense counsel's objection to his first remark, the government reiterated this point during rebuttal, stating "[w]e're talking about a person who's been in trouble." (A28.) This was nothing more than a propensity argument and it was improper. *See* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *United States v. Simpson*, 479 F.3d 492, 504 (7th Cir. 2007) (holding that government's propensity argument was both improper and prejudicial), *abrogated on other grounds by United States v. Boone*, 628 F.3d 927, 933 (7th Cir. 2010).

Not only was it improper, but also it was prejudicial because five of the six *Darden* factors, including the most important weight-of-the-evidence factor, weigh in Griffin's favor. First, although the government did not affirmatively misstate evidence, it asked the jury to draw improper inferences from the evidence, which

has the same effect as misstating the evidence. *See Simpson*, 479 F.3d at 504 (explaining that the government's invitation to the jury to make an improper propensity inference had an effect similar to misstating the evidence). Specifically, the government asked the jury to conclude from Griffin's prior convictions, his "serious criminal record," that he "meant very much to be around these guns and this ammunition." (A28.)

Furthermore, the government elicited inadmissible evidence to bolster this improper propensity argument. In a § 922(g)(1) case, the name and nature of the defendant's prior conviction is not admissible when the defense has stipulated to that element of the offense because those details are no longer probative, yet remain extremely prejudicial. *Old Chief v. United States*, 519 U.S. 172, 178, 185 (1997); *United States v. Moore*, 641 F.3d 812, 824 (7th Cir. 2011) (explaining that in felon-in-possession cases, the details of a predicate conviction are not admissible if the parties stipulate to the conviction).

The government introduced through testimony the nature and extensiveness of Griffin's prior criminal record. During probation officer LaTasha Perry's testimony, the government asked, "[a]nd what are your duties as a Probation and Parole Agent," to which she responded, "[t]o supervise felony drug offenders."[6] (Tr. 135.) Moreover, the government purposefully elicited an improper legal conclusion, *Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.2d 520, 529 (D.C. Cir. 1982) ("lay legal conclusions are inadmissible"), when it asked Officer

[6] Other testimony indicating the nature of Griffin's criminal record included Mario Walker's statement that Griffin "was high off some weed." (Tr. 166.) Defense counsel objected to that testimony as well.

Wawrzyniakowski if he thought Griffin had committed the crime for which he was on trial. (Tr. 91) ("[w]hat criminal act did you determine had taken place in this case that caused you to seize these weapons."). The officer responded that he believed Griffin had committed "the crime of felon in possession of firearm." (Tr. 92.) Finally, the government elicited testimony that suggested that Griffin was a repeat offender with extensive run-ins with the law. *See* (Tr. 93) (Wawrzyniakowski stating police conducted two background checks on Griffin ahead of the search and someone "recognized [Griffin] from our team").

Introducing the name and nature of Griffin's criminal history prejudiced him. Instead of a single, unidentifiable felony conviction, which could be a white-collar crime like tax evasion or wire fraud, the jury was informed that Griffin had been convicted for a drug offense, that police believed he was guilty of the charged crime, and that he was well known in police circles. Moreover, because the government continued to refer to these convictions by improperly asking its lay witness to draw legal conclusions about whether Griffin committed a crime or not, the testimony invaded the jury's province to decide those very same questions. Thus, under this first factor, the government prejudiced Griffin by both: (1) urging the jury to make a propensity inference based on Griffin's criminal record; and (2) improperly eliciting inadmissible, prejudicial evidence to which Griffin had already stipulated.

Turning to the second factor, although none of the defendant's specific trial rights were implicated by these comments, the paucity of evidence against Griffin suggests these comments did harm his broader right to a fair trial. Third, the

defense never invited any of these remarks. As for the fourth factor, the district court's instructions neither fully addressed nor cured this improper argument. After defense counsel objected to the government's use of Griffin's prior convictions in closing, the court did not instruct the jury to abstain from using the prior convictions as evidence of the defendant's guilt or even the proper use of that evidence. (A24.) Instead, the district court simply told the jury that it would hear that instruction later. (A24.) Although the district court eventually instructed the jury that it could not use the defendant's prior convictions for any reason other than to judge his credibility, this instruction was not given until after closing arguments. (Tr. 287.) The instruction was delayed and addressed the impropriety abstractly instead of specifically prohibiting the jury from using the evidence in an improper manner. Thus, the instruction did not cure prejudice to the defendant because it was "neither prompt, specific, nor emphatic." *United States v. Blanchard*, 542 F.3d 1133, 1153 (7th Cir. 2008) (explaining that the trial court's untimely and generic remedial instruction was insufficient to cure prejudice to the defendant). These improper remarks were some of the last statements the jury heard before deliberation, and the district court left it ill-equipped to distinguish this improper argument from the legitimate evidence.

The fifth factor, the weight of the evidence, is the most crucial in determining the prejudicial effect on the defendant by improper remarks, *Morgan*, 113 F.3d at 90, and it weighs heavily in Griffin's favor. This Court has found that improper prosecutorial comments did not prejudice the defendant when the evidence of his

guilt was particularly strong. *See Morgan*, 113 F.3d at 91 (explaining that the strong evidence against the defendant was the most important factor in determining the improper remarks were not prejudicial); *Rodriguez v. Peters*, 63 F.3d 546, 562 (7th Cir. 1995) (holding that limiting instruction and "overwhelming evidence" prevented the allegedly improper comment from prejudicing defendant); *United States. v. Pirovolos*, 844 F.2d 415, 427 (7th Cir. 1988) (holding improper remarks were not prejudicial because of the "overwhelming evidence" of the defendant's guilt). When the weight of the evidence against the defendant is particularly weak, this Court has found that prejudice resulted from the government's improper remarks. *U.S.* ex rel. *Shaw v. De Robertis*, 755 F.2d 1279, 1284–85 (7th Cir. 1985) (holding that the main reason prejudice was found was the uncertainty of the defendant's guilt created by vague and contradictory testimony). In this case there was scant, if any, evidence of Griffin's guilt even though the facts were largely undisputed. *See* Section I, *supra*. Thus, the government sought to shore up its case by arguing that Griffin's criminal history demonstrated that Griffin was inclined to exercise control over the guns and ammunition recovered. Without this improper remark, it is unlikely the jury would have convicted Griffin on the weak evidence in the record.

Finally, under the sixth factor, this Court considers whether the defendant had an opportunity to rebut the improper remarks. Although defense counsel tried to flag for the jury the impropriety of the propensity remark during his closing remarks, both the district court and the government interrupted him and halted his

argument. (Tr. 277–278.) Moreover, defense counsel had no opportunity to address the subsequent propensity remark made during the government's rebuttal. (A27–28.) This was an extremely close case and these comments unfairly tipped the scale in the prosecution's favor. In light of the trial as a whole, the jury likely convicted him at least in part based on these comments. The comments therefore affected the trial's outcome and prejudiced Griffin.

B. The government improperly argued that the jury should convict Griffin to protect the community.

The government also improperly encouraged the jury to convict Griffin in order to protect the community. Defense counsel did not separately object to the prosecutor's entreaty to the jury that it must "protect the community" from Griffin through its verdict. To the extent that counsel's other objections to the government's closing argument did not encompass this statement, this Court reviews the issue for plain error, *United States v. Spivey*, 859 F.2d 461, 465 (7th Cir. 1988), on top of the two-step *Darden* analysis, *United States v. Hale*, 448 F.3d 971, 986 (7th Cir. 2006). As noted above, *see* Section II *supra*, *Olano* sets out the four-part test for a plain-error analysis. *Olano*, 507 U.S. at 732.

During its closing argument the government asked the jury to convict Griffin so that it could "protect the community from people who refuse to abide by the laws that we, the people, make." (A27.) The government went on to say: "that's what I'm asking you to do this afternoon, is to protect the community from someone who refuses to obey the laws that everybody, all of us, have to abide by." (A27.) The government strongly suggested that if Griffin was not convicted of this crime, he

would commit others and jeopardize the safety of the community. This Court has previously held that "conjuring up a specter of future harm resulting from a new crime" is improper because it asks the jury to convict the defendant for reasons other than the evidence. *United States v. Cunningham*, 54 F.3d 295, 301 (7th Cir. 1995); *see also United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking."). The government's emphasis on Griffin's prior convictions throughout the trial conjured up the specter of future crimes and this argument improperly asked the jury to convict him for that reason.

The majority of the *Darden* factors, including the weight-of-the-evidence factor, supports the conclusion that Griffin was prejudiced by this argument. First, although the government did not affirmatively misstate the evidence, all the impermissibly elicited testimony concerning the nature of Griffin's prior offenses bolstered this improper argument. The name and nature of Griffin's prior drug convictions made him seem much more dangerous than a generic felon, which in turn made the "protect the community" argument that much more effective. Although the second and third factors do not weigh heavily in Griffin's favor, the fourth factor does. The district court gave no curative or limiting instruction to reduce the impact of this improper argument. As previously explained, there was little, if any, evidence of Griffin's guilt, weighing the fifth factor in Griffin's favor.

Finally, the argument was made during the government's rebuttal so the defense had no chance to rebut this remark.

The government's protect-the-community remark also satisfies the plain-error standard. First, as noted above, courts have consistently held that this kind of plea to the jury is an error. *Cunningham*, 54 F.3d at 301. In this case, the prosecutor's remark also was clear and obvious, thus satisfying *Olano's* second requirement that the error be plain. (Tr. 281.) The third part, that the error affected the defendant's substantial rights, is satisfied. As discussed above, this remark prejudiced Griffin under the *Darden* factors and affected his substantive due process rights. *United States v. Lee*, 743 F.2d 1240, 1255 (8th Cir. 1984) (holding that an argument indicating a jury's conviction of defendants would decrease the impact of the drug trade on the community was prejudicial and affected the defendant's substantive rights).

Finally, this improper remark compromised the fairness and integrity of the judicial proceeding because it encouraged the jury to convict Griffin for reasons beyond the evidence. The negative effect on the integrity and fairness of the judicial proceeding is further exacerbated because the government's two improper remarks complemented each other and prejudiced Griffin. The impact of the protect-the-community remark would have been negligible had the jury believed that Griffin was a law-abiding citizen. By arguing that Griffin had a propensity towards criminality, however, the government successfully suggested that Griffin not only committed the crime at issue but also that he will commit yet another crime if he is

freed. Given the weight of the evidence, the potential consequence of the protect-the-community remark was grave because it could have given the jury the sole reason to convict Griffin. The integrity of the judicial proceedings is seriously impaired if prosecutors are allowed to shore up weak cases with improper remarks. Thus, this Court should vacate Griffin's conviction and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, the appellant, Cory L. Griffin, respectfully requests this Court to either reverse his conviction or to vacate his conviction and remand for a new trial.

Dated: November 8, 2011

Respectfully submitted,

CORY L. GRIFFIN
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Cory L. Griffin

No. 11-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORY L. GRIFFIN,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Cory L. Griffin, hereby certify that I electronically filed the foregoing with the clerk of the Seventh Circuit Court of Appeals on November 8, 2011, which will send the filing to the office listed below. I also served two copies of this brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on November 9, 2011.

STEPHEN INGRAHAM
Assistant United States Attorney
530, U.S. Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

s/ SARAH O'ROURKE SCHRUP
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Dated: November 8, 2011

No. 11-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORY L. GRIFFIN,

Defendant-Appellant.

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

I, the undersigned, counsel for the Defendant-Appellant, Cory L. Griffin, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 12-point Century Schoolbook font.

The length of this brief is 10,817 words.

s/ SARAH O'ROURKE SCHRUP
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Dated: November 8, 2011

No. 11-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

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v.

CORY L. GRIFFIN,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Cory L. Griffin, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

s/ SARAH O'ROURKE SCHRUP
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Phone: (312) 503-0063

Dated: November 8, 2011

No. 11-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CORY L. GRIFFIN,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Wisconsin
The Honorable Judge Rudolph T. Randa
Case No. 08-CR-195

ATTACHED REQUIRED 30(a) & 30(b) COMBINED APPENDIX OF DEFENDANT-APPELLANT CORY L. GRIFFIN

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Cory L. Griffin

RULE 30(a) & 30(b) COMBINED APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

CORY L. GRIFFIN,

Defendant.

Case No. 08-CR-195 (RTR)
[18 U.S.C. §§ 922(g)(1) and 924(a)(2)]

SECOND SUPERSEDING INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. On or about April 30, 2008, in the State and Eastern District of Wisconsin,

CORY L. GRIFFIN,

who previously had been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed ten firearms and approximately 91 rounds of ammunition which, prior to his possession of them, had been transported in interstate commerce, the possession of which was therefore in and affecting commerce.

2. The firearms are more fully described as:

a. A Smith and Wesson .38 caliber revolver, bearing serial number S853391;
b. A Sturm Ruger, model Vaquero, .44 caliber revolver, bearing serial number 55-44341;
c. A Sears Roebuck & Co., model 41, .22 caliber rifle, bearing no visible serial number;
d. A Westernfield, model M150D, .410 gauge shotgun, bearing serial number 302955;
e. A Remington, model 1100, 12 gauge shotgun, bearing serial number M066580V;
f. A Savage Arms, model 94 series M, .410 gauge shotgun, bearing serial

number P548164;

g. A New Haven, model 600AT, 12 gauge shotgun, bearing serial number H645061;

h. An American Gun Co. shotgun, bearing serial number 414419;

i. A Mossberg, model 5500MK II, 12 gauge shotgun, bearing serial number 049646; and

j. A Browning, model B-80, 20 gauge shotgun, bearing serial number 431PX01777.

3. The ammunition is more fully described as:

a. 30 rounds of .22 caliber Federal brand ammunition;
b. 9 rounds of 12 gauge Remington brand shotgun shells;
c. 15 rounds of .410 gauge Federal brand shotgun shells;
d. 10 rounds of 20 gauge Remington brand shotgun shells; and
e. 27 rounds of 20 gauge Federal brand shotgun shells.

All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

A TRUE BILL

[redacted]

FOREPERSON

Date: 8/18/2009

MICHELLE L. JACOBS
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 08-CR-195

CORY L. GRIFFIN,

Defendant.

JURY INSTRUCTIONS

IMPEACHMENT OF DEFENDANT - CONVICTIONS

You have heard evidence that the defendant has been convicted of other crimes. You may consider this evidence only in deciding whether the defendant's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose. A conviction of another crime is not evidence of the defendant's guilt of any crime for which the defendant is now charged.

ELEMENTS OF OFFENSE - FELON IN POSSESSION OF A FIREARM

To sustain the charge of felon in possession of a firearm or ammunition, the government must prove the following propositions:

First, that, prior to April 30, 2008, the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year;

Second, that on April 30, 2008, the defendant knowingly possessed a firearm or ammunition; and

Third, that the firearm or ammunition possessed by the defendant had traveled in interstate commerce prior to defendant's possession of it on that date.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

(Definition of possession)

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

Evidence that Mr. Griffin was an occupant of or present on premises where the firearms or ammunition were present is insufficient by itself to establish beyond a reasonable doubt that Mr. Griffin had direction and control over the firearms or ammunition.

Possession is not the same as ownership. A person can possess an object that he or she does not own or have legal title to. The government only needs to prove that the defendant possessed any one of the firearms or ammunition in this case. The government does not need to prove that the defendant owned or had legal title to any of the firearms or ammunition.

Possession need not be exclusive. More than one person may have the ability to exercise direction or control over a firearm or ammunition.

"KNOWINGLY" - DEFINITION

When the word "knowingly" or the phrase "the defendant knew" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 08-CR-195

CORY L. GRIFFIN,

Defendant.

UNANIMITY SPECIAL VERDICT FORM

If you find the defendant guilty of the offense of possession of a firearm or ammunition by a prohibited person as charged in count one, you must answer the following:

Which of the following firearm or firearms do you find was or were possessed by the defendant?

_____ A Smith and Wesson, .38 caliber revolver, bearing serial number S853391
_____ A Sturm Ruger, model Vaquero, .44 caliber revolver, bearing serial number 55-44341
_____ A Remington, model 1100, 12 gauge shotgun, bearing serial number M066580V
_____ A Westernfield, model M1 50D, .410 gauge shotgun, bearing serial number 302955
_____ A Sears Roebuck & Co., model 41, .22 caliber rifle, bearing no visible serial number
__✓__ An American Gun Co. shotgun, bearing serial number 414419
_____ A Savage Arms, model 94 Series M, .410 gauge shotgun, bearing serial number P548164
_____ A New Haven, model 600AT, 12 gauge shotgun, bearing serial number H645061
_____ A Mossberg, model 5500MK II, 12 gauge shotgun, bearing serial number 049646
_____ A Browning, model B-80, 20 gauge shotgun, bearing serial number 431PX01777

(Check each firearm which the jury unanimously agrees the defendant possessed.)

Which of the following ammunition do you find was possessed by the defendant?

_____ 30 rounds of .22 caliber Federal brand ammunition

__✓__ 9 rounds of 12 gauge Remington brand shotgun shells

__✓__ 15 rounds of .410 gauge Federal brand shotgun shells

_____ 27 rounds of 20 gauge Federal brand shotgun shells

_____ 10 rounds of 20 gauge Remington brand shotgun shells

(Check the ammunition which the jury unanimously agrees the defendant possessed.)

Dated at Milwaukee, Wisconsin, this 10TH day of November, 2009.

[redacted]
Foreperson

[redacted]
Printed Name of Foreperson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 08-CR-195

-vs-

CORY L. GRIFFIN,

Defendant.

DECISION AND ORDER

On September 24, 2010, the defendant, Cory L. Griffin ("Griffin"), brought a Renewed Motion for Acquittal or New Trial. Griffin personally made a Motion for Acquittal on November 10, 2009, after a jury found him guilty of the offense charged in Count One of the Second Superceding Indictment.

Griffin argues that the evidence was insufficient to support the verdict, that the Court gave an erroneous instruction, and that the government committed reversible error in arguing to the jury. The government has responded to the renewed motion, the Court has read the submissions, and rules as follows.

Griffin's renewed motion is denied. The Court finds nothing in the renewed motion for acquittal that persuades it to reverse the ruling it made on November 10, 2009. The evidence was more than sufficient for the jury to decide as it did, the instruction given was not erroneous, and the argument made by the government was not improper.

Because the Court finds no reason to reverse its earlier ruling, the renewed motion is, as previously indicated, is **DENIED.**

Dated at Milwaukee, Wisconsin, this 7th day of January, 2011.

SO ORDERED,

s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA
V.

CORY LYDALE GRIFFIN

JUDGMENT IN A CRIMINAL CASE

Case Number: **08-Cr-195**

USM Number: **09633-089**

Peter J. Kovac
Defendant's Attorney
Stephen A. Ingraham
Assistant United States Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) **One (1) of the Second Superseding Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	**Being a Felon in Possession of a Firearm and Ammunition**	**April 30, 2008**	**1**

The defendant is sentenced as provided in Pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

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

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

April 20, 2011
Date of Imposition of Judgment

s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa, U. S. District Judge
Name & Title of Judicial Officer

April 22, 2011
Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case:
Sheet 2 - Imprisonment

Defendant: **Cory Lydale Griffin**
Case Number: **08-Cr-195**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of : **60 months.**

Defendant shall be given credit for time served, if any, as determined/calculated by the United States Bureau of Prisons.

☒ **The court makes the following recommendations to the Bureau of Prisons:**

(1) Defendant be placed at a facility as close to his home (Milwaukee, Wisconsin) as possible;
(2) Defendant participate in the 500-hour Intensive Drug Treatment Program.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case:
Sheet 3 - Supervised Release

Defendant: **Cory Lydale Griffin**
Case Number: **08-Cr-195**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two drug tests thereafter within one year.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ **The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)**
- ☒ **The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)**
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

Defendant: **Cory Lydale Griffin**
Case Number: **08-Cr-195**

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant is to participate in a program of testing to include not more than six urinalysis tests per month and residential or outpatient treatment for drug and alcohol abuse, as approved by his supervising probation officer, until such time as he is released from such program. The defendant shall pay the cost of this program under the guidance and supervision of his supervising probation officer. The defendant is to refrain from use of all alcoholic beverages throughout the supervised release term.

2. The defendant is to provide access to all financial information requested by the supervising probation officer including, but not limited to, copies of all federal and state income tax returns. All tax returns shall be filed in a timely manner. The defendant shall also submit monthly financial reports to the supervising probation officer.

3. The defendant is to cooperate with Child Support Enforcement Unit in payment of any child support or arrearages and to make regular payments at the direction of the supervising probation officer.

AO 245B (Rev 06/05) Judgment in a Criminal Case:
Sheet 5 - Criminal Monetary Penalties

Defendant: **Cory Lydale Griffin**
Case Number: **08-Cr-195**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	**$100.00**	**waived**	**$**

☐ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

going to offer some evidence, as the Court understands it. But because we moved the case forward quickly, we're going to take a break at this point and send you out to lunch. Okay? We always take a break at the end of the Government's case anyway, so this is -- even though it's a little early for lunch, we'll do that now. And we'll have you back here at 12:15 when the defense will offer its first witness. Okay?

MR. KOVAC: Could we make that 12:30? That's an hour and 10 minutes.

THE COURT: All right. 12:30. And again, it's tempting to discuss the case. You've heard the Government's case, but please don't. Only after all the evidence is in. We'll see you back here at 12:30 when the defense will offer its first witness. Have a good lunch.

(Whereupon the jury was excused at 11:20 a.m.)

THE COURT: Anything else we should take up before --

MR. KOVAC: Yes. I would make a motion at this time to dismiss for failure of the Government to establish a prima facie case. I think that on the basis of the authority that I've submitted to the Court in connection with the jury instruction on possession, that accepting things in the light most favorable to the Government, that they haven't met their burden. And this is not just perfunctory, and I hope it's not ignored. I hope it's not considered frivolous. Because the cases that I have submitted -- and I gave copies of all these

yesterday to the Government and this morning in court -- they were all cases in which there had been convictions. And the Court of Appeals reversed for insufficiency of the evidence. And the evidence was, essentially, contraband found in a home. Or contraband in a location where persons besides the Defendant had equal access to the contraband. And those convictions -- convictions that were supposedly beyond a reasonable doubt, were found to be inappropriate because they didn't meet that standard. And that was viewing everything most favorable to the Government. And that -- and that's what this case is. That there are weapons in a family home. So that's -- I think that the Government hasn't met its burden.

MR. INGRAHAM: Your Honor, the case of United States against Castillo, 406 F.3d 806, talks about someone who jointly occupies a premises, and whether -- whether firearms in a jointly occupied premises -- what there needs to be in order to find someone culpable for possessing firearms in such a location.

That's the evidence in this case, Your Honor. Mr. Griffin was in a home that he jointly occupied with at least his two parents, and a brother. And so there were 10 firearms in that home. So the question is, is there evidence that supports -- according to the Castillo case, the question is whether there is evidence that supports a nexus between the weapons -- or the weapon and the Defendant. In this case the

nexus, the -- well, the weapons were readily accessible to the Defendant. The testimony is that he was located in the upstairs bedroom where five of the weapons were found at the time of the search warrant. So that answers the question of whether he had access to that room. He clearly would have had access to the room where the other five weapons were found, because they were in the kitchen.

But beyond that, the testimony of Mario Walker, if credited, would establish a nexus between Mr. Cory Griffin and those firearms, because it was Mario Walker's testimony that Mr. Cory Griffin's father bought the handguns for Mr. Cory Griffin. And so I think that is -- that establishes the nexus. It establishes a clear nexus between Cory Griffin and the firearms.

I believe Mr. Walker also testified that Mr. Griffin's father bought the long guns for him as well. But at any rate, that testimony establishes the nexus between this Defendant and the firearms in the jointly occupied premises.

THE COURT: Anything else?

MR. INGRAHAM: No.

THE COURT: Well, this is a tough row to hoe for people bringing motions at this point, because the Court has to analyze the evidence in the light most favorable to the party moved against. In this case, the Government. And the Court can't substitute its judgment for a jury at any time a motion is

made -- similar motions are made. And there is an issue of credibility in this case based upon just Mr. Walker's testimony. He said the Defendant told him he owned the pistols. Or the revolvers, not the guns. That's enough. May be disbelieved by the jury. If that's the case, then we go from there. But it is a matter of credibility that's not for the Court's resolution at this time in this type of motion. So the Court, given that heavy burden, is going to deny the motion. Anything else we should take up?

MR. KOVAC: What about the -- when are we going to talk about instructions?

THE COURT: Well, is there -- the Court's got the Government's instructions. The only disagreement we have -- I'm going to give a cautionary instruction, the one that you submitted, relative to a witness should be -- a witness whose testimony should be viewed with special caution or extreme caution. It's the one that is always given when someone cooperates or gets a benefit from the Government. And the other one, that is the what is possession instruction that you submitted. Is the Government objecting to that instruction?

MR. INGRAHAM: No, Your Honor. I do think -- for purposes of clarity for the jury I think it would be helpful to them that that statement taken from the Castillo case, that the Defendant jointly occupies the premises -- there should be evidence that supports the nexus between the weapon and the

about possession. He's going to tell you that possession doesn't have to be actual possession. To legally possess something you don't have to hold it in your hand, or carry it in your pocket, or otherwise have it on your person. This is an important point in your deliberations in a few minutes, because as you know, the evidence in this case has not shown that the Defendant was seen with a gun or had ammunition in his hand. He wasn't found with a gun or ammunition in his pocket. So whether there was or was not D.N.A. or fingerprint evidence is really not the issue in this case. Instead, possession can be legal possession if it was what we call constructive possession.

What is constructive possession? Again, you're going to be told that constructive possession is the power and intent to exercise control over something.

Did the Defendant have the power to exercise control over the guns and ammunition in evidence? Well, he had lived for 3 weeks in the house where all of these things were recovered. And despite self-serving statements that you heard about how often he was there, we know that not one of these items was under lock and key. Many of the guns were not even hidden, like the ones next to the refrigerator or behind the kitchen door leading to the stairway. Or barely hidden, like the two handguns behind the headboard in the master bedroom. Or the three long guns in the bedroom closet. So again, you can note from the summary Exhibit where all of these things were

located.

But what do the -- what does the fact that we know that all of these guns were readily available mean? Well, it means that the Defendant did have the power to control these guns. He not only lived in the house, but he had access to all of it. Nothing -- nothing prevented him from getting any one of those firearms. He was seen in the very bedroom area on the morning of the search where five of those guns were found.

Now, the ammunition was even more readily available to him. It wasn't hidden at all. It was openly seen on all three floors of the house. On a bedside stand, on the top floor bedroom, in the master bedroom. At the bottom of the steps just off the kitchen on the ground floor. Even on top of the basement pool table and television set. None of these places were under lock and key or kept off -- or kept away from the Defendant. He had access to all of them.

So what do we conclude about these guns and this ammunition being readily available to the Defendant? We conclude that he obviously had the power to control all of these things. All of the guns, and all of the ammunition. But what about his intent? Did he mean to exercise control over these guns and ammunition? How should we evaluate this issue?

A first clue. Did the Defendant and those around him know that he was not to possess or even to be around these items? Yes. The Defendant's Probation Officer, LaTasha Perry,

told the Defendant's father that there were to be no firearms in the home when the Defendant came to live there. The same Probation Officer told the Defendant that one of the conditions of his supervision on probation was that he was not to possess a firearm.

You heard LaTasha Perry tell you that had she known there was a gun in the house where the Defendant was living, that he had a duty to tell her about it so that he could find another place to live. That's how serious it is. You couldn't just be there with a gun. The Defendant did neither of these things. He didn't -- he continued to live in the house, among all these unlocked guns, and all the openly displayed ammunition. Why did he not act to get rid of the guns or move? Because it not only didn't bother him to be around them, he preferred it. He lived in what his mother called a rough neighborhood. He would rather violate his conditions of supervision and his probation than live in a place without an available gun or ammunition. Why else would he violate his conditions of probation when he was supposedly anxious to cooperate and to abide by it? This is the only fair conclusion, the only reasonable conclusion you can draw from this evidence. And what it means is that he did intend to possess these guns and ammunition. And that means that he's guilty.

The Judge is also going to instruct you that when you deliberate you don't have to use some unfamiliar process of

legal reasoning in order to reach your conclusions. You get to use your common sense, just like in the rest of your lives. And what does your common sense tell you about a person with a serious criminal record, who knows he's not supposed to be around firearms or ammunition, who knows that his father has firearms that have been returned to him, but who nonetheless chooses to be around not just one or two of them --

MR. KOVAC: I object and move for a mistrial. I don't know if you want me to state it on the record, but -- state it in front of the jury, but he just argued that you should consider his serious prior record as to whether he's guilty of the offense, which is contrary to the instructions the Court is giving. He's mis-instructing the jury as to the law.

THE COURT: Well, the Court will deny the motion at this time. The Court will advise the jury that the subject of prior criminal record will be brought up in the instruction relative to the credibility and weight you should give to the testimony of any witness who has been previously convicted of a crime.

MR. INGRAHAM: Ladies and gentlemen, your common sense tells you that this Defendant meant very much to be around these guns and this ammunition. And that he certainly intended to exercise control over them, had the situation called for it.

As important as your common sense is, ladies and gentlemen, you don't have to rely only on it to evaluate this

question of whether the Defendant intended to control the guns and ammunition. Because you also heard from a guy that he had a conversation with in jail. Mario Walker. And who talked to the Defendant about the Defendant's case. As the Defendant himself admitted, he talked about his case.

Now, what did Mario Walker tell you? He told you that the Defendant knew the guns were there. Second, he told you that the Defendant said that he had access to these guns. And third, he told you that the handguns recovered from the upstairs bedroom where the Defendant was seen even belonged to him. That the Defendant's father had bought them for him. This goes beyond confirming what the recovery of the evidence tells you. It tells you that the Defendant knew the guns were there, that they were available to him, and that the handguns were his. All of these statements fit the common sense view of this entire situation. The Defendant was living among these openly available guns and ammunition not by mistake, not because of ignorance, and he was not at all indifferent to the guns and the ammunition. He had access to them, and he owned the handguns. In other words, by his own words to Mario Walker he intended to possess these guns and ammunition.

Can you believe the testimony of somebody who is in jail and wants to persuade the Government to give him a shorter sentence? There is no doubt, ladies and gentlemen, that you ought to be careful in evaluating the testimony of Mario Walker.

up in a bad neighborhood. He had a little bit of pride. And he didn't want to make that admission, because he sees something for his future. He sees that things, even though they may be bad, and a lot of people may not have been able to survive, and get into trouble, like he has, he sees a future. That's what you saw from him on the witness stand.

There was a future that the Administrative Law Judge has given him the chance to pursue. Because he's a decent guy, and he's learned from his mistakes. And you just get a sense from him that, you know, he's telling you yeah, I have to go live with my parents but, you know, I'm 28 years old. Or 27, or whatever he was then. And, you know, I really shouldn't be living with my parents, but I'll do that, and then I'm going to go out and get a life of my own. Not because he doesn't like his parents. He loves his parents. But he sees a future. And I think that came through. And I think we need to reward that. Well, not reward it. I think we need to search for truth, use reason and common sense, and let him have that chance in the future. Thank you.

THE COURT: Mr. Ingraham.

MR. INGRAHAM: Ladies and gentlemen, we the people, we are the Government. Some of us are Government employees, but we the people are the Government. And your service on this jury yesterday and today is -- like we were talking about yesterday, it's part of showing that we -- that you, we, are the

Government. We, the people, make the laws through our representatives. We, the people, help to enforce the law. And that's part of what you're doing right now. So your jury service -- it is true that it can protect our community from overreach by the Government. That's true. Your jury service can do that. It can also, however, protect the community from people who refuse to abide by the laws that we, the people, make. And that's what I'm asking you to do this afternoon, is to protect the community from someone who refuses to obey the laws that everybody, all of us, have to abide by.

I'm not conceding at all, ladies and gentlemen, that the evidence in this case is not sufficient unless you believe Mario Walker. I think Mario -- if you use your common sense, as you use your reason and common sense, you can conclude that Mario Walker was truthful about the essence of what he told you. Because it squares with details that you know, such as the number of guns. It also squares with your common sense about the whole scene. But I'm not suggesting that if you disregard the testimony of Mario Walker, you must find the Defendant not guilty. Because the circumstances -- again, your common sense -- the circumstances show that he did intend to possess the firearms and the ammunition.

His parents worked all day. He was -- he was there. Notwithstanding the self-serving testimony about he was never there. His Probation Officer certainly thought he was there.

When she went to visit him, that's where he was. He was there. In that house. With all that stuff around. He used the refrigerator. Of course, he did. He used that back staircase. He looked down to his right as he was using it, and he saw the ammunition. He knew the stuff was there.

He wasn't aware of where the guns and ammunition was? Come on. Again, you get to use your common sense. He went to the basement every now and then. He saw the ammunition on top of the T.V., and on top of the pool table. An ex-smoker who doesn't want anything to do with cigarettes? Fair enough. We all know such people. Perhaps we ourselves are such a person. But that's not what we're talking about here. We're talking about a person who's been in trouble, who wants to walk by the straight and narrow by his own admission, who knows the conditions of his release --

MR. KOVAC: I have the same objection that I made before, Judge.

THE COURT: No. Overruled.

MR. KOVAC: Person who's been in trouble.

THE COURT: No. Overruled.

MR. INGRAHAM: Who knows the conditions of his release. Knows that his father has gotten guns back. And yet he doesn't take the extra effort to make sure that he's in the clear on that point. Instead, he uses the refrigerator, he uses the back steps, and he doesn't do anything about making sure

that he's away from that stuff.

Ladies and gentlemen, you've heard the evidence in the case. You get to use your common sense. You know that all that stuff was in the house; that he was in the house; the stuff wasn't under lock and key; that he had reason to exercise control over it; that somebody even said that -- a witness said that he said that he had access to that stuff, and that at least the two handguns were his.

Ladies and gentlemen, I urge you to go back in the jury room and find the Defendant guilty. Thank you.

THE COURT: Ladies and gentlemen of the jury, I'm now going to read the instructions that you will use in deliberating on this case. And I told you before that you have two duties as a jury. The first, of course, is to decide the facts from the evidence in the case. And then, as you will recall, that's your job and your job alone. And your second is to apply the law to those facts as you find them, and as I give that law to you. And you must follow those instructions. You all promised me you would. Even if you disagree with them, each of the instructions is important, and you must follow all of them.

Now, you have to perform these duties fairly and impartially. Do not allow sympathy, prejudice, passion, bias or public opinion to influence you. You should not be influenced by any person's race, color, religion, national origin, or sex.

Nothing that I say now, or nothing I said during the

MR. KOVAC: Five or 10 minutes. All right. And then I also assume that if they ask to see a firearm, that there will be some Marshal who will be there, let them examine the firearm, have discussion, and then the firearm will be removed from the jury.

THE COURT: Yes.

MR. KOVAC: Then the only Exhibit that I object to them seeing is the photograph of the prison letters.

THE COURT: And since the Court allowed it into evidence, the Court will let them see it if they request it, over the objection of the defense. Anything else?

MR. KOVAC: Yes. I do renew my motion for mistrial on the basis of the prosecution's closing argument. I believe both in opening statement and the rebuttal statement they made reference to Mr. Griffin's character as evidence in support of a guilty finding. They can only make an argument that he's got a prior record, so don't believe what he said. But that wasn't the argument that was made in both sections. And so I move for mistrial on that basis.

THE COURT: Okay. Does the Government wish to respond?

MR. INGRAHAM: Judge, that was not the -- neither the closing argument, nor the rebuttal, was in any way intended to, or did in its -- if it's looked at in its essence -- was it an argument that the jury ought to convict Mr. Griffin based upon

the fact that he's been convicted before.

THE COURT: Well -- and the Court overruled the objections, because the context of the reference was in connection to -- at least the way the Court viewed it -- and that's the reason for the Court's decision overruling the objection and the motion, is that it was an example of Mr. Griffin's experience with the system. In other words, he should have known better type of argument. I think that's what the Government was trying to say there. That I think is not a basis for a mistrial. But the record is made, and if it comes to that, we'll let the Seventh Circuit decide.

MR. KOVAC: Or this Court will have another opportunity --

THE COURT: -- yes --

MR. KOVAC: --possibly. Hopefully not, you won't have that opportunity, but it's possible you may have the opportunity to reconsider that.

THE COURT: Right. Anything else?

MR. INGRAHAM: Judge would there be any problem to having the summary Exhibit, Exhibit 44, going back to the jury? Because if they do find -- if they reach a guilty verdict, then they need to unanimously decide which of these items were actually possessed. And I think that Exhibit -- that summary Exhibit would be helpful to them, because there are so many items on the unanimity form, that I think it would be helpful to

them to -- in discussing --

MR. KOVAC: If they think they need it, they can ask for it, and they can have it. But they should not be given as their only document a summary of the Government's evidence. I'll prepare a summary of the defense position that we could send back there. But if they need it, they will ask for it. If they don't need it, they won't ask for it.

THE COURT: Well, subject that Exhibit to the same rules that I said would subject the other Exhibits. So I won't send that back. Anything else?

MR. INGRAHAM: Nothing. Thank you.

MR. KOVAC: No, Your Honor.

THE COURT: All right. Well, we know where you can be located in case we have to locate you. And we will abide the jury's verdict.

MR. KOVAC: What is your plan as to the length of the jury deliberations?

THE COURT: Well, we usually go in around 5:00 when the heat kicks off and the doors are locked to ask them what they -- what their pleasure is. That is, are they anywhere near a verdict? Would they like to return to consider? Have more time to deliberate when they're fresh? And then we play off of that response. But I generally don't keep verdicts -- or juries here late.

MR. KOVAC: Do not?

THE COURT: I do not.

MR. KOVAC: If they say they want to return at a later date, what date would that be?

THE COURT: Well, I would have to get a -- I think we can get, and it's been used in the past, another Judge to take the verdict. Because I will be out of town until Sunday.

MR. KOVAC: But is tomorrow an option for jury deliberations?

THE COURT: All the Federal facilities are closed.

MR. KOVAC: That's why I'm asking.

THE COURT: So it's not.

MR. KOVAC: So if they don't reach a verdict here tonight, they'll be told to come back on Thursday.

THE COURT: Thursday morning.

MR. KOVAC: Okay. Thank you, Your Honor.

THE COURT: Okay.

(Whereupon a recess was called by the Court. Upon conclusion of the recess, the proceedings continued as follows:)

THE COURT: We have a verdict.

(Whereupon the jury was returned to the courtroom at 7:33 p.m.)

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict in this case?

THE JURY: Yes, Your Honor, we have.

THE COURT: Would you hand that verdict to the

Bailiff, please. The Court has been handed the verdict. The Court will read the verdict:

"We, the Jury, find the Defendant, Cory Griffin, guilty of the offense charged in Count 1 of the Second Superseding Indictment". Dated at Milwaukee, Wisconsin, this 10th day of November, 2009. Steven (Blank), printed name of foreperson. And Mr. (Blank), that's your signature on the verdict form?

MR. (BLANK): Yes, sir.

THE COURT: And then the unanimity special verdict form reads: "If you find the Defendant guilty of the offense of possession of a firearm or ammunition by a prohibited person as charged in Count 1, you must answer the following: Which of the following firearm or firearms do you find was or were possessed by the Defendant"? And everything is unchecked except the checkmark where it reads: "An American Gun Company shotgun bearing serial number 414419".

"Which of the following ammunition do you find was possessed by the Defendant"? And there are two checks: "9 rounds of .12 gauge Remington brand shotgun shells, and 15 rounds of .410 gauge Federal brand shotgun shells".

Dated at Milwaukee, Wisconsin, this 10th day of November, 2009. Again signed by Steven (Blank), foreperson of the jury.

The Court will enter Judgment on the verdict subject

to post-trial motions. The Court would inquire of the Government and the defense as to whether or not there's a desire to poll the jury. That is, ask the jurors individually as to whether this was and is now their verdict? Does the Government wish to do that?

MR. INGRAHAM: No, Your Honor.

MR. KOVAC: We certainly do, Your Honor.

THE COURT: All right. Madam Clerk, would you inquire of the jurors individually as to whether or not this was and is now their verdict, please.

THE CLERK: Members of the jury, please rise when I call your name.

(Whereupon the jury was so polled.)

THE COURT: Okay. The jury has been polled and the Court, as indicated, will enter Judgment on the verdicts according to the verdict form, and subject to post-trial motions.

Ladies and gentlemen of the jury, this has been a difficult case for you, not only time-wise -- I mean, here it is 25 to 8:00 and you're still here. One of the reasons was we didn't get you here until after Judge Clevert picked his jury, and so that delayed it a bit. But I know this required a great deal not only of patience, but also effort. And I watched you throughout the trial, and I know that you did put the effort that I asked you to put into this case. And I thank you for

that.

But your obligations and duties in this court are now at an end. And I want to thank you for all of what you've done, being able and willing to come down here and serve on jury duty, as I indicated at the start of the case, and now carry through with your jury service in the fashion that you have. But as I indicated, your obligations and duties in this court are at an end.

I indicated throughout the trial, at the beginning and throughout the trial, and just before you heard the final instructions, that you weren't to talk about this case. Now you can talk about this case all you want. If you want to. On the other hand, if you don't still want to talk about the case, you don't have to. And if someone bugs you about talking about the case, well, have them call me. My number is in the book. Okay? But you're free to do that if you want to. So thank you very much. Perhaps when you're called for jury duty again, you know, maybe you will wind up in this courtroom. I don't see too many smiling faces about that prospect. But thank you very much. You're excused and have a good rest of the week, okay?

(Whereupon the jury was excused at 7:39 p.m.)

THE COURT: As indicated, the Court will enter judgment on the verdict. It has, subject to post-trial motions. Relative to a sentencing date, is there going to be a waiver of the Rule 32 time frames so we can set this down at the

convenience of the parties?

MR. KOVAC: That's fine, but I would ask the Court at this moment to consider the fact when you look at what the verdict was, it appears that the gun that they convicted on was distinguished from the other guns only because it was possibly more visible in the jury's eyes. I think this was the gun behind the door. So it appears that the jurors did not, in fact, follow the law. And rather than possession, they were going on the awareness claim. And I would ask the Court to at this time not enter Judgment on the verdict, but rather enter Judgment notwithstanding the verdict.

THE COURT: All right. Well, I assume the Government obviously opposes that motion. But those can be raised in a more thorough manner if the defense wishes to do that, and also if there's a need to -- if this case does wind up on appeal, to ask for an extension on time to file an appeal. But the Court would on this type of issue, and this type of verdict, request that additional submissions be made so the Court can, in turn, have greater effort -- or can make a greater effort at considering that motion. I wasn't wrong? I assume the Government opposes the motion?

MR. INGRAHAM: Yes.

THE COURT: So let's -- we'll do this. We'll set it down for a sentencing date. There's been a waiver of the Rule 32 time frames, as the Court understands it. The Probation

PENGAD-Bayonne, N.J.

EXHIBIT

20

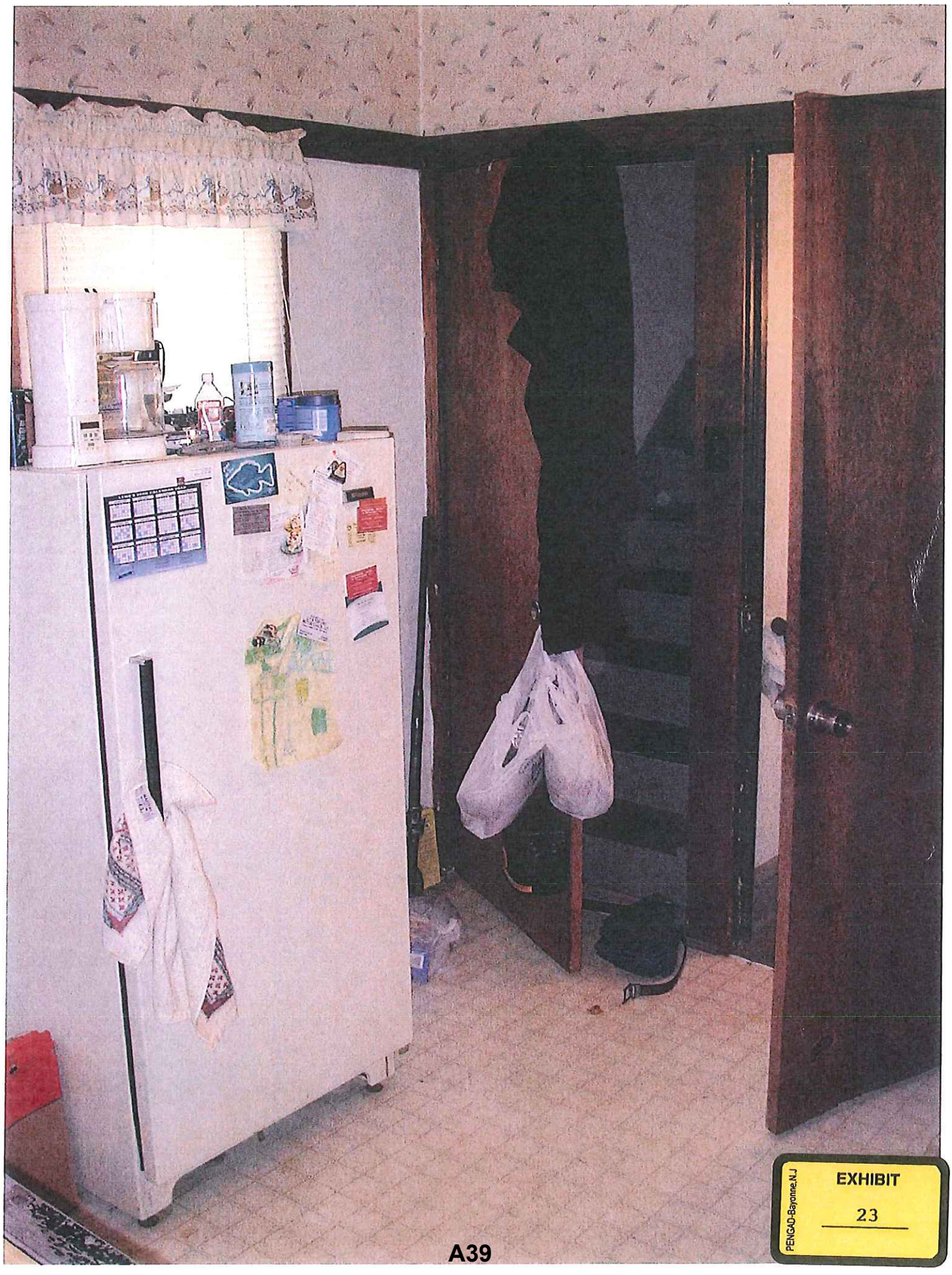

EXHIBIT
23
PENGAD-Bayonne,N.J

EXHIBIT

24

PENGAD-Bayonne,N.J

DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-10 (Rev. 12/2006)

RULES OF COMMUNITY SUPERVISION

WISCONSIN
Administrative Code
Chapter DOC 328 & 332
Federal Law
42 U.S.C. ss 290DD-3, 290ee-3
Federal Regulation
42 C.F.R. Part 2

OFFENDER NAME	DOC NUMBER
Cory Griffin	305771

Notice: If you are on parole and sentenced for crimes committed on or after June 1, 1984, or have chosen to have the new Good Time Law apply to your case and you violate these rules, the highest possible parole violator sentence will be the total sentence less time already served in prison or jail in connection with the offense.

As established by Administrative Rule DOC 328.11, you have an opportunity for administrative review of certain types of decision through the offender complaint process.

The following rules are in addition to any court-ordered conditions. Your probation, parole, or extended supervision may be revoked if you do not comply with any of your court-ordered conditions or if you violate any of the following rules.

1. You shall avoid all conduct which is in violation of federal or state statute, municipal or county ordinances, tribal law or which is not in the best interest of the public welfare or your rehabilitation. Some rules listed below are covered under this rule as conduct contrary to law and are listed for particular attention.
2. You shall report all arrests or police contact to your agent within 72 hours.
3. You shall make every effort to accept the opportunities and counseling offered by supervision.

   The confidentiality of drug, mental health, and alcohol treatment records is protected by Federal and/or state laws and regulations. Generally programs you are involved in may not say to a person outside the Department of Corrections that an offender is attending the program, or disclose any information identifying him/her as a drug/alcohol abuser unless: 1) You consent in writing; or 2) The disclosure is allowed by a court order; or 3) The disclosure is made to medical personnel in a medical emergency or to a qualified personnel for research, audit, or program evaluation; or 4) You commit or threaten to commit a crime either at the program or against any person who works for the program. Programs that contract with the Wisconsin Department of Corrections can release information to Wisconsin Department of Corrections staff.

   Violation of the Federal law and regulations by a program is a crime. These regulations do not protect any information about suspected child abuse or neglect from being reported under state law to appropriate authorities.

   Refusal to sign the consent for releasing information, including placement for treatment, shall be considered a refusal of the program.
4. You shall inform your agent of your whereabouts and activities as he/she directs.
5. You shall submit a written report monthly and any other such relevant information as directed by your agent.
6. You shall make yourself available for searches or tests ordered by your agent including but not limited to urinalysis, breathalyzer, DNA collection and blood samples or search of residence or any property under your control.
7. You shall not change residence or employment unless you get approval in advance from your agent, or in the case of emergency, notify your agent of the change within 72 hours.
8. You shall not leave the State of Wisconsin unless you get approval and a travel permit in advance from your agent.
9. You shall not purchase, trade, sell or operate a motor vehicle unless you get approval in advance from your agent.
10. You shall not borrow money or purchase on credit unless you get approval in advance from your agent.
11. You shall pay monthly supervision fees as directed by your agent in accordance with Wis. Stats. s.304.073 or s.304.074, DOC Administrative Rule Chapter 328.043 to 328.046 and shall comply with any department and/or vendor procedures regarding payment of fees.
12. You shall not purchase, possess, own or carry any firearm or any weapon unless you get approval in advance from your agent. Your agent may not grant permission to carry a firearm if you are prohibited from possessing a firearm under Wis. Stat. s. 941.29, Wisconsin Act 71, the Federal Gun Control Act (GCA), or any other state or federal law.
13. You shall not, as a convicted felon, and until you have successfully completed the terms and conditions of your sentence, vote in any federal, state or local election as outlined in Wisconsin Statutes s.6.03(1)(b).
14. You shall abide by all rules of any detention or correctional facility in which you may be confined.
15. You shall provide true and correct information verbally and in writing, in response to inquiries by the agent.
16. You shall report to your agent as directed for scheduled and unscheduled appointments.
17. You shall submit to the polygraph (lie detector) examination process as directed by your agent in accordance with Wisconsin Administrative Code 332.15.

I have reviewed and explained these rules to the offender.		I have received a copy of these rules.	
AGENT SIGNATURE	AREA NUMBER	OFFENDER SIGNATURE	DATE SIGNED
LaTasha Perry	33110	Cory Griffin	4/5/06

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DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-10 (Rev. 12/2008)

RULES OF COMMUNITY SUPERVISION

WISCONSIN
Administrative Code
Chapter DOC 328 & 332
Federal Law
42 U.S.C. ss 290DD-3, 290ee-3
Federal Regulation
42 C.F.R. Part 2

OFFENDER NAME	DOC NUMBER
Cory Griffin	305771

18. You shall pay fees for the polygraph (lie detector) examination process as directed by your agent in accordance with Wisconsin Administrative Code 332.17(5) and 332.18 and shall comply with any required Wisconsin Department of Corrections procedures regarding payment of fees.
19. You shall follow any specific rules that may be issued by an agent to achieve the goals and objectives of your supervision. The rules may be modified at any time, as appropriate. The specific rules imposed at this time are stated below. You shall place your initials at the end of each specific rule to show you have read the rule.
20. You shall not use or possess any controlled substance, unless legally prescribed by a physician. If you have you shall inform your agent immediately. You shall not consume alcohol. CG
21. You shall not have in your possession any drug paraphernalia, which includes but is not limited to: scales, pipes, syringes, gem packs, rolling papers, etc. CG
22. You shall not knowingly be in the company of persons possessing illegal substances or paraphernalia for use or sale of the same. CG
23. You shall not enter places where drugs are sold or used. You shall not loiter in any known drug area. CG
24. You shall not have in your possession (including in your residence or in a vehicle) any pagers, cell phones, or police scanners, without agent's approval. CG
25. You shall not have in your possession at any time more than $100.00 in cash without agent's approval. CG
26. You shall have no contact with any known gang members, their associates, or gang activity. Nor shall you be in the residence where a known gang member resides or is staying. CG
27. You shall not display any gang representation, including but not limited to gang hand signs, articles of clothing, hats, jewelry, or items which depict criminal activity. CG
28. You shall be prepared to submit a urine sample at each contact with your agent or remain on the premises until you do so. You shall not tamper or falsify any urine sample. Refusal to submit a urine sample will be considered a positive result. CG
29. You shall conduct all business transactions using your legal name. You shall voluntarily disclose your probation/parole status to any law enforcement agencies you may have contact with CG
30. You shall report to any programming, including but not limited to: drug/alcohol, anger management, domestic violence, parenting, or any other treatment deemed necessary by your agent. You shall comply with the conditions of treatment programs and fully advise your agent of your progress and discharge. You shall not terminate any program without your agent's approval. CG
31. You shall seek and maintain full time employment, verified by a payroll check stub. CG
32. You shall pay all court ordered obligations to be satisfied 90 days prior to your discharge date. CG
33. You shall report to your agent within 24 hours of release from any correctional facility. If released on a weekend or a holiday, you shall report the following Monday or the next business day. CG
34. You shall not operate a motor vehicle without a valid driver's license. CG
35. You shall have no contact with any victim(s) or co-defendant(s) of your current or past offense(s), without agent's approval. No contact includes but is not limited to, in person, through mail, by phone, or through a third party. CG
36. You shall cooperate with all Probation/Parole Agents, law enforcement officers, and all DOC staff/programs. CG
37. You shall not engage in any forms of abuse to include verbal threats and acts of physical violence, nor shall you engage in any controlling or aggressive behaviors. This includes but is not limited to: intimidation, psychological, emotional, sexual, or economic abuse. CG

LaTasha Perry

I have reviewed and explained these rules to the offender.		I have received a copy of these rules.	
AGENT SIGNATURE	AREA NUMBER	OFFENDER SIGNATURE	DATE SIGNED
Cory Griffin	3210	Cory Griffin	4/8/08

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LOCATION OF FIREARMS AND AMMUNITION

Firearms

Smith and Wesson, .38 caliber revolver, bearing serial number S853391

Location: Master bedroom behind headboard

photograph: exhibit 3

Sturm Ruger, model Vaquero, .44 caliber revolver, bearing serial number 55-44341

Location: Master bedroom behind headboard

photograph: exhibit 8

Remington, model 1100, 12 gauge shotgun, bearing serial number M066580V

Location: Master bedroom closet

photograph: exhibit 12

Westernfield, model M1 50D, .410 gauge shotgun, bearing serial number 302955

Location: Master bedroom closet

photograph: exhibit 12

Sears Roebuck & Co., model 41, .22 caliber rifle, bearing no visible serial number

Location: Master bedroom closet

photograph: exhibit 12

American Gun Co. shotgun, bearing serial number 414419

Location: Kitchen behind the door to the staircase to the second floor

photograph: exhibit 24

Savage Arms, model 94 Series M, .410 gauge shotgun, bearing serial number P548164

Location: Kitchen next to refrigerator

photograph: exhibit 27

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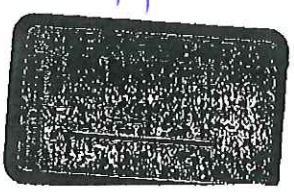


New Haven, model 600AT, 12 gauge shotgun, bearing serial number H645061

Location: Kitchen next to refrigerator

photograph: exhibit 27

Mossberg, model 5500MK II, 12 gauge shotgun, bearing serial number 049646

Location: Kitchen next to refrigerator

photograph: exhibit 27

Browning, model B-80, 20 gauge shotgun, bearing serial number 431PX01777

Location: Kitchen next to refrigerator

photograph: exhibit 27

Ammunition

30 rounds of .22 caliber Federal brand ammunition

Location: Master bedroom nightstand

photograph: exhibit 17

9 rounds of 12 gauge Remington brand shotgun shells

Location: bottom of staircase to the second floor

photograph: exhibit 20

15 rounds of .410 gauge Federal brand shotgun shells

Location: bottom of the staircase to the second floor

photograph: exhibit 20

27 rounds of 20 gauge Federal brand shotgun shells

Location: basement on top of pool table

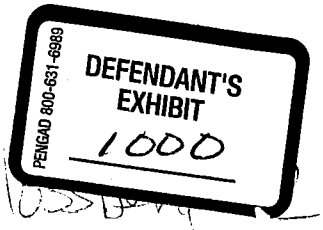
photograph: exhibit 32

10 rounds of 20 gauge Remington brand shotgun shells

Location: basement on top of television

photograph: exhibit 34

From police officer - Tim



10/25/04

K. Mart — Mossberg 12 gauge H645

cousin — Unknown 22 Rifle Bolt act.

mississippi — Savage Single Shot shotgun 41

7 mile fair — Browning B80 20 gauge —

Friend — Mossberg 12 gauge — oc

cousin — Smith & Wesson 38 revolve

7 mile fair — 1 Pellet Gun Rifle 27

New Guns Taken

Dennis Mc — 12 Gage Remington
Mandel Kelly — 410 Bolt Action shot
George Harris — 44 Mag. Revolver

RULE 10(e) INDEX TO THE TRANSCRIPT OF THE PROCEEDINGS

[1] The following references to the sequentially paginated trial transcript include the volume number, where Vol. 1 corresponds to the proceedings on November 9, 2009 and Vol. 2 on November 10, 2009.

[2] The following Exhibit descriptions are from the Master Exhibit List of the United States District Court of Eastern District of Wisconsin