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Hands off the Gun - A Critique of United States v. Jameson and Constructive Possession Law in the Tenth Circuit

Benjamin C. McMurray

HANDS OFF THE GUN!
A CRITIQUE OF *UNITED STATES V. JAMESON* AND CONSTRUCTIVE POSSESSION LAW IN THE TENTH CIRCUIT

BENJAMIN C. MCMURRAY†

INTRODUCTION

When Ben Cecala went to his brother's funeral, he did not have a gun.[1] After the funeral, he asked a friend to take him to the cemetery, but just minutes after the group left the funeral, United States Marshals stopped the car and found a gun right where Ben's feet would have been.[2] Because he was a convicted felon, Ben could not legally have a gun, and he was arrested and charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[3]

The decision about how to defend the case was undoubtedly agonizing.[4] The penalty for illegally possessing a firearm was up to ten years in prison.[5] However, witnesses from the funeral said that Ben could not have had a gun on him during that time.[6] The only evidence to link him to the gun was the fact that it was at his feet when the car was stopped

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† Attorney, Utah Federal Defender Office, and Special Counsel, United States Sentencing Commission; Law Clerk to the Honorable Timothy M. Tymkovich, Tenth Circuit Court of Appeals, 2005-2006; Law Clerk to the Honorable Paul G. Cassell, United States District Court for the District of Utah, 2003-2004; J.D., J. Reuben Clark Law School at Brigham Young University, 2003. This work was undertaken while the author was Special Counsel at the United States Sentencing Commission. The views expressed in this article are those of the author and do not necessarily reflect any policies or positions of the United States Sentencing Commission. I appreciate the thoughtful feedback I received from Jeff Hurd, Erik Luna, Stew Young, Karyn Kenny, and Kent Hart and the constant support and encouragement of my wife, Suzette.

1. Defendant's Sentencing Memorandum at 2, United States v. Cecala, No. 2:06-CR-00733 (D. Utah Mar. 16, 2007). Cecala was ably represented by Kristen Angelos of the Utah Federal Defender Office, where I am currently employed as an attorney. I did not participate in Cecala's case and was not privy to any confidential information. The discussion of this case is based only on pleadings that are a matter of public record.

2. Government's Sentencing Memorandum at 2, United States v. Cecala, No. 2:06-CR-00733 (D. Utah Mar. 23, 2007).

3. Statement by Defendant in Advance of Plea of Guilty at 1, United States v. Cecala, No. 2:06-CR-00733 (D. Utah Jan. 18, 2007).

4. Given the factual complexities and nuances of constructive possession cases, one scholar suggests that attorneys should use a mathematical theorem to predict whether a particular defendant should plead guilty or go to trial based on the probability of prevailing at trial on a constructive possession case. David Caudill, *Probability Theory and Constructive Possession of Narcotics: On Finding that Winning Combination*, 17 HOUS. L. REV. 541, 543 (1980) (arguing that Baye's Theory provides a method for calculating a defendant's chances of winning a constructive possession case). Under the Tenth Circuit's case law, Cecala's chances of winning would be close to zero.

5. 18 U.S.C.A. § 924(a)(2) (2008).

6. Defendant's Sentencing Memorandum, *supra* note 1, at Exhibit 1 (investigator notes of Amy Borgholthaus interview).

and the arresting officer's testimony that Ben made "furtive movements," his head "bobbing up and down," and looked like he was "playing with something in his hands."[7] According to the officer, he "looked like he may have placed something on the floor of the car."[8] A fingerprint examination of the gun turned up a usable print, but this print did not match up with anyone in the fingerprint database.[9] This fact meant the fingerprint could not have been Ben's—as a convicted felon, his prints were in the system and would have shown up as a match.[10] No witness could put the gun in his hand at any point in the past or suggest that Ben ever intended to pick it up at any point in the future.

Still, Ben decided to plead guilty. His plea agreement stated coldly:

> On September 22, 2006, in Tooele, Utah, the car in which I was a passenger was stopped. Officers conducted a search and found a handgun—a Lorcin .380 pistol—and a loaded clip of ammunition on the floor of the car, where my feet had been. I knowingly possessed the firearm because I knew it was on the floor near my feet and I had access to it. Thus, according to the law, I constructively possessed it.[11]

Based on this admission, Ben was sentenced to four years in prison.[12]

Crimes such as § 922(g), of course, aim to keep weapons out of the hands of people who are likely to use them to do harm.[13] In some cases, prosecutors seek to punish individuals for possessing contraband not actually within their immediate, physical control but within the broader sphere over which they assert "dominion and control."[14] Known as "constructive" or "legal" possession, this judicially created doctrine has long been a useful tool for prosecutors to prosecute "cases where actual

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7. Government's Sentencing Memorandum, *supra* note 2, at 2.
8. *Id.*
9. *Id.* at 3.
10. *Id.*
11. Statement by Defendant in Advance of Plea of Guilty, *supra* note 3, at 4.
12. The actual sentence was for 46 months. Judgment in a Criminal Case, United States v. Cecala, No. 2:06-CR-00733 (D. Utah Mar. 26, 2007).
13. Lewis v. United States, 445 U.S. 55, 66 (1980) ("The legislative history of the gun control laws discloses Congress' worry about the easy availability of firearms, especially to those persons who pose a threat to community peace. And Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record.") (citing 114 CONG. REC. 13220 (1968) (remarks of Sen. Tydings)); *id.* at 16298 (remarks of Rep. Pollock); United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998) (quoting *Lewis*, 445 U.S. at 66) (stating that Congress enacted § 922(g)(1) "in order to keep firearms out of the hands of those persons whose prior conduct indicated a heightened proclivity or using firearms to threaten community peace and the 'continued operation of the Government of the United States'").
14. The terms "dominion and control" have been subject to some criticism because they are "simply not informative in any functional manner." Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 759 (1972). However, "every jurisdiction that uses constructive possession defines it in [these] terms." *Id.* at 759 n.26; *see also* SEVENTH CIRCUIT FEDERAL JURY INSTRUCTIONS: CRIMINAL 323 (1999), *available at* http://www.ca7.uscourts.gov/pjury.pdf (substituting the word "direction" for the word "dominion").

possession at the time of arrest can not be shown, but where the inference that there has been possession at one time is exceedingly strong."[15]

But what about cases like Ben's, where the defendant never has and never will lay a hand on the gun? In recent years the Tenth Circuit has expanded the doctrine of constructive possession such that any time a person "has knowledge of and access to" some contraband, he is guilty of possessing that item.[16] This past term, in *United States v. Jameson*,[17] the court reaffirmed its expanded view of the doctrine and held that the government properly established a link between a car passenger and a gun at his feet where the passenger made "furtive movements" and where the gun would have been in plain view but for the fact that the passenger's feet were there.[18]

In expanding the doctrine of constructive possession as it has done, the Tenth Circuit is unique among all other circuits. Ten other circuits have defined constructive possession so as to require proof that the defendant had not only the knowledge of and power to possess the gun (i.e., access to it), but also the *intention* to do so.[19] It is time for the Tenth Circuit to recognize that its common law definition of constructive possession has unfairly broadened the scope of criminal liability and to rectify that injustice by requiring evidence of intention to exercise dominion and control in constructive possession cases.

Part I begins with *Jameson* and studies the expansion of this doctrine in the Tenth Circuit. Part II discusses two major flaws with this development that make the doctrine overbroad and inconsistent with every other circuit. Part III discusses a number of policy considerations

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15. Whitebread, *supra* note 14, at 755 (quotation marks and citation omitted); *see* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 938 (2001) ("[T]he courts invented the concept of constructive possession.").

16. United States v. Jameson, 478 F.3d 1204, 1209 (10th Cir. 2007); *see also* United States v. Ledford, 443 F.3d 702, 713 (10th Cir. 2006); United States v. Colonna, 360 F.3d 1169, 1178 (10th Cir. 2004). For the proposition that the doctrine of constructive possession is a judicially created doctrine, see Whitebread, *supra* note 14, at 751 ("Attempting to rationalize the imposition of criminal liability in situations where there is no actual possession, the courts have constructed a terminology purportedly designed to focus factual inquiries on factors likely to reveal whether the defendant had the ability or capacity to possess the item."); *see also* Mark Rabinowitz, *Criminal Law Constructive Possession: Must the Commonwealth Still Prove Intent?*—Commonwealth v. Mudrick, 60 TEMP. L.Q. 445, 449 (1986) (stating that the doctrine of constructive possession was judicially created).

17. 478 F.3d 1204. Christopher Jameson was ably represented at trial by Lynn Donaldson and on appeal by Kent Hart, both of the Utah Federal Defender Office. I did not participate in representation in either forum and was not privy to any confidential information. The discussion of his case here is based only on the published Tenth Circuit opinion.

18. *Id.* at 1210.

19. *See, e.g.*, United States v. Bustamante, 493 F.3d 879, 889 (7th Cir. 2007); United States v. Gardner, 488 F.3d 700, 713 (6th Cir. 2007); United States v. Introcaso, 506 F.3d 260, 270 (3d Cir. 2007); United States v. Jones, 484 F.3d 783, 788 (5th Cir. 2007); United States v. McFarlane, 491 F.3d 53, 59 (1st Cir. 2007); United States v. Piwowar, 492 F.3d 953, 955 (8th Cir. 2007); United States v. Greer, 440 F.3d 1267, 1271 (11th Cir. 2006); United States v. Paulino, 445 F.3d 211, 222 (2d Cir. 2006); United States v. Ruiz, 462 F.3d 1082, 1089-90 (9th Cir. 2006); United States v. Scott, 424 F.3d 431, 435-36 (4th Cir. 2005).

why the court should limit, rather than expand, this doctrine. Part IV offers specific recommendations that would apply this doctrine more fairly.

I. TENTH CIRCUIT EXPANSION OF THE DOCTRINE OF CONSTRUCTIVE POSSESSION

A. Background of United States v. Jameson

Like *Cecala*, *United States v. Jameson*[20] involved a gun found at the feet of a felon hitching a ride in someone else's car.[21] *Jameson* began with an early morning traffic stop for a taillight that was not working.[22] When he pulled the car over, the officer who initiated the stop saw four occupants in the car.[23] A male occupant in the front passenger seat leaned forward and appeared to rummage through the glove compartment.[24] Another male in the back seat on the passenger side "dropp[ed] his shoulder and lean[ed] forward, as if he were retrieving or concealing something on the floor."[25]

Based on these movements, the officer was concerned that the passengers were hiding drugs or that they could be armed. The officer shined his flashlight into the car but saw only food and other debris on the floor.[26] He then asked the female driving the car for her driver's license, registration, and insurance card.[27] Because her license was suspended, the officer said he would impound the car unless one of the other passengers could legally drive.[28] None of them were licensed, and when asked their names, it turned out that two of the passengers had outstanding warrants for their arrest.[29]

The third passenger was Defendant Christopher Jameson. He was the one in the back seat whom the officer had seen drop his shoulder and lean forward.[30] He initially told officers his name was Adam Gibbons and provided a false birth date.[31] When information from police dispatch refuted this claim, Jameson told officers his name was Christopher Gibbons, but this was also refuted, and Jameson was placed under arrest.[32]

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20. 478 F.3d 1204.
21. *Id.* at 1207.
22. *Id.* at 1206.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 1206-07.
27. *Id.* at 1207.
28. *Id.*
29. *Id.*
30. *Id.* at 1206.
31. *Id.* at 1207.
32. *Id.*

An officer then inventoried the car's contents and discovered a World War II-era bayonet sitting on the back seat.[33] When the officer reached into the car to get the bayonet, "he noticed a small, unloaded .22 caliber pistol . . . on the floor in front of where Mr. Jameson had been sitting. . . . exactly where Mr. Jameson's feet would have been before he exited the car."[34] No fingerprints were found on the gun. Based on these facts, Jameson, who had previously been convicted of a felony, was charged with illegally possessing the pistol in violation of 18 U.S.C. § 922(g)(1).[35] At trial, Jameson requested the following jury instruction:

> The law recognizes two types of possession: actual possession and constructive possession. A person who knowingly has direct physical control over an object or thing, at a given time, is then in actual possession of it.
>
> A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over an object, either directly or through another person or persons, is then in constructive possession of it.
>
> More than one person can be in possession of an object if each knows of its presence and has the power and intention to control it.
>
> A defendant has joint possession of an object when two or more persons share actual or constructive possession of it. However, merely being present with others who have possession of the object does not constitute possession.
>
> In the situation where the object is found in a place (such as a room or car) occupied by more than one person, you may not infer control over the object based solely on joint occupancy. Mere control over the place in which the object is found is not sufficient to establish constructive possession. Instead, in this situation, the government must provide some connection between the particular defendant and the object.
>
> In addition, momentary or transitory control of an object, without criminal intent, is not possession. You should not find that the defendant possessed the object if he possessed it only momentarily, and either did not know that he possessed it or lacked criminal intent to possess it.[36]

While the court adopted much of this language, it replaced the second-to-last paragraph with this paragraph, which eliminated the nexus requirement:

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33. *Id.*
34. *Id.*
35. *Id.* at 1206.
36. Defendant's Proposed Jury Instructions at 2-3, United States v. Jameson, No. 2:04-CR-693-TS (D. Utah June 24, 2005).

> Where a defendant jointly occupies the place where the object is found (such as a room or a car) constructive possession may be shown by direct evidence or by circumstantial evidence, which establishes beyond a reasonable doubt that the defendant had knowledge that the firearm was contained in the place and the defendant had the ability to access the firearm.[37]

Based on the evidence described above and this jury instruction, the jury voted to convict.[38]

Jameson appealed, raising two claims related to constructive possession.[39] First, he argued that the evidence was insufficient to connect him to the gun found on the floor of a car occupied by three other occupants.[40] Second, he claimed that the jury instruction misled the jury because it failed to require proof of any connection between him and the gun in joint possession cases.[41]

B. General Principles

To understand the development of the doctrine in the Tenth Circuit, it is necessary to understand how the doctrine of constructive possession fits within the broader framework of federal criminal law.[42] Federal statutes forbid certain types of people from possessing firearms.[43] These statutes do not define possession, so courts over the years have had to define this term.[44] The most obvious concept of possession is "actual possession," which "exists when a person has direct physical control

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37. *Jameson*, 478 F.3d at 1208; Jury Instructions at 23, United States v. Jameson, No. 2:04-CR-693-TS (D. Utah June 29, 2005).

38. *Jameson*, 478 F.3d at 1206.

39. Jameson also raised a third claim related to a mistrial motion that is not within the scope of this article.

40. *Jameson*, 478 F.3d at 1206.

41. *Id.*

42. For a good overview of case law relating to constructive possession, see generally Kimberly J. Winbush, Annotation, *What Constitutes "Constructive Possession" of Unregistered or Otherwise Prohibited Weapon Under State Law*, 88 A.L.R. 5th 121 (2001); Martin J. McMahon, Annotation, *Drug Abuse: What Constitutes Illegal Constructive Possession Under 21 U.S.C.A. § 841(a)(1), Prohibiting Possession of a Controlled Substance with Intent to Manufacture, Distribute, or Dispense the Same*, 87 A.L.R. FED. 309 (1988).

43. 18 U.S.C.A. § 922(g)(1) (convicted felons), (2) (fugitive from justice), (3) (illicit drug user), (4) (mentally defective), (5) (illegally present alien), (6) (dishonorably discharged veteran), (7) (person who has renounced U.S. citizenship), (8) (person subject to a protective order), (9) (person convicted of a misdemeanor crime of domestic violence), (10) (juvenile) (2008). Other statutes prohibit anyone from possessing certain types of weapons. *See, e.g.*, 26 U.S.C.A. § 5861(b) (an illegally transferred firearm), (c) (an illegally made firearm), (d) (an unregistered firearm), (h) (a firearm with an obliterated serial number), (k) (an illegally imported firearm) (2008).

44. Whitebread, *supra* note 14, at 761 ("Constructive possession is a legal fiction *used by courts* to find possession in situations where it does not in fact exist, but where they nevertheless want an individual to acquire the legal status of a possessor" (emphasis added)). In contrast to the federal definition, some state statutes explicitly define possession to clarify or expand what is essentially the common law doctrine of constructive possession. *Id.* at 759 n.26 (listing jurisdictions that apply a constructive possession doctrine via a statutory provision).

over a firearm at a given time."[45] This happens when the defendant is caught "redhanded," with the object in his hands or on his person.

Of course, a person's possessions are not always physically on his person, and frequently, the government will want to charge someone with possessing something the defendant did not actually possess at the time alleged in the indictment. [46] The legal theory for bringing such prosecutions is "constructive possession." Constructive possession is "possession in law, but not in fact."[47] It is "the gray zone between actual physical possession and proximity to [an object]."[48] Most circuits define constructive possession as having the power *and intention* to exercise control or dominion.[49]

Within the Tenth Circuit, the precise definition for this concept varies slightly from case to case. Some definitions have required proof that the defendant intended to possess the item.[50] Other cases have required the government to prove the defendant "knowingly *has* ownership, dominion or control" over the object.[51] The definition relied on in the most recent cases requires the government to prove the defendant "knowingly has the *power* to exercise dominion or control."[52] Thus, in *Jameson*, the court defined constructive possession as "when a person 'knowingly holds the power and ability to exercise dominion and control over [an object].'"[53] A common example of constructive possession is an item belonging to an individual but left in his house or car. "[O]ne can possess an object while it is hidden at home in a bureau drawer, or while held by an agent, or even while it is secured in a safe deposit box at the bank and can be retrieved only when a bank official opens the vault."[54]

45. *Jameson*, 478 F.3d at 1209.

46. Courts have sometimes treated objects found somewhere other than on the defendant's person as actual possession cases, such as when the only link between a defendant and a gun found not on his person was testimony that a witness saw the defendant put the gun there. *See, e.g.*, United States v. Jones, 484 F.3d 783, 787-88 (5th Cir. 2007); United States v. Linares, 367 F.3d 941, 946-47 (D.C. Cir. 2004). In these cases, the location where the gun was found suggests nothing about the defendant's relationship to the gun, so the jury must either accept the witness's testimony and find the defendant actually possessed the gun or reject the witness's testimony and find the defendant never had possession.

47. United States v. Zink, 612 F.2d 511, 516 (10th Cir. 1980).

48. Caudill, *supra* note 4, at 546.

49. *See, e.g.*, United States v. Bustamante, 493 F.3d 879, 889 (7th Cir. 2007); United States v. Gardner, 488 F.3d 700, 713 (6th Cir. 2007); United States v. Introcaso, 506 F.3d 260, 270 (3d Cir. 2007); United States v. Jones, 484 F.3d 783, 788 (5th Cir. 2007); United States v. McFarlane, 491 F.3d 53, 59 (1st Cir. 2007); United States v. Piwowar, 492 F.3d 953, 955 (8th Cir. 2007); United States v. Greer, 440 F.3d 1267, 1271 (11th Cir. 2006); United States v. Paulino, 445 F.3d 211, 222 (2d Cir. 2006); United States v. Ruiz, 462 F.3d 1082, 1089-90 (9th Cir. 2006); United States v. Scott, 424 F.3d 431, 435-36 (4th Cir. 2005).

50. *See e.g.*, United States v. Lopez, 372 F.3d 1207, 1212-13 (10th Cir. 2004); United States v. McCoy, 781 F.2d 168, 170 (10th Cir. 1985); *Zink*, 612 F.2d at 516.

51. *See, e.g.*, United States v. Avery, 295 F.3d 1158, 1177 (10th Cir. 2002); United States v. McKissick, 204 F.3d 1282, 1298 (10th Cir. 2000).

52. United States v. Hien Van Tieu, 279 F.3d 917, 922 (10th Cir. 2002); *see also* United States v. Culpepper, 834 F.2d 879, 881 (10th Cir. 1987).

53. *Jameson*, 478 F.3d 1204, 1209 (10th Cir. 2007) (quoting *Lopez*, 372 F.3d at 1211).

54. United States v. Zavala-Maldonado, 23 F.3d 4, 7 (1st Cir. 1994).

Not surprisingly, this doctrine is useful "where actual possession at the time of arrest can not be shown, but where the inference that there has been possession at one time is exceedingly strong."[55] "The problem is not so much with the idea as with deciding how far it should be carried."[56]

In cases of sole occupancy, constructive possession can be inferred from the fact that the object was found in a place where the defendant had exclusive control. For example, a person living alone has constructive possession of everything in his apartment, even when he is at work: "When a defendant has exclusive possession of the premises on which a firearm is found, knowledge, dominion, and control can be properly inferred because of the exclusive possession alone."[57] "This inference has been deemed reasonable because one in exclusive control or possession of an area is presumed to have knowledge of its contents, the ability to control its contents, and the intent to exercise that control."[58]

The matter is trickier when the defendant has joint control over the area where the object is found. "[I]n joint occupancy cases, knowledge, dominion, and control may not be inferred simply by the defendant's proximity to a firearm."[59] That is, the fact that a gun is found in a room or car where the defendant is present should not establish constructive possession if others had access to that area. Or, where the defendant was not present, the fact that a gun was found in an area where he shared access, such as a closet or dresser, does not establish constructive possession. "[W]hen 'two or more people occupy a given space . . . the government is required to meet a higher burden in proving constructive possession.'"[60] Specifically, in the Tenth Circuit "the government must 'present some evidence to show some connection or nexus between the defendant and the firearm.'"[61] The issue for the jury, then, would be whether one of several occupants in a car had a connection with a gun found there, or whether an absent spouse had some connection with a gun found in a shared closet.

The most recent discussion of the nexus requirement is *Jameson*, which described the precedent defining this requirement as "cryptic."[62]

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55. Whitebread, *supra* note 14, at 755 (quotation marks and citation omitted).
56. *Zavala-Maldonado*, 23 F.3d at 7.
57. *Jameson*, 478 F.3d at 1209.
58. Rabinowitz, *supra* note 16, at 455.
59. *Jameson*, 478 F.3d at 1209.
60. *Id.* (quoting United States v. Michel, 446 F.3d 1122, 1128 (10th Cir. 2006)).
61. *Id.*
62. *Id.* The Tenth Circuit has discussed constructive possession in a couple of cases since *Jameson*, but neither bears on this discussion. In *United States v. Ramirez*, 479 F.3d 1229, 1257 (10th Cir. 2007), the Tenth Circuit upheld a drug possession conviction based on constructive possession. However, the contours of the nexus requirement was not at issue despite the fact that defendant had no connection to the apartment where the drugs were found. The court stated that "the legally determinative relationship is not the one connecting [the defendant] to the apartment, but the relationship linking [him] to the seized methamphetamine." *Id.* at 1250. The conviction was af-

However, *Jameson* made some points abundantly clear. First, "where the defendant in a joint occupancy situation has knowledge of and access to the weapons, there is a sufficient nexus to infer dominion and control."[63] Second, in contrast to almost every other circuit,[64] "intent to possess is not required by § 922(g). 'It is not necessary to show that the defendant intended to exercise . . . dominion or control.'"[65] These two principles eliminate the well-settled principle that proximity alone will not support a constructive possession theory[66] by essentially allowing a conviction to stand based on proximity alone.

C. *Development of the Doctrine*

A review of the development of this doctrine in the Tenth Circuit may help us understand how the court arrived at its holding in *Jameson*.

1. *Lucero v. United States*

It appears the Tenth Circuit's first opportunity to discuss constructive possession was in 1962 in *Lucero v. United States*.[67] In *Lucero*, two defendants were prosecuted for two instances of selling heroin to an undercover officer.[68] In the first instance, Defendant Lucero and Defendant Maestas sat with an undercover officer in the booth of a tavern. The officer testified that he negotiated the price with Maestas, but when he went to pay Maestas, Maestas responded, "No, not here."[69] Lucero interjected that the officer should pay Maestas, and then they would go somewhere else for the delivery. The officer said he would not pay until he got the drugs, so the trio left, and at some point Lucero, not Maestas, gave the drugs to the officer.[70]

In the second instance, the officer saw Maestas sitting in a car outside a lounge where he was to meet Lucero for another buy.[71] The officer approached Maestas, who told him Lucero was inside. The officer found Lucero and bought more heroin from him, and as the officer was

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firmed based on evidence showing that the defendant directed the movement of the drugs. *Id.* In *United States v. Mendez*, No. 06-3282, 2008 WL 192861 (D. Kan. Jan. 24, 2008), the defendant did not raise a legal challenge to a firearm conviction, arguing only that the evidence was insufficient. The court easily affirmed where the gun was found under a mattress next to the defendant's drug ledger.

63. *Jameson*, 478 F.3d at 1209 (quoting United States v. Colonna, 360 F.3d 1169, 1179 (10th Cir. 2004)).

64. *See infra* note 173 and accompanying text.

65. *Jameson*, 478 F.3d at 1211 n.2 (quoting *Colonna*, 360 F.3d at 1179).

66. *See Jameson*, 478 F.3d at 1211 (recognizing that the instruction in the case "invites the argument that proximity might be used as the only circumstantial evidence proving knowledge and access" (constructive possession)).

67. 311 F.2d 457 (10th Cir. 1962). Although the Tenth Circuit does not appear to have previously discussed constructive possession of contraband, its use in the criminal context apparently extends as far back as the late 1800s. Whitebread, *supra* note 14, at 754.

68. *Lucero*, 311 F.2d at 458.

69. *Id.*

70. *Id.* at 458-59.

71. *Id.* at 459.

walking away, he saw Lucero get in Maestas's car and drive away.[72] Both were charged with two counts of violating 21 U.S.C. § 174,[73] and Maestas challenged the sufficiency of the evidence against him.[74]

Although the court did not articulate its own definition of constructive possession, it noted a Second Circuit definition: "a person who is sufficiently associated with the persons having physical custody so that he is able, without difficulty, to cause the drug to be produced for a customer can also be found by a jury to have dominion and control over the drug, and therefore possession."[75] Thus, on the first count, the court affirmed because Maestas "was the moving party, . . . he vouched for the quality of the heroin, and . . . he set the price."[76] This evidence, the court stated, "shows more than mere participation in a narcotics transaction."[77] Thus, Maestas "may not escape the consequences of his conduct by avoiding actual contact with the contraband drug."[78]

In contrast, the evidence was insufficient to convict Maestas on the second count. "In this episode Maestas made none of the arrangements, was not the moving party, and did nothing from which constructive possession may be inferred."[79] Judge Seth issued a dissenting opinion, which disagreed on factual rather than legal grounds. He argued that "[t]he meaning of the word 'possession' . . . requires a much stronger showing of dominion and control by Maestas than was made in this case."[80] He agreed that Maestas should be convicted "if the evidence shows that [he] was able to control the drug or cause it to be produced," but he disagreed that the government had established "that Maestas had such dominion or control over the drugs that he could cause them to be produced through or by Lucero or anyone else."[81]

This early opinion is significant because it makes clear that Maestas's mere presence was not enough to establish constructive possession. Even "participation" in the transaction would not have been enough to establish constructive possession. The majority sustained the first count because it was satisfied (unlike Judge Seth) that the level of participation in the case established that Maestas had the ability to exercise control

72. *Id.*
73. *Id.* at 458; *see also* 21 U.S.C. § 174 (repealed 1970) (section set penalties for bringing narcotic drugs into the United States, conspiring to commit unlawful acts respecting such narcotic drugs, and made unexplained possession of narcotic drugs (constructive possession) sufficient evidence for conviction).
74. *Lucero*, 311 F.2d at 458.
75. *Id.* at 459 n.7 (quoting United States v. Hernandez, 290 F.2d 86, 90 (2d Cir. 1961)).
76. *Id.* at 459.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 460 (Seth, J., dissenting).
81. *Id.* at 460-61 (Seth, J., dissenting).

over the drugs. In contrast, because there was no such evidence on the second count, that count was reversed.

2. *Amaya v. United States*

The first case to define constructive possession for the Tenth Circuit was *Amaya v. United States*.[82] *Amaya* involved a controlled drug buy in which the defendant delivered drugs to a confidential informant on multiple occasions.[83] Regarding one transaction, the defendant acknowledged that he was paid to deliver the package of drugs, but he argued that he did not know the package contained drugs.[84] In the other transaction, he acknowledged having contact with the informant, but he claimed he gave the informant only a piece of paper and denied having given him drugs.[85]

On appeal, the defendant challenged the district court's instructions regarding possession. The district court instructed the jury that

> actual possession meant that the defendant knowingly had manual, personal or physical possession; that constructive possession meant that although the narcotic may be in the physical possession of another, the defendant knowingly had the power of exercising control over it; that possession was not limited to manual touch or personal custody; that it was sufficient to constitute possession under the statute if the defendant had knowledge of the presence of the narcotic and control over it; and that "power to produce or dispose of the narcotic was evidence of such control."[86]

The district court also told the jury "that mere presence in the vicinity of the narcotic or for that matter mere knowledge of its physical location did not constitute possession."[87] On appeal, the Tenth Circuit held that these instructions "correctly stated the law."[88]

Amaya is important because it would be cited by a number of cases that have contributed to the Tenth Circuit's current definition of constructive possession as "knowingly hold[ing] the power and ability to exercise dominion and control over [the object]."[89] However, the fact that *Amaya*'s standard did not include an intent requirement should not count for too much because the question of intent or any nexus was not

82. 373 F.2d 197 (10th Cir. 1967).
83. *Id.* at 198.
84. *Id.*
85. *Id.*
86. *Id.* at 199.
87. *Id.*
88. *Id.* (citing United States v. Jones, 308 F.2d 26 (2d Cir. 1962); United States v. Landry, 257 F.2d 425 (7th Cir. 1958)).
89. United States v. Culpepper, 834 F.2d 879, 881 (10th Cir. 1987) (citing *Amaya*, 373 F.2d at 199); *see also* United States v. Lopez, 372 F.3d 1207, 1211-12 (10th Cir. 2004) (quoting *Culpepper* and citing *Amaya* for this proposition); United States v. Zink, 612 F.2d 511, 516 (10th Cir. 1980) (citing *Amaya* for the same definition).

before the court in this case. The issue for the jury was whether it should accept the informant's testimony that the defendant gave him the drugs and the inference that the defendant did so knowingly or whether it should accept the defendant's testimony to the contrary.[90] Significantly, this early definition also made clear that simply being around contraband was not enough to establish constructive possession.

3. *United States v. Culpepper*

In 1987, the Tenth Circuit introduced an important caveat to the definition from *Amaya*. The charge in *United States v. Culpepper*[91] was possessing marijuana with intent to distribute, specifically two fields where marijuana was being cultivated for harvest and sale.[92] Defendant Culpepper told an undercover officer that he was interested in selling two fields of marijuana that he had planted but did not have time to harvest.[93] He took the officer to the fields, taught him how to harvest the marijuana, and showed him where in the vicinity he could hide it.[94]

Culpepper was convicted for possessing the two marijuana fields, and he argued on appeal that the evidence was insufficient to convict him. Culpepper's primary argument was that the lack of fences or guards, the lack of evidence to suggest recent cultivation or care, and the fact that he did not own the property showed there was no connection between him and the property.[95] While these factors might bear on the question of constructive possession, the Tenth Circuit found ample evidence to link Culpepper to the field: his offer to sell the fields, his statement that he had planted and harvested there, and the fact that it was ready to be harvested just as he had said.[96] However, starting with the definition of constructive possession in *Amaya*, the Tenth Circuit added a new requirement: "the government must establish that there was a sufficient nexus between the accused and the drug."[97]

4. *United States v. Mills* and Subsequent Cases Regarding Intent to Exercise Dominion and Control

Since *Culpepper*, the Tenth Circuit has consistently recognized the nexus requirement and has occasionally reversed a conviction based on the insufficiency of the evidence establishing a nexus.[98] One of these

90. 373 F.2d at 198-99.
91. 834 F.2d 879 (10th Cir. 1987).
92. *Id.* at 880-81.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 882 (citing United States v. Cardenas, 748 F.2d 1015, 1020 (5th Cir. 1984); United States v. Rackley, 742 F.2d 1266, 1272 (11th Cir. 1984)).
98. United States v. Hishaw, 235 F.3d 565, 571 (10th Cir. 2000); United States v. Taylor, 113 F.3d 1136, 1145-46 (10th Cir. 1997) (holding that the government did not establish a nexus between the defendant and a weapon found in a jointly occupied apartment despite witness testimony that the

cases, *United States v. Mills*,[99] is frequently cited in constructive possession cases because of its contributions to the development of this doctrine.[100]

Mills involved a convicted felon who lived in a house with guns.[101] The case began when police officers came to the home that Defendant Ervin Mills shared with Judy Hall on June 24, 1992. The officers had a warrant to determine whether the engine in Hall's truck was stolen. They decided to take the truck away so they could inspect it more closely, but before doing so, they let Mills get Hall's belongings out of the truck.[102] Mills put Halls' things in his garage, including a Ruger pistol and Winchester shotgun. Six days later, on June 30, officers returned to the home with another warrant, this time to search for a marijuana-growing operation on the premises.[103] During the search, officers rediscovered the pistol and shotgun from Hall's truck, now in a compartment for extra leaves in the dining room table.[104]

Mills was charged with possessing the firearms on June 30 but not with possessing them on June 24.[105] At trial, Hall testified "that she placed the guns in the dining room table without Mills' knowledge and contrary to his instructions."[106]

The Tenth Circuit again emphasized the need for the government to establish a nexus in joint occupancy cases. It stated, "[i]n cases of joint occupancy, where the government seeks to prove constructive possession by circumstantial evidence, it must present evidence to show some connection or nexus between the defendant and the firearm or other contraband."[107] The court continued: "A conviction based upon constructive possession will be upheld 'only when there was some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband.'"[108]

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defendant had previously possessed a gun); United States v. Reece, 86 F.3d 994, 996 (10th Cir. 1996) (reversing conviction for possession with intent to distribute drugs where the government did not establish a nexus between car driver and drugs found in passenger's pockets); United States v. Mills, 29 F.3d 545, 549-50 (10th Cir. 1994).

99. 29 F.3d 545.

100. *See, e.g.*, United States v. Jimenez, 205 F.App'x 656, 663 (10th Cir. 2006); *see also* United States v. Colonna, 360 F.3d 1169, 1178-79 (10th Cir. 2004).

101. *Mills*, 29 F.3d at 546-47.

102. *Id.* at 547.

103. *Id.*

104. Officers also found a .22 semi-automatic pistol under Halls's mattress, a rusted rifle in a crawl space underneath the house, and two pipe bombs in the laundry room. *Id.* Mills was charged with possessing the pipe bombs but was acquitted. *Id.* It is unclear whether he was charged with possessing these other two guns, but the opinion only addresses the charges relating to the two guns originally found in Halls's truck.

105. *Id.*

106. *Id.* at 550.

107. *Id.* at 549.

108. *Id.* at 549-50 (quoting United States v. Mergerson, 4 F.3d 337, 349 (5th Cir. 1993)).

The evidence, however, failed to establish either the connection or the knowledge necessary to support a conviction.

> Even if the jury disbelieved the entire defense testimony, that disbelief could not constitute evidence of the crimes charged and somehow substitute for knowing constructive possession in this joint occupancy situation. We are unwilling to infer knowledge of "dominion and control" over Hall's guns contained in the compartment (and out of view) on June 24 solely because Mills handled them and placed them in the garage six days before in cooperation with law enforcement. Nor was the defense required to prove that Mills was denied access to Hall's table or compartment; rather, the government had to come forward with evidence to connect Mills with knowing constructive possession of the firearms extending beyond his handling them on June 24. Mere dominion or control over the dining room was insufficient to establish constructive possession.[109]

The precise rationale for this opinion is somewhat elusive, as it is unclear whether the court reversed on the knowledge element or the nexus requirement. On the one hand, it appears the court was concerned by the lack of knowledge—although Mills had dominion and control over the compartment where the guns were found, he did not know they were there. The court said it was "unwilling to infer knowledge" from the earlier possession.[110]

The problem with this view is that the court did not rest on the lack of knowledge but went on to cite the lack of a connection or nexus between Mills and the guns. "[T]he government had to come forward with evidence to *connect* Mills with knowing constructive possession of the firearms."[111] Had the court been focused solely on the mens rea, it could have reversed without discussing the nexus requirement at all. Instead, the court specifically stated that "the government had to come forward with evidence to prove Mills knew the firearms were within his dominion and control."[112] The court explicitly stated that the police-authorized possession on June 24 could not qualify as a nexus.[113]

This caveat is significant because it shows that knowledge and access are not enough to establish a nexus. At the time the officers left on June 24 and police authorization terminated, Mills had the ability to exercise dominion and control over the guns, and he knew it. Thus, to say there was no nexus on June 24, when Mills had knowledge of the weapons, is to say that knowing access to firearms cannot, by itself, establish the required nexus. There must be something more.

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109. *Id.* at 550.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

As will be argued more completely, the implicit core of this nexus is intent to exercise dominion or control over the item. But before turning to those recent cases that explicitly reject intent as an aspect of this nexus, it is worth pausing to note that from time to time the court has sanctioned an intent requirement. In 1980, the Tenth Circuit in *United States v. Zink*[114] upheld a conviction where the district court had included an intent requirement in its definition of constructive possession.[115] In contrast to the constructive possession definition discussed above, the court defined constructive possession as follows: "A person who although not in actual possession knowingly has both the power *and the intention* at a given time to exercise dominion or control over a thing either directly or indirectly or through another person or persons is then in constructive possession of it."[116] On appeal, the Tenth Circuit affirmed the conviction over a challenge to the jury instruction, stating that the jury was "properly instructed" and calling this a "stock instruction on this issue which has been affirmed many times."[117]

Five years later, in *United States v. McCoy*,[118] the Tenth Circuit defined constructive possession without reference to its own precedent, citing instead standard language from the Fifth Circuit that included an intent requirement. "The defendant had constructive possession if he had the intent and the power to exercise dominion and control over the weapons as charged."[119]

Most recently, in 2004, the Tenth Circuit again affirmed the same jury instruction it called "stock" in 1980.[120] However, that case did not raise a question about intent, and in defining constructive possession, the court used the standard definition going back to *Amaya*, which does not include an intent requirement.[121] In short, until 2004, the limits of constructive possession had been discussed primarily in terms of the nexus requirement, though we can see the intent requirement popping up from time to time.

5. Focusing on an Intent Requirement: *United States v. Colonna* and *United States v. Ledford*

The first case to specifically discuss an intent requirement in the context of constructive possession was *United States v. Colonna*,[122] which specifically held in 2004 that knowledge of and access to a gun establish an adequate nexus and that the constructive possession does not

114. 612 F.2d 511 (10th Cir. 1980).
115. *Id.*
116. *Id.* at 516 n.1 (emphasis added).
117. *Id.* at 516.
118. 781 F.2d 168 (10th Cir. 1985).
119. *Id.* at 171 (quoting United States v. Smith, 591 F.2d 1105, 1107 (5th Cir. 1979)).
120. United States v. Lopez, 372 F.3d 1207, 1211 (10th Cir. 2004).
121. *Id.* at 1211-12.
122. 360 F.3d 1169 (10th Cir. 2004).

require proof that the defendant intended to exercise dominion or control over the object.[123]

The facts of *Colonna* are straightforward. Officers executed a warrant on Defendant Colonna's home and found guns and ammunition in a dresser drawer in his bedroom, along with a marijuana pipe.[124] Colonna claimed the guns were his wife's. Colonna's wife testified that the guns and ammunition were in her bedside dresser, not her husband's.[125] However, she also testified that her husband had taken a marijuana pipe from their son and put it in *his* bedside dresser. Another officer testified that Colonna had admitted that he knew the guns were there, that he should not have had them, but that the guns belonged to his wife.[126]

The Tenth Circuit began with a typical recitation of the applicable law, ending with this proviso: "In order to sustain a conviction based upon constructive possession, the government must present 'evidence supporting at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband.'"[127] From this proposition, the court concluded: "Thus, *knowledge* and *access* are required to prove that the defendant knowingly held the power to exercise dominion and control over the firearm."[128]

One aspect of *Colonna* that separates it from all preceding Tenth Circuit cases is that the defendant specifically argued that constructive possession requires the government to prove *intention* to exercise dominion and control.[129] The court rejected this issue of first impression. "[W]here the defendant in a joint occupancy situation has knowledge of and access to the weapons, there is a sufficient nexus to infer dominion or control. It is not necessary to show that the defendant intended to exercise that dominion or control."[130]

In light of these legal rulings, Colonna's sufficiency argument was doomed. The court reasoned that a jury could have concluded the dresser where the guns were found was Colonna's, not his wife's.[131] From that inference, the jury could appropriately infer that he had knowledge of and access to them.

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123. *Id.* at 1179.
124. *Id.* at 1173.
125. *Id.* at 1179.
126. *Id.*
127. *Id.* (quoting United States v. Hien Van Tieu, 279 F.3d 917, 922 (10th Cir. 2002)). Interestingly, the "knowledge and access" language apparently originated with *Mills*. *Hien Van Tieu* attributes this language to *United States v. Heckard*, 238 F.3d 1222, 1228 (10th Cir. 2001). *Heckard*, 238 F.3d at 1228, in turn, cites *United States v. Mills*, 29 F.3d 545, 550 (10th Cir. 1994).
128. *Colonna*, 360 F.3d at 1179.
129. *Id.*
130. *Id.*
131. *Id.* at 1180.

While it is true that prior Tenth Circuit precedent did not require evidence of intent, the court did not address the merits of an intent requirement. This hasty rejection is particularly troubling because the court could have easily affirmed without rejecting the rule on a fact-based sufficiency challenge. Taken together, from the facts that the guns were in Colonna's dresser, that he knew they were there, and that he knew he should not have them, the jury could reasonably have found both the power *and the intention* to exercise dominion and control over them. Thus, instead of rejecting the requirement without considering its merits, the Tenth Circuit could have left the issue unresolved and simply affirmed under either standard.

After *Colonna*, the next significant case to discuss an intent requirement[132] was *United States v. Ledford*.[133] *Ledford* arose out of a police response to a domestic violence complaint. Officers responded to the home where defendant Ledford lived with his girlfriend Kathleen Carey. Carey told officers that Ledford had threatened to kill her with a gun, and she led them to a .41 caliber handgun in the top drawer of a dresser inside the house and told them it was Ledford's.[134] Meanwhile other officers arrested Ledford, who was walking nearby. One officer asked Ledford about the gun, and he responded that a friend had given it to him a couple of months earlier to fix, but he knew he should not have a gun because he was a convicted felon.[135]

At trial, Ledford requested a jury instruction that would have required the government to establish that he "knowingly ha[d] both the power and the intention at a given time to exercise dominion or control over a thing."[136] The government objected to this instruction under *Colonna*, and the court gave an instruction that did not require a showing of intent. It told the jury:

> A person who, although not in actual possession, knowingly has the power at any given time to exercise dominion or control over a thing, either directly or indirectly through another person, is then in constructive possession of it. To prove constructive possession the government must prove that the defendant had knowledge of and access to the firearm.[137]

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132. Interestingly, between *Colonna* and *Ledford*, the court upheld a jury instruction that required the jury to find both power and intent to exercise dominion and control. United States v. Lopez, 372 F.3d 1207, 1211 (10th Cir. 2004). However, the intent requirement was not at issue in *Lopez*.

133. 443 F.3d 702 (10th Cir. 2006).

134. *Id.* at 705-06.

135. *Id.* at 705.

136. *Id.* at 706.

137. *Id.* at 714.

Ledford raised four legal arguments in support of an intent requirement.[138] First, Ledford argued that *Colonna* was inconsistent with prior case law, specifically those cases discussed above that ratified a jury instruction with intent language.[139] The court properly noted that these cases did not "address intent because the issue was not raised on appeal."[140] Moreover, these opinions themselves, along with most other Tenth Circuit opinions, defined constructive possession without reference to intent.[141]

Ledford next argued that without an intent requirement, § 922(g)(1) became a general intent crime rather than a specific intent crime.[142] The court did not reject this reasoning but concluded that it was not a problem: "Congress may criminalize knowing acts committed without specific intent."[143]

Third, Ledford challenged the instruction for lack of a nexus requirement.[144] The court agreed that a showing of some nexus was required, but it reasoned that under *Colonna*, the instruction was appropriate: "[W]e made it clear that knowledge and access together are sufficient to show nexus, and the jury was instructed on that principle."[145] Ledford argued that knowledge and access were insufficient to establish a nexus in *Mills*, to which the court responded that *Mills* was factually distinct:

> There, the government failed to show sufficient evidence of constructive possession when the defendant had placed guns in the garage of a residence six days prior to the guns being found in the dining room. We held the government did not come forward with the necessary evidence to connect Mr. Mills with knowing constructive possession of the firearms beyond his handling them on the prior date. Mere dominion or control over the dining room was insufficient to establish constructive possession.[146]

In contrast, Carey linked Ledford to the gun, and Ledford himself told two others that he knowingly possessed the gun. The court concluded that this evidence was sufficient to establish a nexus, but left

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138. Ledford also tried to distinguish *Colonna* on its facts, but the factual distinction was inconsequential. *Id.* at 715.

139. *See supra* notes 114-20 and accompanying text; *see also Ledford*, 443 F.3d at 716.

140. *Ledford*, 443 F.3d at 715.

141. *Id.* at 715-16 (discussing United States v. Lopez, 372 F.3d 1207, 1212 (10th Cir. 2004); United States v. Zink, 612 F.2d 511, 516 (10th Cir. 1980)).

142. *Ledford*, 443 F.3d at 716.

143. *Id.*

144. *Id.*

145. *Id.* at 716-17.

146. *Id.* (citing United States v. Mills, 29 F.3d 545 (10th Cir. 1994)). As discussed above, this analysis of *Mills* falls short because it ignores the fact that the court was adamant in saying that Mills did not have constructive possession when he knew the guns were left unsecured in his garage. *See supra* notes 108 and 109 and accompanying text.

"open the possibility that there may be a future case in which the specific facts require a harder look at the nexus requirement."[147]

Finally, Ledford argued that the recent Tenth Circuit Proposed Pattern Criminal Jury Instructions required an intent instruction.[148] Since *Ledford*, the court has adopted a pattern instruction that does not include an intent requirement.[149] However, at the time, a proposed pattern instruction would have told jurors that "[a] person who, although not in actual possession, knowingly has both the power *and the intention* at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it."[150] Although these proposed instructions included an intent requirement, the Tenth Circuit declined to follow that recommendation on the ground that the proposed instructions had not been adopted and were subject to approval on a case-by-case basis.[151]

D. Jameson *and the Nexus Requirement*

As noted above,[152] the Tenth Circuit most recently addressed the content of the nexus requirement in *United States v. Jameson*.[153] Jameson's appeal raised two claims related to constructive possession.[154] First, he argued that the evidence was insufficient to connect him to the gun found on the floor of a car occupied by three other individuals.[155] Second, he claimed that the jury instruction misled the jury because it failed to require proof of any connection between him and the gun in joint possession cases.[156]

The Tenth Circuit rejected both these claims. On the sufficiency claim, the Tenth Circuit began by defining constructive possession. "Constructive possession exists when a person 'knowingly holds the power and ability to exercise dominion and control over [a firearm].'"[157] It further recognized that "in joint occupancy cases, knowledge, dominion, and control may not be inferred simply by the defendant's proximity

147. *Ledford*, 443 F.3d at 717.
148. *Id.*
149. TENTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.31 (2006), *available at* http://www.ck10.uscourts.gov/downloads/pji10-cir-crim.pdf.
150. CRIMINAL PATTERN JURY INSTRUCTIONS (PROPOSED) § 1.31 (REV. AUG. 9, 2004) (emphasis added).
151. *Ledford*, 443 F.3d at 717. The version that was ultimately adopted eliminated the intent language. *See* TENTH CIRCUIT PATTERN JURY INSTRUCTIONS, *supra* note 149, at § 1.31.
152. *See supra* Part I.A.
153. 478 F.3d 1204 (10th Cir. 2007).
154. Jameson also raised a third claim related to a mistrial motion that is not within the scope of this article.
155. *Jameson*, 478 F.3d at 1206.
156. *Id.*
157. *Id.* at 1209 (quoting United States v. Lopez, 372 F.3d 1207, 1211 (10th Cir. 2004)).

to a firearm. Instead, the government must present evidence to show some connection or nexus between the defendant and the firearm."[158]

The court cited *Colonna* for the proposition that "*knowledge* and *access* are required to prove that [a] defendant knowingly held the power to exercise dominion and control over [a] firearm."[159] This meant, however, that "where the defendant in a joint occupancy situation has knowledge of and access to the weapons, there is a sufficient nexus to infer dominion and control."[160] The court again reiterated that "[p]roximity alone . . . is insufficient to establish knowledge and access to (and dominion and control over) a firearm in a join occupancy case."[161]

Turning to the facts, the court found sufficient evidence of a nexus, namely "Mr. Jameson's proximity to the pistol . . . coupled with [his] furtive movements, his inferred physical contact with the pistol (his foot was on top of it), and the pistol's being in plain view and easily retrievable to a passenger in Mr. Jameson's seat."[162]

Having thus found a nexus, the court then turned to the jury instruction, which had eliminated any requirement that the jury find a nexus.[163] The court acknowledged that Jameson's proposed instruction "was preferable to that used by the district court because it expressly stated that mere control over the area near the firearm (in other words, proximity) is insufficient, by itself, to establish constructive possession."[164] Furthermore, the court's instruction "invites the argument that proximity might be used as the only circumstantial evidence proving knowledge and access."[165] Although one would expect this defect to be fatal, the court affirmed the instruction on the ground that a different instruction told the jury that "merely being present with others who have possession of the object does not constitute possession."[166] Coupled with the paragraph on momentary control of an object, these instructions "adequately informed the jury that mere proximity is not sufficient to establish constructive possession."[167] Although *Ledford* had anticipated a future case that would "require a harder look at the nexus requirement," the court decided that *Jameson* was not that case.[168]

158. *Id.* (quoting United States v. Michel, 446 F.3d 1122, 1128 (10th Cir. 2006)).
159. *Id.* (quoting United States v. Colonna, 360 F.3d 1169, 1179 (10th Cir. 2004)).
160. *Id.* (quoting *Michel*, 446 F.3d at 1128).
161. *Id.* (quoting United States v. Hishaw, 235 F.3d 565, 572 (10th Cir. 2000)).
162. *Id.* at 1210.
163. For the jury instruction, see *supra* Part I.A. and accompanying text.
164. *Jameson*, 478 F.3d at 1211.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1212 (quoting United States v. Ledford, 443 F.3d 702, 717 (10th Cir. 2005)).

II. PROBLEMS WITH THE TENTH CIRCUIT RULE

The Tenth Circuit's line of reasoning as reflected in *Jameson* has two primary defects. First, the court's reliance on *Colonna* and that case's rejection of an intent requirement runs contrary to every other circuit and eliminates an important protection for defendants. Second, allowing the district court to equate knowledge and access with constructive possession, as in *Ledford* and *Jameson*, reflects an unsound extension of *Colonna* and effectively eliminates the nexus requirement.

A. Intent to Exercise Dominion and Control

The first defect from this recent line of cases is that it allows the government to establish constructive possession without requiring proof that the defendant intended to exercise control or dominion over the firearm. *Colonna* held that "where the defendant in a joint occupancy situation has knowledge of and access to the weapons, there is a sufficient nexus to infer dominion or control. It is not necessary to show that the defendant intended to exercise that dominion or control."[169]

Before addressing the merits of such a rule, it is worth noting that the court did not need to reject whole cloth an intent requirement in order to uphold the jury verdict. In *United States v. Walls*,[170] the Seventh Circuit reversed a conviction where the jury had not been instructed on intent. However, in doing so, it specifically noted that the evidence before it would have supported a jury verdict had the jury been properly instructed as to what inferences it might make.[171] Relevant to the *Colonna* analysis, the Seventh Circuit specifically noted that "[a] jury could infer that [the defendant] had both knowledge and intent to exercise dominion and control over [a gun] merely from its presence in the bedroom that [the defendant] shared with [another person]."[172] Put more broadly, it is not impossible that the facts of the case would support an inference not only of knowledge and access, but also intent. Consistent with this principle, the *Colonna* court, rather than reject the intent requirement without any discussion of the merits of the rule, could have simply held that the arguable location of the gun—in Colonna's bedside drawer—established not only knowledge and access but also intent to exercise dominion and control over the gun.

In any case, *Colonna* squarely conflicts with the rule in the other circuits, which have held that constructive possession requires proof of not only the power but also the *intent* to exercise dominion or control

169. United States v. Colonna, 360 F.3d 1169, 1179 (10th Cir. 2004) (citing United States v. Mills, 29 F.3d 545, 550 (10th Cir. 1994)).
170. 225 F.3d 858 (7th Cir. 2000).
171. *Id.* at 867.
172. *Id.*

over an object.[173] Although the D.C. Circuit has not adopted such a definition in a published opinion, it has done so in an unpublished decision[174] and has also approved a jury instruction that used such a definition.[175] Consistent with this requirement, these courts have also included an intent requirement in their pattern jury instructions.[176]

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173. *See, e.g.*, United States v. McFarlane, 491 F.3d 53, 59 (1st Cir. 2007) ("[A] conviction for constructive possession requires proof that a 'person knowingly has the power and intention at a given time to exercise dominion over an object.'") (quoting United States v. Gobbi, 471 F.3d 302, 309 (1st Cir. 2006)); United States v. Introcaso, 506 F.3d 260, 270 (3d Cir. 2007) ("To demonstrate constructive possession, the Government must submit sufficient evidence to support an inference that the individual 'knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons.'") (citation omitted); United States v. Jones, 484 F.3d 783, 788 (5th Cir. 2007) (stating that in constructive possession cases, "[t]he government must offer evidence to prove that the defendant (1) knew that the thing was present, and (2) intended to exercise dominion or control over it."); United States v. Gardner, 488 F.3d 700, 713 (6th Cir. 2007) ("'[c]onstructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.'") (quoting United States v. Kincaide, 145 F.3d 771, 782 (6th Cir. 1998)); United States v. Bustamante, 493 F.3d 879, 889 (7th Cir. 2007) ("'Defendants are in constructive possession of a gun if they have the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.'") (quoting United States v. Walls, 225 F.3d 858, 864 (7th Cir. 2000)); United States v. Piwowar, 492 F.3d 953, 955 (8th Cir. 2007) ("Constructive possession 'requires knowledge of an object, the ability to control it, and the intent to do so.'") (quoting United States v. Cuevas-Arrendondo, 469 F.3d 712, 715 (8th Cir. 2005)); United States v. Paulino, 445 F.3d 211, 222 (2d Cir. 2006) ("Constructive possession exists when a person . . . knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.") (citing United States v. Gordils, 982 F.2d 64, 71 (2d Cir. 1992)); United States v. Greer, 440 F.3d 1267, 1271 (11th Cir. 2006) ("Constructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise dominion or control."); United States v. Scott, 424 F.3d 431, 435-36 (4th Cir. 2005) ("When the government seeks to establish constructive possession under § 922(g)(1), it must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm . . . ."); United States v. Terry, 911 F.2d 272, 278 (9th Cir. 1990) ("In the more difficult situation where the premises are shared by more than one person, . . . a party has knowledge of the weapon and both the power and the intention to exercise dominion and control over it, then he has constructive possession.") (quoted in United States v. Ruiz, 462 F.3d 1082, 1089-90 (9th Cir. 2006)).

174. United States v. Johnson, No. CR 91-00142-01, 1993 WL 390062, at *2 (D.C. Cir. Sept. 30, 1993) ("A person has constructive possession of an object when he knowingly has the power and intent to exercise dominion and control over it."). The D.C. Circuit's more recent, published decisions apparently limit the doctrine with a requirement similar to the Tenth Circuit's nexus requirement. *See, e.g.*, United States v. Littlejohn, 489 F.3d 1335, 1338-39 (D.C. Cir. 2007) ("To establish constructive possession, the government must show that the defendant knew of, and was in a position to exercise dominion and control over, the contraband. Thus, there must be something more than mere presence at the scene of a criminal transaction. There must be some action, some word, or some conduct that links the individual to the contraband.") (internal citations and quotation marks omitted).

175. United States v. Morgan, 914 F.2d 272, 275 (D.C. Cir. 1990).

176. FIRST CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 4.06 (1998) ("A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it."); THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS CRIMINAL § 6.18.922G-4 (2007) ("If you find that *(name)* . . . had the power and intention to exercise control over it, even though it was not in *(name)*'s physical possession—that is, that *(name)* had the ability to take actual possession of the object when *(name)* wanted to do so—you may find that the government has proven possession."); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.31 (2001) ("A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it."); SIXTH CIRCUIT CRIMINAL

It is true that these circuits occasionally omit an intent requirement from a definition of constructive possession.[177] However, these definitions arise in the context of cases challenging other aspects of possession or constructive possession. No circuit beside the Tenth has ever held that constructive possession may be established without a showing of intent to exercise control or dominion.

1. Making Intent a Triable Issue in Other Circuits

A brief look at some of these cases illustrates why an intent requirement is so crucial. The main reason for adopting an intent requirement is that a defendant's intent may be the only fact distinguishing innocent and guilty conduct. The Fifth Circuit, for example, has recognized that constructive possession cases invite arguments about a defendant's intent in ways that are not raised by an actual possession case.[178]

> In constructive possession cases, knowledge *and intent* are frequently at issue. A defendant will often deny any knowledge of a thing found in an area that is under his control (e.g., a residence, an automobile) or claim that it was placed there by accident or mistake. The government then must offer evidence to prove that the "defendant (1) knew that the thing was present, and (2) intended to exercise dominion or control over it. In contrast, the only knowledge that the government must show in an *actual* possession prosecution is the defendant's awareness that (1) he physically possesses the thing, and (2) the thing he possesses is contraband. Intent is not an element of actual possession under § 922."[179]

PATTERN JURY INSTRUCTIONS § 2.10 (2007) ("To establish constructive possession, the government must prove that the defendant had the right to exercise physical control over the [firearm] and knew that he had this right, and that he intended to exercise physical control over [the firearm] at some time, either directly or through other persons."); SEVENTH CIRCUIT FEDERAL JURY INSTRUCTIONS: CRIMINAL 922(g) (1999) ("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."); EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CRIMINAL § 8.02 (2007) ("A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it."); NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 3.18 (2003) ("A person has possession of something if the person . . . knows of its presence and has the power and intention to control it."); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 6 (2003) ("A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.").

177. *See, e.g.*, United States v. Moye, 454 F.3d 390, 395 (4th Cir. 2006) (quoting United States v. Rusher, 966 F.2d 868, 878 (4th Cir. 1992)). In *Moye*, the court stated: "Constructive possession is established if it is shown 'that the defendant exercised, or had the power to exercise, dominion and control over the item.'" *Id.* However, this was an actual possession case, and the precise definition of constructive possession was not at issue.

178. *Jones*, 484 F.3d at 788.

179. *Id.* (citation omitted).

A couple of cases illustrate how defendants have put intent at issue in triable ways.[180] In *United States v. Piwowar*,[181] the defendant was prosecuted for possessing guns and ammunition seized from a padlocked, walk-in refrigerator found in a building owned by him but leased to a woman who could lawfully possess them.[182] It was undisputed that the guns belonged to the defendant before he became a convicted felon. At trial, the woman testified that she had purchased the weapons from the defendant but had never moved them after taking possession of them.[183] Thus, the defendant argued that he had no intention to exercise dominion or control over these weapons that he had sold to the woman and were kept in her part of the building.

The Eighth Circuit recognized that "[a] jury might have accepted this testimony and concluded he no longer possessed the firearms and ammunition."[184] However, because the woman also acknowledged that the defendant was the only one with a key to the refrigerator where the guns were kept, the Eighth Circuit reasoned that the jury could properly have found an intention to exercise dominion and control and affirmed the conviction.[185]

In *United States v. McFarlane*,[186] Detective David Delehoy heard the sound of gunshots and saw Antwone Moore sprinting away from the area from where the sound came.[187] From his patrol car, Delehoy lost sight of Moore behind some buildings but saw him emerge a few seconds later, this time walking rapidly. Delehoy also saw Defendant Clive McFarlane following Moore, about 100 feet behind.[188] Delehoy drove to meet Moore, who told him McFarlane was trying to shoot him. About that time, Delehoy saw McFarlane approach a set of trash cans along the path that Moore had traveled. McFarlane took the liner from the trash can, leaned into the can with both arms, and stood up to replace the liner.[189] Based on this sequence of events, Delehoy arrested McFarlane

180. The cases discussed in this section are not the only ones that show why an intent requirement is so important. *See, e.g.*, United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998) (noting that omission of an intent requirement was "less than ideal" but holding omission was harmless on the facts of the case); United States v. Newsom, 452 F.3d 593, 605-06 (6th Cir. 2006) (holding that instruction that lacked intent requirement was improper but that defendant waived any challenge to the error); United States v. Martin, 180 F.3d 965, 967 (8th Cir. 1999) (reversing constructive possession conviction on ground that "[k]nowledge of the possible location of a firearm here is not a showing of power and *intention* to exercise dominion and control over an object").

181. 492 F.3d 953 (8th Cir. 2007).

182. *Id.* at 954-55.

183. *Id.* at 955.

184. *Id.* at 956.

185. *Id.*

186. 491 F.3d 53 (1st Cir. 2007).

187. *Id.* at 55.

188. *Id.*

189. *Id.*

and then found a gun with six spent ammunition cases in the trash that had interested McFarlane.[190]

McFarlane was charged with possessing that gun. At trial, he testified that he and Moore had gotten in a fight, during which Moore had tried to shoot him.[191] McFarlane testified that Moore then fled, and he followed, stopping only to look in the trash can out of curiosity.[192] The district court told the jury that constructive possession was "the power and intention at any given time to exercise control or dominion of the object" and gave an example to illustrate the concept.[193] However, the jury presented two separate questions to the court: (1) "Does looking for the gun constitute *intent* to exercise control and dominion over the gun?" and (2) "Does opening the trash bag, with the intent to find the gun, which is indeed there, constitute putting himself in the position to have the *power* to exercise control and dominion over the gun?"[194]

McFarlane asked for a specific instruction that would have told the jury that "mere curiosity . . . coupled with a direct look at the gun . . . does not establish constructive possession."[195] The court decided not to specifically answer the question, committing the central issue of intent to the jury:

> As I told you, possession requires . . . both the ability and intention to take physical control of an object. You are asking me to decide whether a particular act by itself constitutes intent to exercise control and whether . . . doing something with that intent then puts the defendant in the position of having the power to exercise control. . . . And all I can tell you is that you need to look at all of the evidence of what occurred. You need to look—particularly with respect to intent—you need to look at everything the defendant did, at everything he said, and the circumstances that existed at the time that he acted and spoke and decide from all of that whether he had the intent at a particular point in time that you're considering to exercise control over the object.[196]

On appeal, the First Circuit affirmed the district court's instruction as a proper statement of the law.[197]

McFarlane shows how a defendant's intent can be the only distinction between guilty and innocent conduct. The jury's question about "looking for the gun" suggests the jurors may have accepted McFarlane's story that he was chasing the person who had tried to shoot him. The

190. *Id.*
191. *Id.* at 56.
192. *Id.*
193. *Id.* at 58.
194. *Id.*
195. *Id.* at 59.
196. *Id.* at 58-59.
197. *Id.* at 61.

court's response made clear that it did not want to tell the jury there could be no intent on these facts as a matter of law. But at the same time, it left open the possibility that McFarlane might be innocent, depending on how the jury resolved the question of his intent. If it was true that McFarlane was just curious and had no intention to exercise control over the gun, he should have been acquitted. Indeed, the First Circuit recognized that "the main dispute at trial was over McFarlane's intent in going to the trash can."[198]

These cases present tough factual questions suitable for a jury. *Piwowar* is a case where the defendant claimed he tried to distance himself from the guns but was still linked factually to them. *McFarlane* is a case where the defendant claimed he crossed paths with the gun but had no intention to take possession. In both cases, the circuit courts recognized that a jury could have accepted the defendants' claims and acquitted.

2. Same Cases, Tenth Circuit

In contrast, neither *Piwowar* nor *McFarlane* would have posed a triable issue in the Tenth Circuit, even if the jury accepted the defendants' version of the facts. Piwowar would have no basis for acquittal because he knew the guns were in the walk-in refrigerator (he put them there originally) and he had access (a key to the refrigerator). McFarlane knew the gun was in the trash can (at least by the time he looked in there) and he had access (as seen by his rummaging). In the Tenth Circuit, McFarlane's requested instruction—that merely looking at the gun out of curiosity was not constructive possession—would not only have been unwarranted. It would have been wrong. And neither case would have any legal hope for acquittal.[199]

The First Circuit put it well:

> The issue of *intention* is quite as important as the issue of power. Someone might have effective power over [contraband] simply because [it was] located within reach while [its] true owner was temporarily absent; but if such a person had power over the [contraband] (say, as a temporary visitor to the room [or car] in which [it was] located) but had no intention to exercise that power, there might still be no crime.[200]

198. *Id.* at 59.

199. Under such circumstances, the only reason to go to trial would be the hope for jury nullification. This is a risky strategy because courts may not give a nullification instruction. While jury nullification is certainly unlikely, it is not impossible. In one memorable case in the District of Utah, the defendant charged with constructively possessing a firearm found in his bedroom closet actually prevailed at trial on what was essentially a jury nullification theory. United States v. Morales, No. 1:03-cr-56-PGC (2003) (acquitting defendant despite admission that he had handled the gun).

200. United States v. Zavala-Maldonado, 23 F.3d 4, 8 (1st Cir. 1994); *see also* United States v. Terry, 911 F.2d 272, 280 (9th Cir. 1990) ("[Constructive possession] cases also add some element that distinguishes possession from mere presence or accessibility. It is not enough that a person has

B. Equation of Nexus with Knowledge and Access

A related problem is the analytical chasm between *Colonna* and *Ledford* that has essentially eliminated the value of the nexus requirement. *Colonna* was a sufficiency-of-the-evidence case that held upheld a conviction where the evidence supported the inference that the defendant had knowledge of and access to the firearm.[201] The court stated that "*knowledge* and *access* are required to prove that the defendant knowingly held the power to exercise dominion and control over the firearm."[202] The court continued, "where the defendant in a joint occupancy situation has knowledge of and access to the weapons, there is a sufficient nexus to infer dominion or control."[203] As discussed above, the court could have stopped right here, but it continued on to hold that "[i]t is not necessary to show that the defendant intended to exercise that dominion or control."[204]

In equating constructive possession with knowledge and access, *Colonna* cites *United States v. Gorman*.[205] But a closer look at *Gorman* suggests why *Colonna's* logic is problematic. *Gorman* states: "The government may satisfy the element of knowing possession of a firearm by showing constructive possession: where a defendant 'knowingly hold[s] the power to exercise dominion or control over the firearm.'"[206] Knowledge and control can be inferred where a defendant has exclusive possession of the premises, but where a defendant jointly occupies the premises the government must "show some connection or nexus between the defendant and the firearm or other contraband."[207] While it is true that *Gorman* recognizes the importance of knowledge and access (control), *Colonna* ignores the significance of the nexus requirement. The knowledge and access that create an inference of constructive possession in a sole occupancy situation do not create such an inference in a joint occupancy situation in the absence of a nexus.

From *Colonna*, the Tenth Circuit next upheld instructions that substituted the idea of knowledge and access for the nexus requirement. In *Ledford*, the court told the jury that "[a] person who, although not in actual possession, knowingly has the power at any given time to exercise dominion or control over a thing . . . is then in constructive possession of it."[208] In *Jameson*, it told the jury that "constructive possession may be shown by . . . evidence, which establishes . . . that the defendant had

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the power to control the contraband, in the sense that he simply is in the presence of the contraband and could reach out and take it.").

201. *See supra* notes 122-31 and accompanying text.
202. United States v. Colonna, 360 F.3d 1169, 1179 (10th Cir. 2004) (emphasis in original).
203. *Id.*
204. *Id.*
205. 312 F.3d 1159 (10th Cir. 2002).
206. *Id.* at 1164 (citation omitted).
207. *Id.* (citations omitted).
208. United States v. Ledford, 443 F.3d 702, 714 (10th Cir. 2006).

knowledge that the firearm was contained in the place and the defendant had the ability to access the firearm."[209]

The problem with these instructions is that they essentially "direct a verdict" for the prosecution because the court, rather than the jury, decides whether certain conduct rises to the level of constructive possession.[210] One scholar studying constructive possession cases in Texas state courts identified over thirty variables relevant to deciding whether there was a nexus between a person and an object.[211] He notes:

> The search for a link between the accused and the contraband is not just a qualitative, logical exercise in thinking; the link represents a compendium of the concrete factual elements of the case. The facts themselves must draw the accused toward the contraband or, on the contrary, separate the accused from the circle of control and access which constitutes possession.[212]

To say that only two of those (knowledge and access) always constitutes constructive possession unfairly takes the nexus requirement away from the jury. Rather than deciding whether a nexus exists in light of many circumstantial considerations, the jury decides only whether two particular circumstances exist. And if they do, under the instructions given in *Ledford* and *Jameson*, they must convict.

A Seventh Circuit case illustrates this problem. In *United States v. Walls*,[213] the district court told the jury: "[C]onstructive possession as used in these instructions is the ability to control cocaine or a gun."[214] The Seventh Circuit held that this instruction was improper because it "failed to adequately apprise the jury of the need to find intent."[215]

The court then considered whether the error was harmless. On the one hand, the trial offered ample evidence that could support such an inference. "If the question before us were one of sufficiency of the evidence, there is no doubt whatsoever that the evidence sufficed to demonstrate constructive possession."[216] Interestingly, the Seventh Circuit concluded that "[a] jury could infer that [the defendant] had both knowledge

209. United States v. Jameson, 478 F.3d 1204, 1208 (10th Cir. 2007).

210. This logical leap is precisely the analytical move the *McFarlane* court refused to make. *See supra* notes 186-98 and accompanying text. In *McFarlane*, the district court refused to tell the jury that certain facts could not constitute power and intent because doing so would "provid[e] the court's view as to what the evidence demonstrated" and require it to "decide whether a particular act by itself constitutes intent to exercise control," but that this was the jury's job. United States v. McFarlane, 491 F.3d 53, 58 (1st Cir. 2007). *Cf.* United States v. Morgan, 914 F.2d 272, 275 (D.C. Cir. 1990) (holding that jury instruction did *not* "direct a verdict" for the prosecution because it instructed the jury as to both knowledge and intent).

211. Caudill, *supra* note 4, at 542.

212. *Id.* at 563.

213. 225 F.3d 858 (7th Cir. 2000).

214. *Id.* at 867.

215. *Id.*

216. *Id.*

and intent to exercise dominion and control over [a gun] merely from its presence in the bedroom that [the defendant] shared with [another person]."[217]

On the other hand, however, "the evidence of . . . [the defendant's] knowledge and intent was [not] so overwhelming that no rational jury would find otherwise."[218] Accordingly, the court remanded for a new trial.

Consistent with *Colonna*, *Walls* holds that the location of the object can support the requisite inferences for constructive possession. However, while those inferences may be justified in one case, it does not mean they are justified in every case. Although there can never be a case where the court finds constructive possession without evidence of knowledge and access, not every situation where a defendant has knowledge and access will establish an adequate nexus to support a finding of constructive possession.

Thus, while knowledge and access may support an inference of constructive possession by a properly instructed jury, it does not follow that in every case the jury must make that inference. In contrast to *Jameson*, the Fourth Circuit reversed a conviction based on essentially the same facts. In *United States v. Blue*,[219] a police officer stopped an automobile to investigate a seatbelt violation.[220] Defendant Herbert Blue was sitting in the passenger seat, and as the officer approached the car, he saw Blue's shoulder "dip as if . . . [he] were reaching under the seat with his right hand."[221] Then, during a consent search of the car, the officer found a loaded .38 revolver under Blue's seat.[222] Other than the officer's description of the shoulder dip and the fact that the gun was found under his seat, no evidence linked Blue to the firearm, but he was still convicted for being a felon in possession of a firearm.

On appeal, Blue argued that the evidence was insufficient to establish constructive possession.[223] The Fourth Circuit agreed. It held that "[t]hese facts alone do not justify a finding of constructive possession. To uphold a finding of constructive possession, this court requires more evidence of dominion and control than the government has offered here."[224] The only connection was "mere proximity," which could not establish constructive possession.[225] Thus, "Blue's shoulder dip alone

217. *Id.*
218. *Id.*
219. 957 F.2d 106 (4th Cir. 1992).
220. *Id.* at 107.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 108.
225. *Id.*

does not transform Blue from a mere passenger in the car to a possessor of whatever is discovered underneath the seat in which he is sitting."[226]

Although *Blue*'s strikingly similar facts cast a cold shadow over *Jameson*, the *Blue* court "emphasize[d] that the facts of this case fall outside, but just barely, the realm of the quantum of evidence necessary to support a finding of constructive possession."[227] How little, then, must be added to support a finding of constructive possession? One might conclude that *Jameson* crossed that line because the gun was not under Jameson's seat but presumably under his foot. However, this fact only goes to knowledge. It implies nothing as to any link between the person and the gun.

More troubling is the observation in *Jameson* that the "inferred physical contact with the pistol (his foot was on top of it)"[228] is really nothing more than very close proximity. In one breath, the court writes that "[p]roximity alone . . . is insufficient to establish knowledge and access to . . . a firearm in a joint occupancy case."[229] In the next breath, however, it concludes the evidence, which other than the shoulder dip was nothing more than proximity, was sufficient.

Either the gun was on the floor when Jameson got in the car, or he put it on the floor before the officers searched the car. If it was the latter, then we have a case of actual possession, and a constructive possession instruction would not be appropriate.[230] Although "a reasonable juror could infer that Mr. Jameson had actual physical control of the pistol when the car was pulled over and that he was trying to hide it underneath the seat or under his foot,"[231] one wonders whether the government would ever have prosecuted such a case if it knew it would have to establish actual possession beyond a reasonable doubt. On the other hand, if the gun was already in the car, then the question for the jury was whether such conduct—stepping on a gun that happens to be in the car where someone is getting a ride—rises to the level of possession.

To avoid injustice, it is necessary to impose an intent requirement. It is not unreasonable to conclude that a person sitting in a car knows if a gun is literally under his foot, and in such circumstances, the person

226. *Id*; *see also* United States v. Esquivel-Ortega, 484 F.3d 1221, 1225 (9th Cir. 2007) (recognizing that "a passenger may not be convicted unless there is evidence connecting him with the contraband, other than his presence in the vehicle") (citations omitted).

227. *Blue*, 957 F.2d at 108.

228. United States v. Jameson, 478 F.3d 1204, 1210 (10th Cir. 2007).

229. *Id.* at 1209.

230. *See, e.g.*, United States v. Jones, 484 F.3d 783, 787-88 (5th Cir. 2007) (holding that constructive possession was not warranted where the only evidence linking defendant to abandoned firearm was witness's testimony that he thought he saw defendant put something where gun was later found); United States v. Linares, 367 F.3d 941, 947-48 (D.C. Cir. 2004) (holding that jury could not have convicted on a constructive possession theory without accepting evidence that would support proof of actual possession).

231. *Jameson*, 478 F.3d at 1210.

clearly has access to the gun. But knowledge and access should not be enough to convict. Certainly the person has never taken actual possession, and if he lacks any intention to take possession of the item, then § 922(g) is in no way implicated. On the other hand, if the person is mentally planning to use the gun at some point, then it seems reasonable to say that the person is possessing the gun. This question, of course, may be difficult to answer. But that difficulty does not mean that the court should take the burden away and let the prosecution infer intent from the mere fact of proximity. To the contrary, in the absence of evidence to show the defendant intended to exercise dominion and control, the government should not be allowed to prevail at trial.

By substituting knowledge and access for the nexus requirement, the Tenth Circuit has rendered the requirement meaningless and makes "virtually anyone in a joint occupancy situation liable for contraband possessed by a co-inhabitant,"[232] a situation squarely rejected in *Lucero*.[233] Consider a few examples.

> 1. An upstanding, law-abiding, professional parent is charged with constructive possession of drugs she knows are in her wayward son's unlocked bedroom.
>
> 2. A convicted felon is charged with possessing an expensive hunting rifle kept on display in his neighbor's living room where he is occasionally invited over for dinner.
>
> 3. A convicted felon who knows that his neighbor keeps a gun in his bedroom is given a key to his neighbor's house while the neighbor goes out of town.[234]
>
> 4. A convicted felon shopping for sporting goods for his son is charged with constructively possessing ammunition he sees on unlocked shelves in the store.[235]
>
> 5. A convicted felon working for a construction company is charged with constructively possessing a gun he discovers (but never touches) in the closet of a room he is hired to remodel.

In each of these situations, the government could clearly establish knowledge and access to the contraband. Hopefully, it is equally clear that the doctrine of constructive possession should not extend to such

232. Petition for Certiorari at 7, United States v. Ledford, 443 F.3d 702, 714 (10th Cir. 2006).

233. *See supra* notes 67-81 and accompanying text.

234. At oral argument in *Ledford*, the government conceded that under the court's instruction there, this scenario would constitute constructive possession. *See* Rehearing Petition at 7, United States v. Ledford, 443 F.3d 702, 714 (10th Cir. 2006).

235. *Cf.* United States v. Francis, 462 F.3d 810, 815 (8th Cir. 2006) (holding that employee of a firearms store constructively possessed guns stored within its vault).

situations.[236] However, by substituting knowledge and access for the nexus requirement, the Tenth Circuit has expanded liability to include these situations. As defined by the Tenth Circuit, "the doctrine of constructive possession effectively imposes liability for being present at a place where drugs are being used,"[237] and in the case of felons, it criminalizes mere presence anywhere a gun is known to be found. Such broad liability does not make sense.

III. OTHER POLICY CONSIDERATIONS

Only the Tenth Circuit can rectify this imbalance. Significantly, constructive possession is a judicially-created doctrine.[238] Although Congress could certainly enact a constructive possession statute, it has not done so. Thus, "judicial use of a general possession statute to assert the broader liability usurps the legislature's proper function."[239] Recently, the Tenth Circuit refused to infer a defense to possession that was not established by § 922(g).[240] The court should likewise refrain from expanding liability in a way that is not required by the statute. The strictures of this doctrine fall exclusively within the domain of the court, and it has full authority to expand or limit the doctrine as appropriate. Several policy observations suggest that the court should limit, rather than expand, the doctrine of constructive possession.

A. Firearm Possession Is Not Inherently a Crime

First, courts must remember that firearm possession is not inherently a crime. Section 922(g) "criminalizes conduct that could otherwise be lawful based upon the status of the person engaging in that conduct."[241] Indeed, the Constitution itself secures the right to "keep and bear arms."[242] While scholars from all political stripes have argued whether this creates a personal right to carry arms or merely guarantees that states may assemble their own militias,[243] the existence of such a right certainly repudiates any sense that weapon possession is somehow inherently wrong.

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236. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 908-09 (2001) ("[I]f one expansively defines possession to include constructive possession, the criminalization of possession presumptively criminalizes everyone everywhere.").

237. Whitebread, *supra* note 14, at 765.

238. *Id.* at 761.

239. *Id.* at 765.

240. *See* United States v. Baker, No. 07-3002, 2007 U.S. App. LEXIS 28296, at *15 (10th Cir. Dec. 6, 2007) (holding that court lacked authority to infer a "Good Samaritan" defense to § 922(g) "when Congress could have created the defense had it seen fit to do so").

241. United States v. Walls, 225 F.3d 858, 865 (7th Cir. 2000).

242. U.S. CONST. amend. II.

243. *See, e.g.*, Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

Moreover, while it is common knowledge that convicted felons cannot possess firearms, many of the individuals prosecuted for firearms possession do not realize beforehand that "a misdemeanor [domestic violence] conviction can ban [them] from gun ownership for the rest of [their lives]. Even for the deer hunt."[244] Other defendants may not realize that their state misdemeanor, which carries a maximum penalty greater than two years, disqualifies them from lawfully possessing a firearm under federal law.[245] Still others may not realize they are disqualified by a state felony conviction that did not include the loss of civil rights, despite statutory language that permits possession by defendants whose lost civil rights are subsequently restored.[246] For defendants who did not even realize they could not lawfully possess a firearm, it adds insult to injury to allow the government to convict them of possessing a firearm they never touched or even intended to touch.[247]

Aside from any misunderstanding about the statutory scheme, constructive possession extends liability in a way that can be counterintuitive to defendants. One client charged under § 922(g) admitted that he saw a friend put a gun between the driver and passenger seat when my client was a passenger in the friend's car. He could not understand how he could be charged with possessing the firearm if he never touched the gun or intended to touch the gun. Those who realize they are not allowed to possess a firearm may conscientiously avoid touching a firearm only to discover that they have constrictively possessed a weapon merely by moving into a position where they have access to it. It may well be that the facts of a case discredit a defendant's claim that he was near the gun but had no intention of possessing it. However, the law must protect those who are, in fact, innocent without fear that a known felon *might* take possession of a gun he does not currently have and *might* then use it to commit a violent crime.

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244. *Domestic Violence: Feds Can Take Away Violator's Gun—For Life*, Ogden Standard Examiner (Oct. 27, 2004).

245. 18 U.S.C.A. § 921(a)(20)(B) (2008); Logan v. United States, 128 S. Ct. 475, 479 (2007) ("An offense classified by a State as a misdemeanor . . . may qualify . . . as a predicate for a felon-in-possession conviction under § 922(g)[] only if the offense is punishable by more than two years in prison."). On the flip side, some state felonies do not qualify as felonies for purpose of felon in possession. United States v. Hill, No. 07-3034, 2008 WL 134207 (D. Kan. Jan. 15, 2008) (holding that Kansas conviction was not a felony because defendant could never have received a sentence greater than one year).

246. *Logan*, 128 S. Ct. at 479 (holding that "the § 921(a)(20) exemption provision [for one whose rights are restored] does not cover the case of an offender who retained civil rights at all times, and whose legal status, postconviction, remained in all respects unaltered by any state dispensation").

247. *Cf.* United States v. Chavez-Diaz, 444 F.3d 1223, 1230 (10th Cir. 2006) (acknowledging the possibility that "circumstances may arise where a defendant's ignorance of the law may constitute a mitigating sentencing factor"); United States v. Barker, 546 F.2d 940, 965 n.31 (D.C. Cir. 1976) (stating that "ignorance of law may be considered by the court in mitigation of punishment"). *But see* United States v. Yu, 954 F.2d 951, 956 (3d Cir. 1992) (Becker, J., dissenting) (recognizing that ignorance based on cultural differences may warrant a sentencing reduction but "that a defendant who is or should be familiar with this country's laws and traditions may not invoke ignorance . . . to obtain a reduced sentence").

B. Federal Firearm Charges Carry Harsh Penalties

Second, it is important to remember that firearm cases in the federal system frequently receive lengthy punishments. In general, a felon convicted of carrying a firearm faces a sentence of up to 10 years.[248] However, firearm statutes are subject to severe mandatory minimum sentences, ranging from five years to life.[249] Under 18 U.S.C. § 924(c), if that gun was possessed "in furtherance of any [crime of violence or drug trafficking crime]," the defendant is subject to a mandatory sentence of 5 or 25 years, in addition to any other sentence he might receive.[250]

The Armed Career Criminal Act (ACCA)[251] replaces the 10-year maximum with a 15-year mandatory minimum for defendants with three or more prior drug trafficking or violent felonies.[252] In contrast to § 924(c), which creates a separate crime for situations where guns are linked with crimes of violence or drug trafficking crimes, the ACCA is a sentencing enhancement. Thus, the conduct at issue is identical to any other firearm possession case—the only difference is the status of the offender. Because such lengthy sentences can be grossly disproportionate to a defendant's conduct, the courts should narrow rather than expand liability under these provisions.[253]

C. Limits on Prosecutorial Discretion

In response to these concerns, one might argue that unjust convictions and excessive sentences will be avoided by prosecutors who decide what cases to bring. Indeed, the Tenth Circuit recently rejected a defendant's attempt to impose an intent requirement on actual possession, reasoning in part that "if the safeguard against liability . . . is not provided by the statute, it is found in the exercise of sound prosecutorial discretion."[254] Unfortunately, prosecutorial discretion may not prevent prosecutions in the situations described above, and it certainly does not pre-

248. 18 U.S.C.A. § 924(a)(2) (2008).

249. Bernard Harcourt, *Introduction: Guns, Crime, and Punishment in America*, 43 ARIZ. L. REV. 261, 261 (2001).

250. It is not uncommon for § 924(c) prosecutions to be based on constructive possession theories. *See, e.g.*, United States v. Ruiz, 462 F.3d 1082, 1090 (9th Cir. 2006) (reversing § 924(c) conviction because government failed to establish a positive link between the defendant and the charged weapons). In United States v. Angelos, 433 F.3d 738 (10th Cir. 2006), which has received wide publicity for the 55-year sentence handed down to a first-time convict, 25 years of the sentence are attributable to a constructive possession charge. *Id.* at 754.

251. § 924(e).

252. *Id.*

253. *Cf. Ruiz*, 462 F.3d at 1089 (citing "the mandatory nature of the sentence imposed for a violation of § 924(c)" in support of its finding that the government had not established constructive possession).

254. United States v. Baker, 508 F.3d 1321, 1327 (10th Cir. 2007).

vent prosecutions where the punishment grossly outweighs the crime.[255] A number of factors may account for this.

For one thing, because the ACCA is a sentencing enhancement, a prosecutor may not realize at the time of the indictment that a simple possession charge will result in a mandatory 15-year sentence. The ACCA is triggered by a defendant's prior criminal record, and it is well settled that this prior record need not be charged in the indictment or found by a jury.[256] Thus, it is possible for the prosecutor to learn from a Pre-Sentencing Report (PSR) that a particular defendant faces a 15-year mandatory minimum sentence. By this time, it will typically be too late for a defendant to try to avoid the harsh mandatory minimum by having a trial.[257]

Still, a prosecutor who knows that a defendant faces a 15-year mandatory minimum may be obligated to press charges anyway, despite the fact that such a sentence would be grossly disproportional to the charged conduct. In 2003, Attorney General John Ashcroft instituted a charging policy memorandum that required federal prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case," subject to a handful of exceptions.[258] Under this policy, "[t]he most serious offense or offenses are those that

255. *See, e.g., id.* (upholding conviction and resulting 235-month sentence of a convicted felon who picked up abandoned ammunition to prevent trick-or-treaters from getting it and had it in his possession for only 10 minutes while he tried to take it to the police); *Angelos*, 433 F.3d 754 (10th Cir. 2006) (affirming 55-year sentence for firearms possession in connection with drug trafficking); United States v. Angelos, 345 F. Supp. 2d 1227, 1243-47 (D. Utah 2004) (comparing 55-year sentence for firearms possession in connection with drug trafficking with significantly lighter penalties for more serious crimes); United States v. Pikyavit, No. 2106-CR-407 (D. Utah Apr. 26, 2007) (imposing mandatory 15-year sentence for Native American defendant who lived in deceased parents' home where bullets had been left by family members after years of deer hunting). I represented Pkyavit at trial.

256. *See, e.g., Baker*, 508 F.3d at 1327-30.

257. Although some would argue that a defendant should be aware of what prior convictions he has that might trigger a mandatory minimum under the ACCA, the definitions for crimes of violence and drug trafficking offenses are very technical and have been the source of much litigation at all levels. This Term alone, the United States Supreme Court has already heard three cases arguing technical aspects of the ACCA. *See* Logan v. United States, 128 S. Ct. 475, 479 (2007) ("An offense classified by a State as a misdemeanor . . . may qualify . . . as a predicate for a felon-in-possession conviction under § 922(g)[] only if the offense is punishable by more than two years in prison."); United States v. Rodriguez (06-1646) (asking whether a prior state conviction that carried a higher penalty under a separate rescidivist statute qualified defendant for an enhanced penalty under ACCA); United States v. Begay, (06-1153) (asking whether a prior conviction for felony driving under the influence of alcohol was a crime of violence under ACCA). Thus, it is unreasonable to expect an untrained defendant to understand the full ramifications of his criminal record, and criminal records provided to counsel in discovery are sometimes incomplete. One way to avoid discovering that a defendant qualifies for ACCA enhancement only after he has already pleaded guilty is to rely on a pre-plea PSR. Anecdotally, it appears that pre-plea PSRs are common practice in some districts but infrequent in others.

258. Memorandum from Attorney General John Ashcroft to all Federal Prosecutors (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. The memorandum further defined when a charge is "readily provable." A "charge is not 'readily provable' if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial." *Id.*

generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence."[259] Although "charges should not be filed simply to exert leverage to induce a plea," the policy constricted productive plea discussions because "[o]nce filed, the most serious readily provable charges may not [generally] be dismissed."[260] Under this policy, a line prosecutor may be obligated to bring the "readily provable" charges discussed above and prohibited from dismissing such charges in a plea agreement.

Finally, an expansive doctrine lends itself to misuse of prosecutorial discretion because it "creates a system of selective law enforcement."[261] Professor Whitebread writes:

> The primary utility of the doctrine arises in the group arrest context. In a situation where the police arrest several people in one apartment but cannot show actual possession by any one of them, the doctrine allows the prosecutor to select those whom he will charge and those whom he will not. Such choices are neither uniform nor consistent. They are either based on the irrelevant fact of ownership of the premises or the fortuitous circumstance of proximity, or they flow from the prosecutor's attitude toward drug users and the particular drug.[262]

Or, as seen here, they flow from the prosecutor's attitude towards firearms.[263]

Ultimately, it seems unlikely that prosecutorial discretion will effectively prevent the injustices described here.

IV. RECOMMENDATIONS

In light of these considerations, three recommendations are in order: (1) Require proof of intent in constructive possession cases; (2) Further develop the nexus requirement and correct the unfair practice of replacing the nexus requirement with proof of knowledge and access; and (3) Recognize that a person's intent regarding the weapon may be a mitigating factor not accounted for by the Guidelines.

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259. *Id.*
260. *Id.*
261. Whitebread, *supra* note 14, at 765.
262. *Id.* at 765-766.
263. In a training for state law enforcement officers, one federal prosecutor asked the officers to "get their domestic violence cases with guns moved from state court to federal court, where the sentence can be prison instead of jail time." *Domestic Violence, supra* note 244. He said, "We want more of these cases. We're not getting enough. Do it because it's fun. It's fun to send these guys to prison. Sentences in federal prison are listed in months. When you say 84 months, these . . . guys throw up. I love it. It scares them." *Id.*

A. Require Proof of Intent

The first recommendation is for courts to require proof of intent in constructive possession cases. This recommendation applies first in the district court. Although the Tenth Circuit indicated in *Jameson* that intent is not required, in *United States v. Zink* it specifically affirmed a constructive possession instruction that included an intent requirement: "A person who although not in actual possession knowingly has both the power *and the intention* at a given time to exercise dominion or control over a thing either directly or indirectly or through another person or persons is then in constructive possession of it."[264] On appeal, the Tenth Circuit called this a "stock instruction on this issue which has been affirmed many times."[265] As recently as 2004, the court has affirmed the use of this instruction.[266] Thus, district courts should exercise their discretion at sentencing by requiring evidence of intent in constructive possession cases.[267]

In the end, however, it is not enough that district judges have discretion to give such an instruction. Until they are *required* to give such an instruction, there will be no sure protection for individuals who cross paths with some contraband. Thus, it is up to the Tenth Circuit to join every other circuit in the country and recognize that constructive possession requires proof of a defendant's intention to exercise control or dominion over the object.[268]

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264. United States v. Zink, 612 F.2d 511, 516 n.1 (10th Cir. 1980) (emphasis added).

265. *Id.* at 516.

266. United States v. Lopez, 372 F.3d 1207, 1211 (10th Cir. 2004).

267. One puzzle for defendants who claim they never intended to exercise dominion or control over a gun is whether they should assert their theory of the case at trial or simply plead guilty. On the one hand, they would like to tell the jury that they never intended to touch the gun. However, a defendant who goes to trial loses the benefit of a guideline reduction for pleading guilty. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2003). To then get to that point only to have the district court deny an intent instruction, knowing that the Tenth Circuit will affirm, adds insult to injury. Where a district court judge is inclined to refuse an intent instruction, one approach may allow defendants to preserve the legal issue for appeal while also receiving the reduction for acceptance of responsibility. In contrast to the usual practice of arguing jury instructions on the eve of trial, defense counsel might file a motion with the court prior to the motion cutoff, requesting a specific jury instruction on constructive possession. If the district court agrees to give an intent instruction, the defendant may decide to give up the reduction for accepting responsibility in exchange for the chance to tell his side of the story. If the district court denies such a motion, the defendant may ask to enter a conditional plea, preserving the issue for appeal. If this request is denied, a trial undertaken only to preserve a legal issue for appeal should not disqualify him from the reduction for acceptance of responsibility. The Guidelines make clear that "[c]onviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction" where a defendant "challenge[s] . . . the applicability of a statute to his conduct." *Id.* at cmt. n.2. Under such circumstances, a defendant may do well to stipulate to knowledge and access and point out that because he did not intend to possess the gun, the statute does not apply to him. Because the crux of the jury instruction request and the resultant trial would be simply to preserve the argument that the statute did not apply to his conduct, he should receive acceptance.

268. Because a Tenth Circuit panel has expressly rejected any intent requirement, this may be done only by the en banc court. United States v. Meyers, 200 F.3d 715, 720 (10th Cir. 2000). In the Tenth Circuit, this can happen in a variety of ways. The most well-known way is to seek rehearing en banc following an adverse ruling. *Id.* Litigants should also be aware that a Tenth Circuit panel

Consistent with such a holding, the court should also modify its pattern jury instructions to require a showing of intent. One easy solution would be to simply add intent language to the current instruction as follows: "A person who, although not in actual possession, knowingly has [both] the power [*and the intention*] at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it."[269]

B. Proof: Enforce Nexus Requirement

As discussed above, *Ledford* and *Jameson* weakened the nexus requirement by equating it with knowledge and access.[270] Thus, the second recommendation is that courts give greater content to the nexus requirement. This recommendation can be done in two ways.

First, whatever else a nexus might entail, courts should recognize that there is no nexus unless the defendant intends to exercise dominion or control over the object. One way to do this might be to modify the pattern jury instructions as follows:

> In the situation where the object is found in a place (such as a room or car) occupied by more than one person, you may not infer control over the object based solely on joint occupancy. Mere control over the place in which the object is found is not sufficient to establish constructive possession. Instead, in this situation the government must prove some connection between the particular defendant and the object. *As part of this connection, the government must prove that the defendant knowingly had the power and the intention to exercise dominion or control over the object.*[271]

The Ninth Circuit has required both a nexus and evidence of intent:

> To prove constructive possession, the government must prove a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised dominion and control over the firearms. In the more difficult situation where the premises are shared by more than one person, the Ninth Circuit has found that if a party has knowledge of the weapon and both the power and the intention to exercise dominion and control over it, then he has constructive possession. Mere proximity to contraband, presence on

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"may overrule a point of law established by a prior panel after obtaining authorization from all active judges on the court." *Id.* at 721. This is often done through an "en banc footnote," a footnote stating that the opinion has been circulated to all active judges on the court and that all judges agree the prior opinion should be overturned. *See, e.g.*, United States v. Atencio, 476 F.3d 1099, 1105 n.6 (10th Cir. 2007).

269. *See* TENTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.31 (2006). With the inserted language, this instruction is identical to the version initially proposed in the Tenth Circuit. *See supra* note 150 and accompanying text.

270. *See supra* notes 133-68 and accompanying text.

271. *See* TENTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.31 (italicized language added).

> property where it is found and association with a person or persons having control of it are all insufficient to establish constructive possession.[272]

In addition to clarifying legal standards for this nexus, courts must take this nexus requirement more seriously in future cases. District courts should enter judgments of acquittal, and the Tenth Circuit should reverse convictions where the connection is as tenuous as it was in *Jameson* and *Blue*. Allowing such convictions to stand repudiates the longstanding principle that mere proximity is not enough to convict.

C. Sentencing: Recognize Mitigating Value of Intent

Finally, courts should recognize that a defendant's intent regarding the firearm may justify a sentence below the applicable guideline range. A defendant's intent with regard to the charged firearm is highly relevant to assessing an appropriate sentence.[273] For example, a constructive possession defendant in the Tenth Circuit who never intended even to touch the gun should be punished less severely than a gang member who was heading to a drug deal with a gun tucked into his waistband.

The Guidelines reflect the relevance of intent by imposing a 4-level increase where the defendant "possessed . . . any firearm . . . with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense."[274] On the flip side, the Guidelines provide a 6-level decrease where the weapons were possessed for sporting purposes only.[275]

However, this reduction may not be broad enough in two regards. First, while the sporting use rationale presumably applies to all defendants, the decrease does not. Certain defendants—primarily those with longer criminal records—cannot receive this reduction.[276] Second, the Guidelines do not include a decrease for defendants whose intent regarding the gun may be otherwise provably harmless.[277] This aspect of the current Guidelines is particularly problematic in the Tenth Circuit where a defendant may not have intended to touch the gun at all. Of course, many defendants who try to make such a claim will understandably have

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272. United States v. Carrasco, 257 F.3d 1045, 1049 (9th Cir. 2001) (internal quotation marks and citations omitted).

273. *See, e.g.*, United States v. Sanders, 449 F.3d 1087, 1090-91 (10th Cir. 2006) (discussing how defendant's manifest purposes regarding the rifle he possessed impacted the severity of his sentence and noting that "[o]ne can have a purpose for possessing a firearm before actually using the firearm for that purpose").

274. U.S. SENTENCING GUIDELINES MANUAL (USSG) § 2K2.1(b)(6) (2007).

275. USSG § 2K2.1(b)(2).

276. *Id.*

277. *See, e.g.*, United States v. Herron, 432 F.3d 1127 (10th Cir. 2005) (holding that mandatory application of the Guidelines was not plain error in ACCA case where defendant helped his girlfriend buy a gun for personal protection, showed her how to shoot the gun, and taught her how to clean it).

proof problems. But the burden is theirs,[278] and a defendant who can credibly claim that he did not intend to possess the charged firearm should receive a lower sentence.

Fortunately, the Guidelines themselves acknowledge that a district court is authorized to impose a sentence below the guideline range if a mitigating factor that was "not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines . . . should result in a sentence different from that described."[279] The Guidelines continue: "A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense."[280] Ordinarily, a defendant guilty of knowingly possessing a firearm intended to possess the weapon. Thus, a defendant who pleads guilty to possessing a weapon he never intended to touch seems to fall within the category whose offense is substantially below the ordinary level.

For other defendants who intended to possess the firearm for sporting purposes but are disqualified based on their prior criminal record, a nonguideline sentence may still be appropriate. One district court recently noted that sporting use "is something that the Guidelines take into account in other areas, but for some reason do not take into account in this particular area [where the defendant's prior record disqualifies him from the reduction.]"[281] The court relied on this fact among other mitigating facts as ground for imposing a nonguideline sentence.[282] In similar fashion, the Tenth Circuit should recognize that where the Guidelines do not adequately reflect a defendant's intent regarding the weapon, a sentence below the guideline range is appropriate.

CONCLUSION

None of these recommendations marks a drastic expansion of the law. As discussed above, the Tenth Circuit has already recognized that a district court may properly instruct a jury that constructive possession requires proof of intent to exercise control or dominion, and it is well established that the government must show a nexus to establish its case. But for defendants like Ben Cecala, Chrisopher Jameson, or any other

278. *Cf. Sanders*, 449 F.3d at 1090 (stating that defendant has the burden of proving that he qualifies for a sporting use reduction).

279. USSG § 5K2.0(a)(1)(A).

280. USSG §5K2.0(a)(3).

281. United States v. Pikyavit, No. 2:06-CR-407, at 24.

282. *Id.* (imposing nonguideline sentence based on (1) the fact that defendant possessed only bullets, (2) the fact that the bullets were used only by others for sporting purposes, and (3) the evidence in the case was discovered as a result of the defendant's request that police investigate an assault where he was a victim).

innocent bystanders who happen to find themselves in the presence of contraband, these protections are necessary to avoid liability for "mere proximity" to the contraband.

As seen here, the Tenth Circuit has unfairly expanded the doctrine of constructive possession. Although its recent cases continue to proclaim that "mere proximity" is not enough to establish possession and that a "nexus" is required between the defendant and a firearm,[283] its holdings invalidate these proclamations. By transforming the sufficiency of "knowledge and access" into the touchstone of constructive possession, the Tenth Circuit has eliminated the nexus requirement and broadened the possession to include many situations where individuals would never have touched the object in question. It has defined "possession" in such a way that even a person who is conscientiously trying to live within the limits of the law may unwittingly "possess" an item just by discovering he has access to it. Such breadth is untenable.[284] The Tenth Circuit should join its sister circuits and recognize that possession turns on "the possessor's manifested intent to exercise such control over the object"[285] and require proof of intent to possess in constructive possession cases. It should also conscientiously enforce the nexus requirement and recognize that in the world of harsh federal firearm sentences, a defendant's intent may be the basis for a reduced sentence.

283. *See, e.g.*, *United States v. Ramirez*, 479 F.3d 1229, 1257 (10th Cir. 2007); *United States v. Mendez*, No. 06-3282 (D. Kan. Jan. 24, 2008).

284. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, HARV. L. REV. 457, 459 (1897) (stating that the law must enable even a "bad man" to "predict" the "material consequences" of his conduct, i.e., whether his conduct is legal or not).

285. Whitebread, *supra* note 14, at 759.