

## Appendix A

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL PERRYMAN, Defendant-Appellant.**  
**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**  
**20 F.4th 1127; 2021 U.S. App. LEXIS 37212**  
**No. 20-1453**  
**December 16, 2021, Decided**  
**November 1, 2021, Argued**

**Editorial Information: Prior History**

{2021 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:18-cr-00317 - James P. Hanlon, Judge. United States v. Perryman, 2020 U.S. Dist. LEXIS 8336, 2020 WL 263615 (S.D. Ind., Jan. 17, 2020)

**Counsel** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Pamela Sarah Domash, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Evansville, IN; Lindsay Karwoski, Attorney, Bob Wood, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Indianapolis, IN.

For MICHAEL PERRYMAN, Defendant - Appellant: India R. Lane, Attorney, LAW OFFICE OF INDIA LANE, Indianapolis, IN.

**Judges:** Before HAMILTON, SCUDDER, and ST. EVE, Circuit Judges.

**CASE SUMMARY** Defendant was properly convicted of possession of fentanyl with intent to distribute under 21 U.S.C.S. § 841(a)(1) because reasonable jury could conclude that he constructively possessed drugs by his exclusive control over drugs, he confessed to officers that drugs were his, and drugs were found in home where defendant resided alone.

**OVERVIEW: HOLDINGS:** [1]-Defendant was properly convicted of possession of fentanyl with the intent to distribute under 21 U.S.C.S. § 841(a)(1) because a reasonable jury could conclude that he constructively possessed the drugs by his exclusive control over the drugs, he confessed to the officers that the drugs were his, and the drugs were found in the home where defendant resided alone; [2]-Defendant was properly convicted of possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C.S. § 924(c)(1) because the loaded AR-15 was located near large quantities of fentanyl; [3]-Defendant was properly convicted of possessing a firearm while a convicted felon under 18 U.S.C.S. § 922(g)(1) because the evidence was more than sufficient to enable a rational jury to find that defendant constructively possessed the firearm discovered in the closet of the home where he lived alone.

**OUTCOME:** Judgment affirmed.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Appeals > Briefs***

***Criminal Law & Procedure > Counsel > Right to Self-Representation***

The appellate court has discretion to reject a pro se brief without considering the issues argued when a defendant is represented by counsel.

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***Criminal Law & Procedure > Trials > Motions for Acquittal***

***Evidence > Procedural Considerations > Burdens of Proof > Allocation***

***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Sufficiency of Evidence to Convict***

The appellate court reviews the denial of a motion for acquittal under Fed. R. Crim. P. 29 de novo. A jury verdict will only be overturned if, after viewing the facts in the light most favorable to the government, there was insufficient evidence to convict. The defendant bears the burden of demonstrating that no reasonable jury could find guilt beyond a reasonable doubt. Such a challenge leads to a reversal only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt. This challenge for the defendant has been described as an uphill battle, a momentous task, a heavy burden, and a nearly insurmountable hurdle.

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

***Criminal Law & Procedure > Scienter > Knowledge***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements***

21 U.S.C.S. § 841(a)(1) criminalizes the possession of a controlled substance, such as fentanyl, with the intent to distribute. § 841(a)(1), 841(b)(1)(B)(2). To convict, the government must prove that the defendant knowingly possessed fentanyl with the intent to distribute and knew that fentanyl was a controlled substance. For § 841(a)(1), possession can be either actual or constructive.

***Evidence > Procedural Considerations > Circumstantial & Direct Evidence***

***Evidence > Inferences & Presumptions > Inferences***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession***

Constructive possession is a legal fiction whereby a person is deemed to possess contraband even when he does not actually have immediate, physical control of the object. The defendant must have both the power and intention to exercise dominion and control over the object, either directly or through others, requiring some connection between the defendant and the illegal drugs. That connection can come in one of two ways. The first way is where the defendant alone maintains exclusive control over the property where the contraband was discovered, which allows the logical inference that the defendant possesses the drugs located there. The second way of showing constructive possession, absent the defendant exercising exclusive control over the property, requires a substantial connection to the location where contraband was seized, one sufficient to establish the nexus between that person and any contraband. In either case, the government can show constructive possession through direct or circumstantial evidence.

***Evidence > Inferences & Presumptions > Inferences***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession***

Exclusive control over premises allows the jury to infer the knowledge and intent to control objects within those premises.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession***

Whether a person maintains exclusive control over a residence generally turns on the number of live-in residents, requiring only one, not the number of visitors, the number of signees on the lease, or even the number of people with keys to the home.

***Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations***

The appellate court affords great deference to the jury's factual findings and credibility determinations.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements***

***Criminal Law & Procedure > Criminal Offenses > Weapons > Trafficking > Elements***

Under 18 U.S.C.S. § 924(c)(1)(A), a defendant cannot possess a weapon in furtherance of a drug trafficking crime.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements***

The "in furtherance" of element in 18 U.S.C.S. § 924(c)(1)(A) is fact intensive. Courts frequently list factors that seem relevant and leave it to the trier of fact to apply them to the facts of the case at hand. These factors include the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found. No single factor determines the outcome; this inquiry is holistic. It can be easier to determine furtherance by a holistic analysis than by dissecting the issue into parts.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

Federal law prohibits certain felons from possessing a firearm. 18 U.S.C.S. § 922(g)(1). The government must establish four elements to prove a defendant guilty of this charge: (1) the defendant was convicted of a crime punishable by more than one year; (2) the defendant knowingly possessed a firearm; (3) the defendant knew of his felon status; and (4) the gun possessed by the felon had been in or affected interstate commerce.

***Evidence > Inferences & Presumptions > Inferences***

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession***

18 U.S.C.S. § 922(g) covers possession in every form, whether actual or constructive. As explained above, constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object. A jury can infer constructive possession when the defendant exercises exclusive control over the premises. There are two forms of constructive possession, exclusive control being the first and more straightforward. A person who owns a home controls the objects within, whether drugs or illegal firearms. Third-party access to a home does not negate the inference that the defendant had access to the firearm as well.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***

Where a defendant resides in the home, there is sufficient evidence to establish that he had constructive possession of the firearms seized there. Constructive possession can be established by a showing that the firearm was seized at the defendant's residence.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***

Owning an item is different than possessing it. By its terms, 18 U.S.C.S. § 922(g) does not prohibit a

felon from owning firearms. Rather, it interferes with a single incident of ownership, one of the proverbial sticks in the bundle of property rights, by preventing the felon from knowingly possessing his (or another person's) guns. Courts do not look to a weapon's paperwork. A defendant need only possess a gun to be found guilty under § 922(g)(1).

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses  
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

The appellate court reviews a direct implication of the constitutional right to confrontation de novo. Absent any direct implication though, the appellate court reviews a limitation on cross-examination for abuse of discretion.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation  
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Evidence > Testimony > Examination > Cross-Examination > Scope***

The Confrontation Clause protects the right of a criminal defendant to be confronted with the witnesses against him. U.S. Const. amend. VI. The right to confront a witness also includes the right to cross-examine that person for any bias or motivation to lie. If the defendant's cross-examination, however, does not implicate a core confrontational value, exposing motivation, bias, or incentive to lie, then the constitutional concerns are diminished. The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. District court judges otherwise retain wide latitude to impose reasonable limits on cross-examination based on concern about matters including harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant, all without running afoul of the Confrontation Clause.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation  
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation  
Criminal Law & Procedure > Witnesses > Impeachment  
Criminal Law & Procedure > Witnesses > Credibility***

The Confrontation Clause does not give a defendant a boundless right to impugn the credibility of a witness.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation  
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion  
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation***

Where a core confrontational value was not implicated, the district court properly exercises its wide latitude under the Confrontation Clause to exclude the evidence. When the defendant's argument indirectly implicates a core value, the appellate court asks only whether the district court abused its discretion under the Confrontation Clause in limiting a defendant's cross-examination.

## Opinion

Opinion by: ST. EVE

## Opinion

St. Eve, *Circuit Judge*. Law enforcement agents searched Michael Perryman's home and found drugs, baggies, a digital scale, and a loaded AR-15 rifle. Perryman was then charged with drug and firearm offenses. At trial, he sought to impeach an officer's truthfulness by introducing a fifteen-year-old reprimand regarding an unrelated case, which the district court precluded him from doing. A jury convicted him on all counts. On appeal, Perryman maintains that the evidence was insufficient to convict him on any count and that the district court's exclusion of evidence reporting an incident unrelated to the case violated the Confrontation Clause. We reject{2021 U.S. App. LEXIS 2} both arguments and affirm the conviction.

### I. Background

In Spring 2018, as part of a large antidrug operation, the Drug Enforcement Administration ("DEA") obtained a search warrant for Perryman's home in Indianapolis. A team of federal and local law enforcement agents arrived at the property, just as Perryman was departing in his car. After stopping Perryman and reading him his *Miranda* rights, the agents searched the home, which had a master suite that consisted of a bedroom, bathroom, and a large closet accessible only through the bathroom. In the master bathroom, on a shelf on top of the vanity next to the closet door, they found fentanyl, baggies, and a digital scale. In the closet, there was a loaded AR-15 rifle, three to four steps away from the fentanyl, along with men's shoes and clothes.

Perryman, with the agents' permission, called his then-girlfriend, Rasheema Moore, who arrived soon after. Although she lived elsewhere, she had signed the lease for the home. Moore said that the drugs, money, and gun were not hers.

The agents read Perryman his *Miranda* rights for a second time after the search, and he agreed to talk. He admitted that the drugs were his, then provided the agents{2021 U.S. App. LEXIS 3} with the name of his drug supplier. He did not, however, claim ownership of the gun. The rifle "belonged to a girlfriend," Maurita Thomas, who had originally bought the weapon with Perryman at a gun show. The pair had lived together at different places over the years in homes leased under Thomas's name. And they occasionally went shooting together. When Perryman relocated to the home that agents would later search, the rifle went with him. The two, though, spoke regularly. During one post-arrest conversation, Perryman asked Thomas to lie about the gun. He wanted her to say that she took the weapon from one house to the other. She initially complied, telling an investigator and defense counsel that she moved the weapon. But once under oath, she admitted those statements were untrue; she lied "to protect Michael."

Perryman was indicted on charges of possessing fentanyl with intent to distribute, 21 U.S.C. § 841(a)(1), possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1), and possessing a firearm while a convicted felon, *Id.* § 922(g)(1).

Prior to trial, the government moved in limine to exclude questioning concerning the disciplinary record of Indianapolis Metropolitan Police Department Sergeant Clifton Jones,{2021 U.S. App. LEXIS 4} who participated in the search of Perryman's home. The disciplinary offense stemmed

from a complaint about Officer Jones's involvement in an unrelated investigation.<sup>1</sup> The Disciplinary Board issued a "Written Reprimand" based on its review. Perryman wished to impeach Officer Jones's credibility using this incident and focused his arguments on evidentiary points, adding in one sentence though that "[he] should be able to exercise his rights under the Confrontation Clause." The district court, ruling only on the evidentiary question, granted the government's motion in a sealed entry, concluding that any potential probative value of the evidence was substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusing the issues.

The trial lasted two days. Near the end of the trial, Perryman again sought to impeach Officer Jones with the disputed evidence. The government objected, and the district court excluded the evidence. After the close of the government's case, Perryman moved for acquittal under Rule 29, which the district court denied. The jury convicted him on all counts. The district court sentenced Perryman to 228 months in prison, followed by five years of supervised release.

## **II. (2021 U.S. App. LEXIS 5) Discussion**

Perryman argues that the evidence was insufficient to convict him on any count and that excluding Officer Jones's disciplinary action violated the Confrontation Clause.<sup>2</sup> We address each argument in turn.

### **A. Sufficiency of the Evidence**

We review the denial of a motion for acquittal under Rule 29 de novo. *United States v. Johnson*, 874 F.3d 990, 998 (7th Cir. 2017). A jury verdict will only be overturned "if, after viewing the facts in the light most favorable to the government, there was insufficient evidence to convict." *United States v. Jett*, 908 F.3d 252, 273 (7th Cir. 2018). The defendant bears the burden of demonstrating that no reasonable jury could find guilt beyond a reasonable doubt. *United States v. Tantchev*, 916 F.3d 645, 650 (7th Cir. 2019); *see also United States v. Warren*, 593 F.3d 540, 546 (7th Cir. 2010) ("Such a challenge leads to a 'reversal only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt.'" (quoting *United States v. Moore*, 572 F.3d 334, 337 (7th Cir. 2009))). We have described this challenge for the defendant as an "uphill battle," *United States v. Christian*, 342 F.3d 744, 750 (7th Cir. 2003), a "momentous task," *United States v. Lawrence*, 788 F.3d 234, 239 (7th Cir. 2015), a "'heavy' burden," *Jett*, 908 F.3d at 273 (citation omitted), and a "nearly insurmountable" hurdle, *id.*, one which Perryman cannot overcome for any count.

#### **1. Possession of a Controlled Substance**

Section 841(a)(1) criminalizes the possession of a controlled substance, such as fentanyl, with the intent to distribute. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(2). To convict, the government must prove that the defendant knowingly possessed {2021 U.S. App. LEXIS 6} fentanyl with the intent to distribute and knew that fentanyl was a controlled substance. *See, e.g., United States v. Brown*, 973 F.3d 667, 697-98 (7th Cir. 2020) (marijuana); *United States v. Campbell*, 534 F.3d 599, 605 (7th Cir. 2008) (cocaine). Perryman only disputes whether he possessed the fentanyl. For § 841(a)(1), possession can be either actual or constructive. *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012). In this case, the government relies on constructive possession.

"Constructive possession," we have said, "is a legal fiction whereby a person is deemed to possess contraband even when he does not actually have immediate, physical control of the object." *Id.* The defendant must have both the "power and intention to exercise dominion and control over the object, either directly or through others," requiring some connection between the defendant and the illegal drugs. *Id.* That connection can come "in one of two ways." *Id.* The first way is where the defendant alone maintains "'exclusive control' over the property where the contraband was discovered," which

allows the logical inference that the defendant possesses the drugs located there. *Id.* (quoting *United States v. Castillo*, 406 F.3d 806, 812 (7th Cir. 2005)). The second way of showing constructive possession, absent the defendant exercising exclusive control over the property, requires "'a substantial connection' to the location where contraband was seized," {2021 U.S. App. LEXIS 7} one "sufficient to establish the nexus between that person and [any contraband]." *United States v. Morris*, 576 F.3d 661, 667 (7th Cir. 2009). In either case, the government can show constructive possession through direct or circumstantial evidence. *Lawrence*, 788 F.3d at 240.

Here, a reasonable jury could easily conclude that Perryman constructively possessed the fentanyl by his exclusive control over the drugs. Perryman confessed that the drugs were his, telling the agents immediately that the drugs belonged to him and even providing them with the name of his drug supplier. Perryman claims that this confession was false. But the government offered uncontroverted testimony about its veracity from the task force officer who interviewed Perryman after the search and heard his confession. The jury was entitled to credit that testimony in arriving at its verdict. Perryman even concedes, in his brief before this Court, that "[t]he jury could've relied on the testimony from [the testifying officer] that Mr. Perryman stated that everything in the condo is his except the rifle."

Additional evidence further links Perryman with the drugs. The police found the fentanyl in the home where Perryman resided by himself, paid the bills, and was seen exiting when agents arrived. See {2021 U.S. App. LEXIS 8} *Griffin*, 684 F.3d at 695 ("Exclusive control over the premises allows the jury to infer the knowledge and intent to control objects within those premises ..."). The drugs were in the master suite, where Perryman slept, by a closet filled with men's clothes. Perryman submits that because other people have stayed over, even leaving toothbrushes and feminine hygiene products behind, he could not have been the true possessor. But a person can still constructively possess drugs while living in a space visited by others. Whether a person maintains "exclusive control" over a residence generally turns on the number of live-in residents-requiring only one-not the number of visitors, the number of signees on the lease, or even the number of people with keys to the home. Cf. *Lawrence*, 788 F.3d at 240 ("If a defendant *lives alone* in an apartment and a search reveals contraband, proving constructive possession is relatively easy." (emphasis added)). And both Moore and Thomas, the two most frequent visitors, denied owning the drugs. Cf. *United States v. Rebolledo-Delgadillo*, 820 F.3d 870, 876 (7th Cir. 2016) ("[W]e afford great deference to the jury's factual findings and credibility determinations."). Therefore, the evidence demonstrating Perryman's possession of the drugs, combined with his confession, dooms this {2021 U.S. App. LEXIS 9} challenge.

## 2. In Furtherance of a Drug Trafficking Crime

Under 18 U.S.C. § 924(c)(1)(A), a defendant cannot possess a weapon "in furtherance of" a "drug trafficking crime." See also *United States v. Johnson*, 916 F.3d 579, 588-89 (7th Cir. 2019). Perryman argues that, assuming he committed a drug trafficking crime and possessed the firearm located in his closet, the weapon was not used "in furtherance" of any drug crime.

The "in furtherance of" element is fact intensive. *United States v. Castillo*, 406 F.3d 806, 815 (7th Cir. 2005). Courts frequently "list factors that seem relevant and leave it to the trier of fact to apply them to the facts of the case at hand." *United States v. Brown*, 724 F.3d 801, 803 (7th Cir. 2013). These factors include "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Id.* (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)). No single factor determines the outcome; this inquiry is holistic. See *id.* ("It can be



easier to determine 'furtherance' by a holistic analysis than by dissecting the issue into parts ...").

Here, sufficient evidence establishes that Perryman possessed the gun "in furtherance" of his drug crime. The gun was located three{2021 U.S. App. LEXIS 10} to four steps away from large quantities of fentanyl, in the master closet, accessible only by going through the drug-filled master bathroom, and propped up against the wall, not locked away or hidden. Expert testimony at trial explained that such close proximity suggests that the gun was used to protect the drugs. Moreover, the gun was no ordinary weapon; it was a *loaded* AR-15 rifle, a weapon outlawed in several states, which Perryman could not own under federal law. Together, this evidence more than supports the jury's verdict.

### 3. Felon in Possession of a Firearm

Federal law prohibits certain felons from possessing a firearm. 18 U.S.C. § 922(g)(1). The government must establish four elements to prove a defendant guilty of this charge: (1) the defendant was convicted of a crime punishable by more than one year; (2) the defendant knowingly possessed a firearm; (3) the defendant knew of his felon status; and (4) the gun possessed by the felon had been in or affected interstate commerce. *Id.*; *Rehaif v. United States*, 139 S. Ct. 2191, 2195-96, 204 L. Ed. 2d 594 (2019); *see also United States v. Parsons*, 946 F.3d 1011, 1014 (8th Cir. 2020). Perryman does not contest the first, third, and fourth elements. He contends only that the government failed to meet its burden for the second element, possession of a firearm.

Section 922(g) "covers possession in every{2021 U.S. App. LEXIS 11} form," whether actual or constructive.<sup>3</sup> *Henderson v. United States*, 575 U.S. 622, 626, 135 S. Ct. 1780, 191 L. Ed. 2d 874 (2015). As explained above, constructive possession "is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." *Id.* A jury can infer constructive possession when the defendant exercises exclusive control over the premises. *Griffin*, 684 F.3d at 695 (describing the two forms of constructive possession, "exclusive control" being the first and more straightforward); *see also United States v. Davis*, 896 F.3d 784, 791 (7th Cir. 2018). A person who owns a home controls the objects within, whether drugs or illegal firearms. *United States v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005). Third-party access to a home "does not negate the inference that [the defendant] had access to the firearm as well." *United States v. Villasenor*, 664 F.3d 673, 681 (7th Cir. 2011).

Here, the evidence permitted a rational jury to find that Perryman constructively possessed the weapon discovered in his closet.<sup>4</sup> Perryman lived alone in the home where the police found the weapon and, thus, controlled the premises. While others may have had access, no one else resided there, so there was never joint ownership. And, as previously noted, when a defendant alone controls a property, a jury can reasonably assume that he controls the weapons present there. *Caldwell*, 423 F.3d at 758 (holding that where the defendant resides in the home,{2021 U.S. App. LEXIS 12} there "is sufficient [evidence] to establish that he had constructive possession of the firearms seized there"); *United States v. Kitchen*, 57 F.3d 516, 521 (7th Cir. 1995) ("Constructive possession can be established by a showing that the firearm was seized at the defendant's residence." (quoting *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993))). Moreover, the weapon was in Perryman's closet, by his clothes, feet away from the drugs that he confessed to own, and in the same master suite where he slept every night. Testimony at trial revealed that Perryman brought the rifle to the house and would later ask Thomas, a previous girlfriend, to lie about that fact.

Nor does ultimate ownership of the gun matter, as Perryman contends. Owning an item is different than possessing it. *See Henderson*, 575 U.S. at 626 ("By its terms, § 922(g) does not prohibit a felon from *owning* firearms. Rather, it interferes with a single incident of ownership—one of the proverbial sticks in the bundle of property rights—by preventing the felon from knowingly *possessing* his (or

another person's) guns."). Courts do not look to a weapon's paperwork. A defendant need only possess a gun to be found guilty under § 922(g)(1). See *United States v. Katz*, 582 F.3d 749, 752 (7th Cir. 2009). Therefore, viewed in the light most favorable to the government, the evidence was more than sufficient to enable a rational jury to{2021 U.S. App. LEXIS 13} find that Perryman constructively possessed the AR-15, so his sufficiency claim fails.

## B. The Confrontation Clause

We review a direct implication of the constitutional right to confrontation de novo.<sup>5</sup> *United States v. Rivas*, 831 F.3d 931, 934 (7th Cir. 2016). Absent any direct implication though, we review a limitation on cross-examination for abuse of discretion. *United States v. Carson*, 870 F.3d 584, 597 (7th Cir. 2017).

The Confrontation Clause protects the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend. VI. The right to confront a witness also includes the right to cross-examine that person for any bias or motivation to lie. *United States v. Vasquez*, 635 F.3d 889, 894 (7th Cir. 2011); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). If the defendant's cross-examination, however, does not implicate a core confrontational value-exposing motivation, bias, or incentive to lie-then the constitutional concerns are diminished. *United States v. Hart*, 995 F.3d 584, 589 (7th Cir. 2021); see also *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) ("[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."). District court judges otherwise "retain 'wide latitude' to impose reasonable limits on cross-examination based on concern about matters including harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant, all without running afoul of the Confrontation Clause." *Rivas*, 831 F.3d at 934 (quoting{2021 U.S. App. LEXIS 14} *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Here, the proposed line of questioning into Officer Jones's unrelated disciplinary action did not implicate a core value of the Confrontation Clause. Contrary to Perryman's many assertions, Officer Jones's reprimand did not involve tampering with evidence. Rather, Officer Jones's participation in a police investigation fifteen years ago was questioned, which the Disciplinary Board decided warranted only a written warning. Perryman has not shown, nor could he, that this irrelevant and dated offense relates to his case. See *United States v. Clark*, 657 F.3d 578, 584 (7th Cir. 2011) (emphasizing that "the Confrontation Clause does not give a defendant a boundless right to impugn the credibility of a witness"). Officer Jones was not motivated to lie or harbor any bias against someone unconnected to his disciplinary incident, and Perryman was otherwise able to extensively cross-examine Officer Jones about his role in the investigation. See, e.g., *Hart*, 995 F.3d at 589-90 (noting that the defendant had "ample opportunity to impeach or discredit" the witness); *Carson*, 870 F.3d at 597 (holding that there was no error where the defendant had ample opportunity to expose motivations); *Clark*, 657 F.3d at 584 (rejecting "barely relevant" and "highly inflammatory" questioning).

Given then that a core confrontational value was not implicated, the district court{2021 U.S. App. LEXIS 15} properly exercised its "wide latitude" under the Confrontation Clause to exclude the evidence. *Van Arsdall*, 475 U.S. at 679; see also *Hart*, 995 F.3d at 589 (stating that when the "defendant's argument indirectly implicates a core value," we ask only whether the district court abused its discretion under the Confrontation Clause in limiting a defendant's cross-examination). Introducing the minor, fifteen-year-old reprimand, at best, tangentially related to truthfulness and would likely have prejudiced or confused the jury. See *United States v. Recendiz*, 557 F.3d 511,

530-31 (7th Cir. 2009). And again, Perryman already had a reasonable opportunity to cross-examine Officer Jones. Perryman's constitutional rights, therefore, were not violated.

### III. Conclusion

For these reasons, we affirm the conviction.

### Footnotes

1

Like the district court below, we decline to elaborate upon the details out of respect for Officer Jones's privacy.

2

Perryman filed a pro se brief to raise additional concerns about his sentencing. We have discretion to reject a pro se brief without considering the issues argued when a defendant is represented by counsel, see *United States v. Hunter*, 932 F.3d 610, 620 (7th Cir. 2019), and choose to do so here.

3

We need not consider the government's argument that Perryman actually possessed the rifle.

4

Perryman concedes as much, "The facts may have led the jury to convict based on constructive possession and that Mr. Perryman has a substantial connection to the home." The concession aside, the record also supports the government's case.

5

The government asserts that Perryman did not preserve this constitutional claim below, because he focused his challenge on evidentiary grounds. Perryman notes, however, that his memorandum in support of his motion to the district court stated that he "should be able to exercise his rights under the Confrontation Clause." We assume, without deciding, that his one-sentence reference preserved the issue under Federal Rule of Criminal Procedure 51(b)

## Appendix B

UNITED STATES OF AMERICA, Plaintiff Appellee, Indiana, Indianapolis v. MICHAEL PERRYMAN,  
Defendant Appellant.  
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT  
2022 U.S. App. LEXIS 2694  
No. 20-1453  
January 28, 2022, Decided

Notice:

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Opinion

{2022 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Division. James P. Hanlon,

*Judge.*

**ORDER**

On consideration of the petition for rehearing, the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing is **DENIED**.

**UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL PERRYMAN, Defendant.**  
**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS**  
**DIVISION**  
**2020 U.S. Dist. LEXIS 8336**  
**No. 1:18-cr-00317-JPH-MJD**  
**January 17, 2020, Decided**  
**January 17, 2020, Filed**

**Editorial Information: Subsequent History**

Decision reached on appeal by United States v. Perryman, 2021 U.S. App. LEXIS 37212 (7th Cir. Ind., Dec. 16, 2021)

**Counsel** {2020 U.S. Dist. LEXIS 1} For **MICHAEL PERRYMAN**, Defendant: Finis Tatum, IV, TATUM LAW GROUP, LLC, Indianapolis, IN.  
For USA, Plaintiff: Lindsay E. Karwoski, Pamela S. Domash, UNITED STATES ATTORNEY'S OFFICE (Indianapolis), Indianapolis, IN.

**Judges:** James Patrick Hanlon, United States District Judge.

**Opinion**

**Opinion by:** James Patrick Hanlon

**Opinion**

**ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL**

Mr. Perryman has filed a renewed motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Dkt. [147]. For the reasons stated below, that motion is **DENIED**.

**I.**

**Facts and Procedural Background**

The Second Superseding Indictment charged Mr. Perryman with three counts: possession with intent to distribute fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (Count 1); possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) (Count 2); and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count 3). Dkt. 89.

The Court held a jury trial on September 23-24, 2019. Dkt. 141; dkt. 142. At the close of the government's case, Mr. Perryman moved for judgment of acquittal and the Court deferred ruling on the motion until after the jury rendered a verdict. Dkt. 142. The jury reached a unanimous guilty verdict on all three counts. Dkt. 143. The Court accepted {2020 U.S. Dist. LEXIS 2} the verdict and denied Mr. Perryman's motion for acquittal. Dkt. 142.

On October 8, 2019, Mr. Perryman filed a renewed motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Dkt. 147. He contends that the evidence is insufficient to support his conviction because: (1) the government failed to prove that he possessed the drugs or the firearm; (2) the government failed to prove the quantity of the drugs; and (3) that the evidence did not support

the jury's finding that such possession was "in furtherance" of a drug trafficking crime. See dkt. 148.

## II.

### Applicable Law

Federal Rule of Criminal Procedure 29 "permits a defendant to move for a judgment of acquittal even after a guilty verdict is entered if he does not believe the evidence is sufficient to sustain a conviction." *United States v. Torres-Chavez*, 744 F.3d 988, 993 (7th Cir. 2014). "[A] defendant seeking a judgment of acquittal faces a 'nearly insurmountable hurdle.'" *United States v. Garcia*, 919 F.3d 489, 496 (7th Cir. 2019) (citing *United States v. Johnson*, 874 F.3d 990, 998 (7th Cir. 2017) (invoking chain of quotations)). A court views the evidence in a light most favorable to the government and overturns "the jury's verdict only when the record contains no evidence, regardless of how it is weighed, from which the factfinder could find guilt beyond a reasonable doubt." *Id.* at 507 (quoting *United States v. Faulkner*, 885 F.3d 488, 492 (7th Cir. 2018) (internal quotations omitted)).

## III.

### Analysis

#### A. Count 1, Possession with Intent{2020 U.S. Dist. LEXIS 3} to Distribute Fentanyl

The elements that the government was required to prove for Count 1, possession with intent to distribute fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), were (1) Mr. Perryman knowingly possessed fentanyl; (2) he intended to distribute the substance to another person; and (3) he knew the substance contained some kind of a controlled substance. Dkt. 142-1 at 22 (Final Instructions No. 21); see *United States v. Campbell*, 534 F.3d 599, 605 (7th Cir. 2008).

Mr. Perryman argues that the government did not show that he possessed the drugs as charged in Count 1. Dkt. 148 at 2. In support of this argument, Mr. Perryman contends that the drugs were not on his person and that the plate containing the drugs was not fingerprinted. *Id.* He further argues that because Rasheema Moore and Maurita Thomas stayed at the residence where the drugs were found ("the Residence"), a rational juror could have concluded that they possessed the drugs. *Id.* Mr. Perryman also contends that the government did not prove that the drugs were fentanyl, nor did it prove the quantity of the fentanyl. *Id.* at 2-3.

Possession is a broad term as it can be actual or constructive, dkt. 142-1 at 15 (Final Instruction No. 14); see e.g., *United States v. Kelly*, 519 F.3d 355, 361 (7th Cir. 2008); *United States v. Bustamante*, 493 F.3d 879, 889 (7th Cir. 2007), cert. denied, 552 U.S. 1237, 128 S. Ct. 1460, 170 L. Ed. 2d 287 (2008), exclusive or joint, dkt. 142-1 at 15{2020 U.S. Dist. LEXIS 4} (Final Instruction No. 14); see e.g., *United States v. Lawrence*, 788 F.3d 234, 246 (7th Cir. 2015), and proven through direct or circumstantial evidence, *United States v. Gilbert*, 391 F.3d 882, 886 (7th Cir. 2004). The government could establish possession by showing either that Mr. Perryman had "exclusive control" over the property where the drugs were found or that he had a "substantial connection" to the location where the drugs were found. *United States v. Davis*, 896 F.3d 784, 790 (7th Cir. 2018).

Viewing the evidence in the government's favor, a rational trier of fact could have found that the government proved the essential elements of Count 1 beyond a reasonable doubt. Ample evidence linked Mr. Perryman to the Residence. Both Ms. Moore and Ms. Thomas testified that Mr. Perryman lived in the Residence, and Ms. Moore testified that Mr. Perryman reimbursed her for rent and bills that she paid for the Residence. Mr. Perryman's name was on the Xfinity bill for service to the Residence. Agent McCormick testified that the closet in the master bedroom was filled with men's clothes, and his testimony was corroborated by photographs taken on the day of the search. See *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012); *United States v. Richardson*, 208 F.3d

626, 632 (7th Cir. 2000). This is ample circumstantial evidence to support the jury's verdict that Mr. Perryman possessed the drugs found in the master bathroom. See *United States v. Starks*, 309 F.3d 1017, 1021-22 (7th Cir. 2002) ("[T]he trier of fact is entitled to employ common{2020 U.S. Dist. LEXIS 5} sense in making reasonable inferences from circumstantial evidence.").

Mr. Perryman next contends that the evidence does not support the jury's verdict on the substance or quantity of the drugs because the government only tested part of the substance<sup>1</sup>. Dkt. 148 at 3. Rebecca Wang, a DEA forensic chemist, testified that through a series of scientific tests, she determined that fentanyl was present in the substance. As for the quantity of substance, the relative purity of the substance is irrelevant because Mr. Perryman was charged with possessing with intent to distribute a mixture or substance "containing a detectable amount" of fentanyl, and not pure fentanyl. See 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (emphasis added); *United States v. Duvall*, 272 F.3d 825, 829 (7th Cir. 2001).

There was ample evidence to support the jury's verdict on Count 1.

### **B. Count 2, Possession of a Firearm in Furtherance of a Drug Trafficking Crime**

The elements that the government was required to prove for Count 2, possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1), were (1) Mr. Perryman committed the crime of possession with intent to distribute fentanyl; (2) he knowingly possessed a firearm; and (3) his possession of the firearm was in furtherance{2020 U.S. Dist. LEXIS 6} of the possession with intent to distribute fentanyl. Dkt. 142-1 at 24 (Final Instruction No. 23); see *United States v. Brown*, 724 F.3d 801, 801-02 (7th Cir. 2013).

Mr. Perryman argues that the evidence established only that the firearm was at the Residence. Dk. 148 at 4. He asserts that there was "no 'credible evidence' that would require the jury to do anything other than speculate that the gun was used in furtherance of a drug crime based upon the testimony" of Kevin Steele. *Id.*

Viewing the evidence in the government's favor, a rational jury could have found the essential elements of Count 2 beyond a reasonable doubt. Cliff Jones testified that the drugs and digital scale were in the master bathroom. The loaded firearm was in the closet, in close physical proximity to the drugs and the scale. A reasonable juror could infer that Mr. Perryman stored the loaded firearm in his closet for the security of his drug trade. See *United States v. Huddleston*, 593 F.3d 596, 602 (7th Cir. 2010) ("in furtherance of" element satisfied where jury could have found that defendant possessed gun to protect himself and his stash and his profits); see also *United States v. Webster*, 775 F.3d 897, 906 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2368, 192 L. Ed. 2d 158 (U.S. 2015).

Furthermore, the government did not need to show that Mr. Perryman actually possessed the firearm; constructive possession was enough. See *Griffin*, 684 F.3d at 695; *Richardson*, 208 F.3d at 632. Ms. Thomas{2020 U.S. Dist. LEXIS 7} testified that the firearm was registered in her name but that she left it in a previous apartment that she shared with Mr. Perryman.

There was ample evidence to support the jury's verdict on Count 2.

### **C. Count 3, Possession of a Firearm by a Convicted Felon**

The elements that the government was required to prove for Count 3, possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), were (1) Mr. Perryman knowingly possessed a firearm; (2) at the time of the charged act, he knew that that he had been convicted of a crime that was punishable by a term of imprisonment of more than one year; and (3) the firearm had been shipped or transported in interstate or foreign commerce. Dkt. 142-1 at 25 (Final Instruction No. 24); see *Rehaif v. United States*, 139 S. Ct. 2191, 2195-96, 204 L. Ed. 2d 594 (June 21, 2019). The



parties stipulated that Mr. Perryman had a prior felony conviction and that the firearm had traveled in interstate commerce, see dkt. 142, so the only issue for the jury to decide was whether Mr. Perryman knowingly possessed the firearm found in the Residence.

Mr. Perryman argues again that he did not have exclusive possession over the Residence and that possession of the firearm "could have been joint with Thomas and/or Moore and constructive in nature." Dkt. {2020 U.S. Dist. LEXIS 8} 148 at 6. He further argues that Ms. Thomas owned the firearm. *Id.* at 5.

But possession need not be actual or exclusive and can occur regardless of ownership. *Lawrence*, 788 F.3d at 240 ("Constructive possession is a legal fiction in which a person is deemed to possess contraband even without immediate physical control of the object. To prove constructive possession, the government must establish that the defendant knowingly had both the power and intention to exercise dominion and control over the object, either directly or through others.") (citation omitted); *United States v. Villasenor*, 664 F.3d 673, 681 (7th Cir. 2011) ("The fact that a third party may have had access to the apartment, and therefore the firearm, does not negate the inference that [the defendant] had access to the firearm as well.") (citation omitted); see also *United States v. Kitchen*, 57 F.3d 516, 521 (7th Cir. 1995). In cases where the defendant shares a residence with others, "the government must demonstrate a substantial connection between the defendant and the contraband." *Lawrence*, 788 F.3d at 240 (7th Cir. 2015) (citing *Griffin*, 684 F.3d at 697).

Here, there was evidence sufficient for the jury to find that Mr. Perryman lived in the Residence, and thus had control over it. Moreover, there was a substantial connection between Mr. Perryman and the firearm-the firearm was found in a closet that was full of men's clothing. {2020 U.S. Dist. LEXIS 9} *United States v. Davis*, 896 F.3d 784, 791 (7th Cir. 2018).

There was ample evidence to support the jury's verdict on Count 3.

#### IV.

#### Conclusion

Mr. Perryman's renewed motion for judgment of acquittal is **DENIED**. Dkt. [147].

#### SO ORDERED.

Date: 1/16/2020

/s/ James Patrick Hanlon

James Patrick Hanlon

United States District Judge

Southern District of Indiana

#### Footnotes

1

Agent McCormick testified that one of the field tests on the drugs came back as heroin while the other field tests came out as fentanyl. Rebecca Wang, a DEA forensic chemist, testified that the suspected heroin was not pursued due to insufficient data. Regardless of whether the first field test determined that the substance was heroin, the Court neither weighs the evidence or assesses the credibility of witnesses. *United States v. Sewell*, 780 F.3d 839, 847 (7th Cir. 2015).

## Appendix C

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL PERRYMAN, Defendant-Appellant.**  
**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**  
**20 F.4th 1127; 2021 U.S. App. LEXIS 37212**  
**No. 20-1453**  
**December 16, 2021, Decided**  
**November 1, 2021, Argued**

**Editorial Information: Prior History**

{2021 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:18-cr-00317 - James P. Hanlon, Judge. United States v. Perryman, 2020 U.S. Dist. LEXIS 8336, 2020 WL 263615 (S.D. Ind., Jan. 17, 2020)

**Counsel** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Pamela Sarah Domash, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Evansville, IN; Lindsay Karwoski, Attorney, Bob Wood, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Indianapolis, IN.

For **MICHAEL PERRYMAN**, Defendant - Appellant: India R. Lane, Attorney, LAW OFFICE OF INDIA LANE, Indianapolis, IN.

**Judges:** Before HAMILTON, SCUDDER, and ST. EVE, Circuit Judges.

**CASE SUMMARY** Defendant was properly convicted of possession of fentanyl with intent to distribute under 21 U.S.C.S. § 841(a)(1) because reasonable jury could conclude that he constructively possessed drugs by his exclusive control over drugs, he confessed to officers that drugs were his, and drugs were found in home where defendant resided alone.

**OVERVIEW: HOLDINGS:** [1]-Defendant was properly convicted of possession of fentanyl with the intent to distribute under 21 U.S.C.S. § 841(a)(1) because a reasonable jury could conclude that he constructively possessed the drugs by his exclusive control over the drugs, he confessed to the officers that the drugs were his, and the drugs were found in the home where defendant resided alone; [2]-Defendant was properly convicted of possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C.S. § 924(c)(1) because the loaded AR-15 was located near large quantities of fentanyl; [3]-Defendant was properly convicted of possessing a firearm while a convicted felon under 18 U.S.C.S. § 922(g)(1) because the evidence was more than sufficient to enable a rational jury to find that defendant constructively possessed the firearm discovered in the closet of the home where he lived alone.

**OUTCOME:** Judgment affirmed.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Appeals > Briefs***

***Criminal Law & Procedure > Counsel > Right to Self-Representation***

The appellate court has discretion to reject a pro se brief without considering the issues argued when a defendant is represented by counsel.

***Criminal Law & Procedure > Trials > Motions for Acquittal***

A07CASES

***Evidence > Procedural Considerations > Burdens of Proof > Allocation  
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Sufficiency of  
Evidence to Convict***

The appellate court reviews the denial of a motion for acquittal under Fed. R. Crim. P. 29 de novo. A jury verdict will only be overturned if, after viewing the facts in the light most favorable to the government, there was insufficient evidence to convict. The defendant bears the burden of demonstrating that no reasonable jury could find guilt beyond a reasonable doubt. Such a challenge leads to a reversal only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt. This challenge for the defendant has been described as an uphill battle, a momentous task, a heavy burden, and a nearly insurmountable hurdle.

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

***Criminal Law & Procedure > Scienter > Knowledge***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to  
Distribute > Elements***

21 U.S.C.S. § 841(a)(1) criminalizes the possession of a controlled substance, such as fentanyl, with the intent to distribute. § 841(a)(1), 841(b)(1)(B)(2). To convict, the government must prove that the defendant knowingly possessed fentanyl with the intent to distribute and knew that fentanyl was a controlled substance. For § 841(a)(1), possession can be either actual or constructive.

***Evidence > Procedural Considerations > Circumstantial & Direct Evidence***

***Evidence > Inferences & Presumptions > Inferences***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession***

Constructive possession is a legal fiction whereby a person is deemed to possess contraband even when he does not actually have immediate, physical control of the object. The defendant must have both the power and intention to exercise dominion and control over the object, either directly or through others, requiring some connection between the defendant and the illegal drugs. That connection can come in one of two ways. The first way is where the defendant alone maintains exclusive control over the property where the contraband was discovered, which allows the logical inference that the defendant possesses the drugs located there. The second way of showing constructive possession, absent the defendant exercising exclusive control over the property, requires a substantial connection to the location where contraband was seized, one sufficient to establish the nexus between that person and any contraband. In either case, the government can show constructive possession through direct or circumstantial evidence.

***Evidence > Inferences & Presumptions > Inferences***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession***

Exclusive control over premises allows the jury to infer the knowledge and intent to control objects within those premises.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession***

Whether a person maintains exclusive control over a residence generally turns on the number of live-in residents, requiring only one, not the number of visitors, the number of signees on the lease, or even the number of people with keys to the home.

***Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor***

## **Determinations**

The appellate court affords great deference to the jury's factual findings and credibility determinations.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements***

***Criminal Law & Procedure > Criminal Offenses > Weapons > Trafficking > Elements***

Under 18 U.S.C.S. § 924(c)(1)(A), a defendant cannot possess a weapon in furtherance of a drug trafficking crime.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements***

The "in furtherance" of element in 18 U.S.C.S. § 924(c)(1)(A) is fact intensive. Courts frequently list factors that seem relevant and leave it to the trier of fact to apply them to the facts of the case at hand. These factors include the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found. No single factor determines the outcome; this inquiry is holistic. It can be easier to determine furtherance by a holistic analysis than by dissecting the issue into parts.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***  
***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

Federal law prohibits certain felons from possessing a firearm. 18 U.S.C.S. § 922(g)(1). The government must establish four elements to prove a defendant guilty of this charge: (1) the defendant was convicted of a crime punishable by more than one year; (2) the defendant knowingly possessed a firearm; (3) the defendant knew of his felon status; and (4) the gun possessed by the felon had been in or affected interstate commerce.

***Evidence > Inferences & Presumptions > Inferences***  
***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession***

18 U.S.C.S. § 922(g) covers possession in every form, whether actual or constructive. As explained above, constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object. A jury can infer constructive possession when the defendant exercises exclusive control over the premises. There are two forms of constructive possession, exclusive control being the first and more straightforward. A person who owns a home controls the objects within, whether drugs or illegal firearms. Third-party access to a home does not negate the inference that the defendant had access to the firearm as well.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***

Where a defendant resides in the home, there is sufficient evidence to establish that he had constructive possession of the firearms seized there. Constructive possession can be established by a showing that the firearm was seized at the defendant's residence.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***

Owning an item is different than possessing it. By its terms, 18 U.S.C.S. § 922(g) does not prohibit a felon from owning firearms. Rather, it interferes with a single incident of ownership, one of the proverbial

sticks in the bundle of property rights, by preventing the felon from knowingly possessing his (or another person's) guns. Courts do not look to a weapon's paperwork. A defendant need only possess a gun to be found guilty under § 922(g)(1).

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation***

***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

The appellate court reviews a direct implication of the constitutional right to confrontation de novo. Absent any direct implication though, the appellate court reviews a limitation on cross-examination for abuse of discretion.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation***

***Evidence > Testimony > Examination > Cross-Examination > Scope***

The Confrontation Clause protects the right of a criminal defendant to be confronted with the witnesses against him. U.S. Const. amend. VI. The right to confront a witness also includes the right to cross-examine that person for any bias or motivation to lie. If the defendant's cross-examination, however, does not implicate a core confrontational value, exposing motivation, bias, or incentive to lie, then the constitutional concerns are diminished. The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. District court judges otherwise retain wide latitude to impose reasonable limits on cross-examination based on concern about matters including harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant, all without running afoul of the Confrontation Clause.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation***

***Criminal Law & Procedure > Witnesses > Impeachment***

***Criminal Law & Procedure > Witnesses > Credibility***

The Confrontation Clause does not give a defendant a boundless right to impugn the credibility of a witness.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion***

***Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation***

Where a core confrontational value was not implicated, the district court properly exercises its wide latitude under the Confrontation Clause to exclude the evidence. When the defendant's argument indirectly implicates a core value, the appellate court asks only whether the district court abused its discretion under the Confrontation Clause in limiting a defendant's cross-examination.

## Opinion

Opinion by: ST. EVE

## Opinion

St. Eve, *Circuit Judge*. Law enforcement agents searched Michael Perryman's home and found drugs, baggies, a digital scale, and a loaded AR-15 rifle. Perryman was then charged with drug and firearm offenses. At trial, he sought to impeach an officer's truthfulness by introducing a fifteen-year-old reprimand regarding an unrelated case, which the district court precluded him from doing. A jury convicted him on all counts. On appeal, Perryman maintains that the evidence was insufficient to convict him on any count and that the district court's exclusion of evidence reporting an incident unrelated to the case violated the Confrontation Clause. We reject{2021 U.S. App. LEXIS 2} both arguments and affirm the conviction.

### I. Background

In Spring 2018, as part of a large antidrug operation, the Drug Enforcement Administration ("DEA") obtained a search warrant for Perryman's home in Indianapolis. A team of federal and local law enforcement agents arrived at the property, just as Perryman was departing in his car. After stopping Perryman and reading him his *Miranda* rights, the agents searched the home, which had a master suite that consisted of a bedroom, bathroom, and a large closet accessible only through the bathroom. In the master bathroom, on a shelf on top of the vanity next to the closet door, they found fentanyl, baggies, and a digital scale. In the closet, there was a loaded AR-15 rifle, three to four steps away from the fentanyl, along with men's shoes and clothes.

Perryman, with the agents' permission, called his then-girlfriend, Rasheema Moore, who arrived soon after. Although she lived elsewhere, she had signed the lease for the home. Moore said that the drugs, money, and gun were not hers.

The agents read Perryman his *Miranda* rights for a second time after the search, and he agreed to talk. He admitted that the drugs were his, then provided the agents{2021 U.S. App. LEXIS 3} with the name of his drug supplier. He did not, however, claim ownership of the gun. The rifle "belonged to a girlfriend," Maurita Thomas, who had originally bought the weapon with Perryman at a gun show. The pair had lived together at different places over the years in homes leased under Thomas's name. And they occasionally went shooting together. When Perryman relocated to the home that agents would later search, the rifle went with him. The two, though, spoke regularly. During one post-arrest conversation, Perryman asked Thomas to lie about the gun. He wanted her to say that she took the weapon from one house to the other. She initially complied, telling an investigator and defense counsel that she moved the weapon. But once under oath, she admitted those statements were untrue; she lied "to protect Michael."

Perryman was indicted on charges of possessing fentanyl with intent to distribute, 21 U.S.C. § 841(a)(1), possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1), and possessing a firearm while a convicted felon, *Id.* § 922(g)(1).

Prior to trial, the government moved in limine to exclude questioning concerning the disciplinary record of Indianapolis Metropolitan Police Department Sergeant Clifton Jones,{2021 U.S. App. LEXIS 4} who participated in the search of Perryman's home. The disciplinary offense stemmed

from a complaint about Officer Jones's involvement in an unrelated investigation.<sup>1</sup> The Disciplinary Board issued a "Written Reprimand" based on its review. Perryman wished to impeach Officer Jones's credibility using this incident and focused his arguments on evidentiary points, adding in one sentence though that "[he] should be able to exercise his rights under the Confrontation Clause." The district court, ruling only on the evidentiary question, granted the government's motion in a sealed entry, concluding that any potential probative value of the evidence was substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusing the issues.

The trial lasted two days. Near the end of the trial, Perryman again sought to impeach Officer Jones with the disputed evidence. The government objected, and the district court excluded the evidence. After the close of the government's case, Perryman moved for acquittal under Rule 29, which the district court denied. The jury convicted him on all counts. The district court sentenced Perryman to 228 months in prison, followed by five years of supervised release.

## **II.{2021 U.S. App. LEXIS 5} Discussion**

Perryman argues that the evidence was insufficient to convict him on any count and that excluding Officer Jones's disciplinary action violated the Confrontation Clause.<sup>2</sup> We address each argument in turn.

### **A. Sufficiency of the Evidence**

We review the denial of a motion for acquittal under Rule 29 de novo. *United States v. Johnson*, 874 F.3d 990, 998 (7th Cir. 2017). A jury verdict will only be overturned "if, after viewing the facts in the light most favorable to the government, there was insufficient evidence to convict." *United States v. Jett*, 908 F.3d 252, 273 (7th Cir. 2018). The defendant bears the burden of demonstrating that no reasonable jury could find guilt beyond a reasonable doubt. *United States v. Tantchev*, 916 F.3d 645, 650 (7th Cir. 2019); see also *United States v. Warren*, 593 F.3d 540, 546 (7th Cir. 2010) ("Such a challenge leads to a 'reversal only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt.'" (quoting *United States v. Moore*, 572 F.3d 334, 337 (7th Cir. 2009))). We have described this challenge for the defendant as an "uphill battle," *United States v. Christian*, 342 F.3d 744, 750 (7th Cir. 2003), a "momentous task," *United States v. Lawrence*, 788 F.3d 234, 239 (7th Cir. 2015), a "'heavy' burden," *Jett*, 908 F.3d at 273 (citation omitted), and a "nearly insurmountable" hurdle, *id.*, one which Perryman cannot overcome for any count.

#### **1. Possession of a Controlled Substance**

Section 841(a)(1) criminalizes the possession of a controlled substance, such as fentanyl, with the intent to distribute. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(2). To convict, the government must prove that the defendant knowingly possessed{2021 U.S. App. LEXIS 6} fentanyl with the intent to distribute and knew that fentanyl was a controlled substance. See, e.g., *United States v. Brown*, 973 F.3d 667, 697-98 (7th Cir. 2020) (marijuana); *United States v. Campbell*, 534 F.3d 599, 605 (7th Cir. 2008) (cocaine). Perryman only disputes whether he possessed the fentanyl. For § 841(a)(1), possession can be either actual or constructive. *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012). In this case, the government relies on constructive possession.

"Constructive possession," we have said, "is a legal fiction whereby a person is deemed to possess contraband even when he does not actually have immediate, physical control of the object." *Id.* The defendant must have both the "power and intention to exercise dominion and control over the object, either directly or through others," requiring some connection between the defendant and the illegal drugs. *Id.* That connection can come "in one of two ways." *Id.* The first way is where the defendant alone maintains "exclusive control" over the property where the contraband was discovered," which



allows the logical inference that the defendant possesses the drugs located there. *Id.* (quoting *United States v. Castillo*, 406 F.3d 806, 812 (7th Cir. 2005)). The second way of showing constructive possession, absent the defendant exercising exclusive control over the property, requires "a substantial connection' to the location where contraband was seized," **{2021 U.S. App. LEXIS 7}** one "sufficient to establish the nexus between that person and [any contraband]." *United States v. Morris*, 576 F.3d 661, 667 (7th Cir. 2009). In either case, the government can show constructive possession through direct or circumstantial evidence. *Lawrence*, 788 F.3d at 240.

Here, a reasonable jury could easily conclude that Perryman constructively possessed the fentanyl by his exclusive control over the drugs. Perryman confessed that the drugs were his, telling the agents immediately that the drugs belonged to him and even providing them with the name of his drug supplier. Perryman claims that this confession was false. But the government offered uncontroverted testimony about its veracity from the task force officer who interviewed Perryman after the search and heard his confession. The jury was entitled to credit that testimony in arriving at its verdict. Perryman even concedes, in his brief before this Court, that "[t]he jury could've relied on the testimony from [the testifying officer] that Mr. Perryman stated that everything in the condo is his except the rifle."

Additional evidence further links Perryman with the drugs. The police found the fentanyl in the home where Perryman resided by himself, paid the bills, and was seen exiting when agents arrived. *See* **{2021 U.S. App. LEXIS 8}** *Griffin*, 684 F.3d at 695 ("Exclusive control over the premises allows the jury to infer the knowledge and intent to control objects within those premises ..."). The drugs were in the master suite, where Perryman slept, by a closet filled with men's clothes. Perryman submits that because other people have stayed over, even leaving toothbrushes and feminine hygiene products behind, he could not have been the true possessor. But a person can still constructively possess drugs while living in a space visited by others. Whether a person maintains "exclusive control" over a residence generally turns on the number of live-in residents-requiring only one-not the number of visitors, the number of signees on the lease, or even the number of people with keys to the home. *Cf. Lawrence*, 788 F.3d at 240 ("If a defendant *lives alone* in an apartment and a search reveals contraband, proving constructive possession is relatively easy." (emphasis added)). And both Moore and Thomas, the two most frequent visitors, denied owning the drugs. *Cf. United States v. Rebolledo-Delgadillo*, 820 F.3d 870, 876 (7th Cir. 2016) ("[W]e afford great deference to the jury's factual findings and credibility determinations."). Therefore, the evidence demonstrating Perryman's possession of the drugs, combined with his confession, dooms this **{2021 U.S. App. LEXIS 9}** challenge.

## 2. In Furtherance of a Drug Trafficking Crime

Under 18 U.S.C. § 924(c)(1)(A), a defendant cannot possess a weapon "in furtherance of" a "drug trafficking crime." *See also United States v. Johnson*, 916 F.3d 579, 588-89 (7th Cir. 2019). Perryman argues that, assuming he committed a drug trafficking crime and possessed the firearm located in his closet, the weapon was not used "in furtherance" of any drug crime.

The "in furtherance of" element is fact intensive. *United States v. Castillo*, 406 F.3d 806, 815 (7th Cir. 2005). Courts frequently "list factors that seem relevant and leave it to the trier of fact to apply them to the facts of the case at hand." *United States v. Brown*, 724 F.3d 801, 803 (7th Cir. 2013). These factors include "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Id.* (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)). No single factor determines the outcome; this inquiry is holistic. *See id.* ("It can be

easier to determine 'furtherance' by a holistic analysis than by dissecting the issue into parts ... ").

Here, sufficient evidence establishes that Perryman possessed the gun "in furtherance" of his drug crime. The gun was located three{2021 U.S. App. LEXIS 10} to four steps away from large quantities of fentanyl, in the master closet, accessible only by going through the drug-filled master bathroom, and propped up against the wall, not locked away or hidden. Expert testimony at trial explained that such close proximity suggests that the gun was used to protect the drugs. Moreover, the gun was no ordinary weapon; it was a *loaded* AR-15 rifle, a weapon outlawed in several states, which Perryman could not own under federal law. Together, this evidence more than supports the jury's verdict.

### 3. Felon in Possession of a Firearm

Federal law prohibits certain felons from possessing a firearm. 18 U.S.C. § 922(g)(1). The government must establish four elements to prove a defendant guilty of this charge: (1) the defendant was convicted of a crime punishable by more than one year; (2) the defendant knowingly possessed a firearm; (3) the defendant knew of his felon status; and (4) the gun possessed by the felon had been in or affected interstate commerce. *Id.*; *Rehaif v. United States*, 139 S. Ct. 2191, 2195-96, 204 L. Ed. 2d 594 (2019); *see also United States v. Parsons*, 946 F.3d 1011, 1014 (8th Cir. 2020). Perryman does not contest the first, third, and fourth elements. He contends only that the government failed to meet its burden for the second element, possession of a firearm.

Section 922(g) "covers possession in every{2021 U.S. App. LEXIS 11} form," whether actual or constructive.<sup>3</sup> *Henderson v. United States*, 575 U.S. 622, 626, 135 S. Ct. 1780, 191 L. Ed. 2d 874 (2015). As explained above, constructive possession "is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." *Id.* A jury can infer constructive possession when the defendant exercises exclusive control over the premises. *Griffin*, 684 F.3d at 695 (describing the two forms of constructive possession, "exclusive control" being the first and more straightforward); *see also United States v. Davis*, 896 F.3d 784, 791 (7th Cir. 2018). A person who owns a home controls the objects within, whether drugs or illegal firearms. *United States v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005). Third-party access to a home "does not negate the inference that [the defendant] had access to the firearm as well." *United States v. Villasenor*, 664 F.3d 673, 681 (7th Cir. 2011).

Here, the evidence permitted a rational jury to find that Perryman constructively possessed the weapon discovered in his closet.<sup>4</sup> Perryman lived alone in the home where the police found the weapon and, thus, controlled the premises. While others may have had access, no one else resided there, so there was never joint ownership. And, as previously noted, when a defendant alone controls a property, a jury can reasonably assume that he controls the weapons present there. *Caldwell*, 423 F.3d at 758 (holding that where the defendant resides in the home,{2021 U.S. App. LEXIS 12} there "is sufficient [evidence] to establish that he had constructive possession of the firearms seized there"); *United States v. Kitchen*, 57 F.3d 516, 521 (7th Cir. 1995) ("Constructive possession can be established by a showing that the firearm was seized at the defendant's residence." (quoting *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993))). Moreover, the weapon was in Perryman's closet, by his clothes, feet away from the drugs that he confessed to own, and in the same master suite where he slept every night. Testimony at trial revealed that Perryman brought the rifle to the house and would later ask Thomas, a previous girlfriend, to lie about that fact.

Nor does ultimate ownership of the gun matter, as Perryman contends. Owning an item is different than possessing it. *See Henderson*, 575 U.S. at 626 ("By its terms, § 922(g) does not prohibit a felon from *owning* firearms. Rather, it interferes with a single incident of ownership—one of the proverbial sticks in the bundle of property rights—by preventing the felon from knowingly *possessing* his (or

another person's) guns." Courts do not look to a weapon's paperwork. A defendant need only possess a gun to be found guilty under § 922(g)(1). See *United States v. Katz*, 582 F.3d 749, 752 (7th Cir. 2009). Therefore, viewed in the light most favorable to the government, the evidence was more than sufficient to enable a rational jury to{2021 U.S. App. LEXIS 13} find that Perryman constructively possessed the AR-15, so his sufficiency claim fails.

## B. The Confrontation Clause

We review a direct implication of the constitutional right to confrontation de novo.<sup>5</sup> *United States v. Rivas*, 831 F.3d 931, 934 (7th Cir. 2016). Absent any direct implication though, we review a limitation on cross-examination for abuse of discretion. *United States v. Carson*, 870 F.3d 584, 597 (7th Cir. 2017).

The Confrontation Clause protects the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend. VI. The right to confront a witness also includes the right to cross-examine that person for any bias or motivation to lie. *United States v. Vasquez*, 635 F.3d 889, 894 (7th Cir. 2011); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). If the defendant's cross-examination, however, does not implicate a core confrontational value-exposing motivation, bias, or incentive to lie-then the constitutional concerns are diminished. *United States v. Hart*, 995 F.3d 584, 589 (7th Cir. 2021); see also *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."). District court judges otherwise "retain 'wide latitude' to impose reasonable limits on cross-examination based on concern about matters including harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant, all without running afoul of the Confrontation Clause." *Rivas*, 831 F.3d at 934 (quoting{2021 U.S. App. LEXIS 14} *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Here, the proposed line of questioning into Officer Jones's unrelated disciplinary action did not implicate a core value of the Confrontation Clause. Contrary to Perryman's many assertions, Officer Jones's reprimand did not involve tampering with evidence. Rather, Officer Jones's participation in a police investigation fifteen years ago was questioned, which the Disciplinary Board decided warranted only a written warning. Perryman has not shown, nor could he, that this irrelevant and dated offense relates to his case. See *United States v. Clark*, 657 F.3d 578, 584 (7th Cir. 2011) (emphasizing that "the Confrontation Clause does not give a defendant a boundless right to impugn the credibility of a witness"). Officer Jones was not motivated to lie or harbor any bias against someone unconnected to his disciplinary incident, and Perryman was otherwise able to extensively cross-examine Officer Jones about his role in the investigation. See, e.g., *Hart*, 995 F.3d at 589-90 (noting that the defendant had "ample opportunity to impeach or discredit" the witness); *Carson*, 870 F.3d at 597 (holding that there was no error where the defendant had ample opportunity to expose motivations); *Clark*, 657 F.3d at 584 (rejecting "barely relevant" and "highly inflammatory" questioning).

Given then that a core confrontational value was not implicated, the district court{2021 U.S. App. LEXIS 15} properly exercised its "wide latitude" under the Confrontation Clause to exclude the evidence. *Van Arsdall*, 475 U.S. at 679; see also *Hart*, 995 F.3d at 589 (stating that when the "defendant's argument *indirectly* implicates a core value," we ask only whether the district court abused its discretion under the Confrontation Clause in limiting a defendant's cross-examination). Introducing the minor, fifteen-year-old reprimand, at best, tangentially related to truthfulness and would likely have prejudiced or confused the jury. See *United States v. Recendiz*, 557 F.3d 511,

530-31 (7th Cir. 2009). And again, Perryman already had a reasonable opportunity to cross-examine Officer Jones. Perryman's constitutional rights, therefore, were not violated.

### III. Conclusion

For these reasons, we affirm the conviction.

### Footnotes

1

Like the district court below, we decline to elaborate upon the details out of respect for Officer Jones's privacy.

2

Perryman filed a pro se brief to raise additional concerns about his sentencing. We have discretion to reject a pro se brief without considering the issues argued when a defendant is represented by counsel, *see United States v. Hunter*, 932 F.3d 610, 620 (7th Cir. 2019), and choose to do so here.

3

We need not consider the government's argument that Perryman actually possessed the rifle.

4

Perryman concedes as much, "The facts may have led the jury to convict based on constructive possession and that Mr. Perryman has a substantial connection to the home." The concession aside, the record also supports the government's case.

5

The government asserts that Perryman did not preserve this constitutional claim below, because he focused his challenge on evidentiary grounds. Perryman notes, however, that his memorandum in support of his motion to the district court stated that he "should be able to exercise his rights under the Confrontation Clause." We assume, without deciding, that his one-sentence reference preserved the issue under Federal Rule of Criminal Procedure 51(b).