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Appeal No. 24-CF-668

DISTRICT OF COLUMBIA COURT OF APPEALS

DEMANN SHELTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

REPLY BRIEF FOR APPELLANT

JACLYN FRANKFURT
SHILPA S. SATOSKAR
*AREEBA JIBRIL

PUBLIC DEFENDER SERVICE
633 3rd St, NW
Washington, DC 20001
Telephone: (202) 628-1200

*Counsel for Oral Argument

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ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ANSWERED THE JURY'S QUESTION BY INSTRUCTING IT THAT IT COULD CONVICT MR. SHELTON OF JOINT CONSTRUCTIVE POSSESSION OF A WEAPON, WHERE THERE WAS INSUFFICIENT EVIDENCE OF JOINT POSSESSION.

The trial court erred in responding to the jury's note stating it was deadlocked on the gun charges, and asking whether "two or more people can have joint possession of an item," by telling the jury that joint constructive possession was a potential theory of conviction, despite insufficient evidence to prove that Mr. Shelton and another occupant of the car jointly possessed the gun in the jacket. That error requires reversal here, where the jury's note, combined with its relatively quick verdict after the trial court's response, indicated that the jury may have convicted on a factually unsupported theory, rebutting the presumption in *Griffin v. United States*, 502 U.S. 46 (1991), that a jury instructed on both a factually supported and unsupported ground for conviction will choose the supported ground. The government's arguments to the contrary are without merit.

A. There Was Insufficient Evidence to Prove Beyond a Reasonable Doubt That Mr. Shelton and Mr. Smith Jointly Possessed the Weapon.

The judge's joint constructive possession instruction was erroneous on this record because the evidence could not support a conclusion beyond a reasonable doubt that Mr. Shelton and the other occupants of the car worked together in a "concert of action" to jointly exercise dominion and control over the firearm. *Thomas v. United States*, 806 A.2d 626, 629 (D.C. 2002) (citation omitted) (reversing where jury's note indicated it had convicted on a joint constructive

possession theory despite insufficient evidence of a “concert of action” between Mr. Thomas and Mr. Parker, although there was sufficient evidence of sole constructive possession). The government’s attempts to manufacture some level of cooperation between Mr. Smith and Mr. Shelton are belied by the record.

First, there is no record support for the government’s claim (at 13-16) that the jury could infer joint possession from the location from which the gun was recovered. Having failed to present evidence that Mr. Shelton, who sat still in the car when officers approached and made no furtive movements, *see* 4/24/24 Tr. 111-12, accepted the firearm from Mr. Smith and placed it in the jacket, the government argues that “the firearm’s location deep in the jacket pocket,” plus Mr. Smith’s frantic movements, “suggested [Mr.] Shelton aided [Mr. Smith] in placing the firearm there.” Gov. Br. 13-14.

The evidence the government relies on, however, shows the placement of the firearm in the outside pocket of the jacket *only after* the jacket had been manipulated by officers and removed from the car. *See* Gov. Br. 14-16 (citing Gov. Ex. 304 17:56:44-57:19 (bodyworn camera footage showing the jacket placed on the ground outside of the car, with an officer holding open jacket pockets for another officer to view inside); Gov. Ex. 202 (photo of an officer holding open the outside pocket of the jacket after it had been removed from the car, with firearm visible inside); 4/24/24 Tr. 168-73 (testimony from Officer Anderson, who arrived on the scene after the firearm had already been discovered by Officer Laury, regarding the items found

in the jacket).¹ By the time the jacket had been manipulated by officers and removed from the car, the precise placement of the firearm within the pocket was more attributable to gravity and the actions of the officers, than to the actions of anyone in the car. Other footage and testimony similarly showed that the jacket was not searched until after it had been moved by officers. *See* Gov Ex. 302 17:47:30 (bodyworn camera footage showing officer searching jacket after it had been removed from the car); Def. Ex. 201 17:56:48-57 (bodyworn camera footage showing jacket on the ground outside car; officer opening pockets so another officer can photograph what is inside); 4/24/24 Tr. 112-13 (Officer Rogers testifying that the jacket was taken out of car before Officer Laury searched it).

Because there was no evidence showing how deep the firearm was in the pocket *prior* to officers' manipulation of the jacket, the location of the gun when it was ultimately recovered could not support a finding beyond a reasonable doubt that Mr. Shelton worked together with Mr. Smith to place it there. As this Court has emphasized, "[t]he issue is not whether the jury may engage in inferential thinking; it may. The issue is whether the evidence is probative enough to permit the jury to make a required inference beyond a reasonable doubt." *Rivas v. United States*, 783 A.2d 125, 149-50 n.33 (D.C. 2001) (en banc) (Ruiz, J., concurring). The evidence

¹ The government (at 14) also cites the judge's statement that the gun was not "located in the jacket in a manner consistent with its having been solely deposited there by the front-seat passenger." As Mr. Shelton explained in his initial brief, any such finding was unsupported by facts in the record, and was therefore clearly erroneous. *Davis v. United States*, 564 A.2d 31, 35 (D.C. 1989) (factual finding is "clearly erroneous" if the "judgment is plainly wrong or without evidence to support it"). *See* Appellant's Br. at 34.

of the location of the gun was not nearly “probative enough to permit [Mr. Shelton’s] jury to make [the] required inference [of working together] beyond a reasonable doubt.”²

Second, the evidence did not support a finding beyond a reasonable doubt that Mr. Shelton and Mr. Smith jointly possessed the gun in the jacket as part of a coordinated drug dealing enterprise, as the government claims. Gov. Br. 16-18. The government primarily relies on generalized testimony from an expert witness that it characterizes as evidence that “drug dealers typically have large amounts of cash in varying denominations and firearms on their person or nearby,” Gov. Br. 16 (citing 4/25/24 Tr. 108-09, 148), and that “multiple drug dealers working together often perform [separate] roles,” *id.* (citing 4/25/24 Tr. 117-18). But this Court has emphasized that such “generalized expert testimony” about how drug dealers may organize their operations must be accompanied by facts in the record showing that the defendants acted “consistent[ly] with expert testimony.” *Rivas*, 783 A.2d at 152 (Ruiz, J., concurring). The government must also prove that the gun is linked to the drug dealing enterprise. *See Proctor v. United States*, 172 A.3d 396, 406-07 (D.C. 2017) (general expert testimony was not “strong enough” to prove that defendant intended to use gun as part of his “involvement in a criminal enterprise” with other occupants of the house).

² To the contrary, the evidence indicated that Mr. Shelton and Mr. Smith were *not* working together. While Mr. Smith’s frantic arm movements, flight from the car, and assault of an officer as he fled all suggested consciousness of guilt, *see* 4/24/24 Tr. 161, 103-04, 107-08, Mr. Shelton acted completely differently, sitting still in the car and making no furtive movements, *see* 4/24/24 Tr. 111-12.

This Court requires far more than generalized expert testimony to prove constructive possession of contraband in connection with an ongoing criminal enterprise. In *Rivas*, Judge Ruiz explained that expert testimony that drug dealers “sometimes” work together and that “drug dealers working together ‘sometimes’ have different responsibilities,” where “‘somebody might hold the narcotics, somebody might hold the money,’” was insufficient to show that defendant Rivas, a passenger in a car, was involved in an ongoing drug dealing operation, because there were no facts showing that his actions or relationship with the other occupants of the car were “consistent with the roles described by the government expert.” *Rivas*, 783 A.2d at 151-52, 153 (Ruiz, J., concurring).

Similarly, this Court held in *Proctor* that “general expert testimony” that “a lot of time there’s a gun present somewhere around where the dealer is” did not prove beyond a reasonable doubt that defendant Proctor constructively possessed, as part of a drug dealing operation, a gun found in a closet in a bedroom that Proctor shared with his baby’s mother, along with mail addressed to him, marijuana, plastic sandwich bags, and a men’s jacket containing a large amount of cash. *Proctor*, 172 A.3d at 406-07. The Court explained that the general expert testimony was not “strong enough” to prove that Proctor intended to use the gun as part of his “involvement in a criminal enterprise” with other occupants of the house, even though the closet also contained other items connected with drug dealing and Proctor’s car contained additional marijuana and a digital scale. *Id.* at 406-07. And in *Jackson v. United States*, 61 A.3d 1218, 1226 (D.C. 2013), this Court held that the evidence was insufficient to show that Jackson constructively possessed

marijuana found in individually packed sandwich bags inside a closed cooler next to him in the backseat area of a parked car, where an expert testified that multiple people selling drugs from a car “might ‘sometimes’ divvy up the responsibilities of sales and distribution,” but there was no evidence that Jackson had participated in packaging the drugs or had “actually engaged in the activity described by the expert.”³

Here, the expert testimony about drug operations was both generalized and inconsistent with the facts in the record, which contradicted any theory that Mr. Shelton and Mr. Smith were working together to distribute drugs with the use of the gun in the jacket. Expert witness Officer Brown testified that multiple drug dealers working together “might” or “oftentimes” perform different roles, such as “the money person,” the “lookout[],” the person who “get[s] the drug product,” and “the person that has the firearm,” 4/25/24 Tr. 117; Gov. Br. 17, but that generalized testimony had “no echo” in the facts, *Rivas*, 783 A.2d at 152-53 (Ruiz, J., concurring). As this Court explained in *Rivas*, “[t]he generalized expert testimony presented in this case [could] meet only part of the government’s burden.” *Id.* at 152.

³ In contrast, this Court held in *Parker v. United States*, 601 A.2d 45 (D.C. 1991), that there was sufficient evidence that a driver and front seat passenger were engaged in an ongoing drug dealing operation together where an expert testified about drug dealing enterprises operating from “inconspicuous, middle aged vehicles,” and the testimony was accompanied by facts showing that defendants’ “older model brown Plymouth” was stopped in an “area notorious for heroin trafficking at a time when daily drug sales typically begin,” with a brown bag containing 27 bags of heroin found “equidistant between [defendants]” on the front bench seat. *Id.* at 50-52.

The government had to “prove also that [Mr. Shelton] was acting pursuant to such shared division of labor with [Mr. Smith].” *Id.*

The evidence here not only failed to support the theory that Mr. Shelton and Mr. Smith were acting pursuant to the “shared division of labor” that the expert described, but *contradicted* it. The government notes that Mr. Shelton was carrying “\$2,442.00 in cash of varying denominations” and that his jacket contained “52 zips containing drugs, a sandwich bag containing 7.8 grams of drugs, 20 suboxone strips” and a “digital scale” along with the firearm. Gov. Br. 17 (citing 4/24/24 Tr. 48-49, 173; 4/25/24 Tr. 105-09, 116, 147-48). It also points to the “zip lock bags containing drugs” found on Mr. Smith, Gov. Br. 17 (citing 4/24/24 Tr. 110, 155),⁴ but notably fails to mention that a gun was also found in the glove compartment in front of Mr. Smith, 4/24/24 Tr. 154, and that the government “disavowed that the gun in the glove box [was] Mr. Shelton’s,” 4/25/24 Tr. 118 (judge’s statement).

These facts indicated that the two men were *not* working together in a drug dealing enterprise, let alone one that involved joint possession of the gun in the jacket. Rather, the facts suggested only that each man was *independently* connected to indicia of drug dealing, and *independently* could be connected to a firearm. The drugs and scale in Mr. Shelton’s jacket, and the cash on his person encompassed every different role described by the expert. And Mr. Smith had access to drugs on

⁴ Mr. Smith had “white rock-like substance in small zips” on his person, 4/24/24 Tr. 155, but there was no evidence about the quantity.

his person, and a different gun in front of him in the glove compartment. Nor was there any other evidence of the men working together to sell drugs.⁵

As in *Rivas*, here, the expert testimony about multiple drug dealers working together in a joint enterprise had “no echo” in the facts presented about Mr. Shelton and Mr. Smith. 783 A.2d at 153 (Ruiz, J., concurring). Rather, the evidence here was directly contrary to the expert testimony about how drug dealing enterprises “often” work, Gov. Br. 17, and “more consistent” with independent activity, *Rivas*, 783 A.2d at 153 (Ruiz, J., concurring) (expert testimony failed to fill gaps in theory that *Rivas* and *Melgar* engaged in a joint drug operation where there was no evidence “that *Rivas*’ movements were consistent with the roles described by the government expert, that ‘somebody might hold the narcotics, somebody might hold the money,’” and evidence was “at least equally consistent, if not more consistent” with “possibility that *Melgar* . . . was in charge of both the money and the drugs”). The expert testimony therefore did not support the theory that Mr. Shelton and Mr. Smith had joint constructive possession of the gun in the jacket as part of their purported drug dealing operation. *See also Proctor*, 172 A.3d at 406-07 (general expert

⁵ The police did not witness the two men engaged in any drug transaction. *United States v. Hubbard*, 429 A.2d 1334, 1338 (D.C. 1981) (officers observed “what appeared to be two narcotic transactions” take place in area known for high incidence of narcotic related activity). There was no evidence that the car was in an area known for drug dealing. *Parker*, 601 A.2d at 52 (car stopped in area “notorious for heroin trafficking at a time when daily drug sales typically begin”). There was no evidence in the record about how the men were connected or how long they had been in the vehicle together. *See Thomas*, 806 A.2d at 629. And the men acted very differently in response to police – Mr. Smith fled from the car, assaulting an officer in the process, 4/24/24 Tr. 161, 103-04, while Mr. Shelton continued to sit in the backseat as officers approached, 4/24/24 Tr. 111-12.

testimony not “strong enough” to prove that Proctor intended to use gun as part of his “involvement in a criminal enterprise” with other occupants of house, even though closet and his car contained drugs and other indicia of drug dealing).

The government’s reliance on *Bruce v. United States*, 305 A.3d 381 (D.C. 2023), is also misplaced. To begin with, *Bruce* did not address the question of joint constructive possession. Further, Bruce’s conviction for firearm possession was based not only on strong evidence linking Bruce to an ongoing, openly visible drug operation, but also DNA evidence linking him to the firearm he was convicted of possessing. Officers executing a search warrant at an apartment found Bruce and Cary, a resident, inside. After Cary let the officers in, they saw Bruce walk out of a galley kitchen, where the officers saw “in plain view” a 9mm semiautomatic pistol propped up on a stand with its barrel pointing down. 305 A.3d at 388.⁶ Next to the kitchen was a table with suspected powdered and crack cocaine, two digital scales, plastic sandwich bags, and other items used to make crack cocaine from cocaine powder (baking soda, a microwave, and multiple Pyrex containers). *Id.* at 388. Bruce’s shoes were under the table, and his jacket, which was hung up next to the kitchen, contained more than \$5,000 cash in varying denominations. Bruce’s car contained loose bullets and almost \$9,000 cash in varying denominations. *Id.* at 388-89. Although it is true, as the government points out, that the drugs, cash, and firearm were “indicative of a drug-dealing operation,” *id.* at 400, the Court’s affirmance of Bruce’s conviction for firearm possession was based on additional evidence linking

⁶ Upon patting him down, officers found in Bruce’s pocket keys to the apartment and to his car, which was parked outside. *Id.*

Bruce to the firearm, including “strong DNA evidence,” *id.* at 395. The “evidence of [an] ongoing drug operation” in the apartment, *id.*, was only a small part of the proof that Bruce constructively possessed the firearm, which included forensic evidence showing that it was “approximately 58.1 septillion times more likely” that the three DNA profiles found on the gun were from Bruce and two unknown, unrelated individuals than from three unknown, unrelated individuals, *id.* at 388, that Bruce was the only person seen exiting the kitchen, where the gun was placed awkwardly in plain view, and that Bruce had a key to the apartment, *id.* at 395.⁷

Bruce does not support the government’s position that there was sufficient evidence that Mr. Shelton and Mr. Smith *jointly* possessed the gun in the jacket as part of an ongoing collaboration to deal drugs. Here, the record lacked evidence that Mr. Shelton and Mr. Smith were working together in an ongoing drug operation or otherwise linking both men to the gun in the jacket. Unlike in *Bruce*, where the drug operation was being conducted openly inside an apartment with multiple residents and the gun was visible, here Mr. Shelton and Mr. Smith each had access to drugs and a firearm that were concealed from the other’s view. And unlike the DNA evidence connecting Bruce and Cary to the firearm, here there was no evidence connecting both Mr. Shelton and Mr. Smith to the firearm.⁸

⁷ Forensic evidence also connected Cary to the firearm. *See id.* at 388 (“it was ‘approximately 540 times more likely’” that DNA on gun came from Cary and two unknown, unrelated individuals than from three unknown, unrelated individuals).

⁸ Having failed to present evidence that Mr. Shelton and Mr. Smith had joint constructive possession of the firearm, the government cannot distinguish *Thomas v. United States* from this case. Gov. Br. 19-21 (“Here, unlike *Thomas*, there was
(Footnote Cont’d on Following Page)

B. The *Griffin* Presumption Does Not Apply Because the Record Indicates That the Jury Doubted the Sole Possession Theory and May Have Convicted on an Unsupported Joint Possession Theory.

The government’s argument that “*Griffin* requires affirmance of [Mr.] Shelton’s convictions,” Gov. Br. 25, is based on a mischaracterization of *Griffin v. United States*, 502 U.S. 46 (1991), and its progeny. The government claims that under *Griffin*, an error in instructing a jury on a factually unsupported theory of conviction is always harmless where the jury was also instructed on a factually supported theory. *Griffin* does not stand for this absolute rule. Rather, *Griffin* announced a *rebuttable presumption* that a jury instructed on two theories of conviction – one factually sufficient and one factually insufficient – will convict on the factually supported theory, so that the error in instructing on the factually insufficient theory is harmless. But as the government’s own quotation from *Griffin* makes clear, the presumption that a jury faced with such a choice will reject the factually insufficient theory applies only “*in the absence of anything in the record to show the contrary.*” Gov. Br. 23 (quoting *Griffin*, 502 U.S. at 50) (emphasis added). Here, because the record powerfully shows “the contrary,” the *Griffin* presumption is inapplicable. Reversal is required because the jury’s note, which

evidence supporting a joint constructive possession theory.”). The government points out that in *Thomas*, there was “no evidence indicating how long Mr. Thomas and Mr. Parker were together before the police arrived or what they had been doing,” Gov. Br. 20 (quoting *Thomas*, 806 A.2d at 629), and that “Thomas and Parker each threw one object apiece,” Gov. Br. 21, but this case is no different. Here, too, there was “no evidence indicating how long Mr. [Shelton] and Mr. [Smith] were together before the police arrived or what they had been doing,” and Mr. Shelton and Mr. Smith were “each” in proximity to “one” firearm “apiece.”

indicated that jurors doubted the theory of sole possession, the trial court's answer that joint possession was an available alternative theory, and the jury's subsequently quick guilty verdict, strongly suggest that the jury may have convicted Mr. Shelton on a joint possession theory that lacked sufficient evidence. *See Thomas*, 806 A.2d at 629-30 (reversing where jury's note and judge's answer suggested jury may have convicted based on factually unsupported theory); *United States v. Henning*, 286 F.3d 914, 922 (6th Cir. 2002) (reversing where there was evidence, "contrary" to the *Griffin* presumption, "indicating that the jurors may have convicted on the factually inadequate theory").

Griffin established a rebuttable presumption, not an automatic rule. The defendant in *Griffin* was charged with a conspiracy to defraud both the IRS and the DEA, and the evidence at trial supported the IRS theory but not the DEA theory. Nevertheless, both theories were submitted to the jury, which returned a general verdict of guilty. *Griffin* argued that her conviction should be reversed because it was "possible" that the jury relied on the unsubstantiated DEA theory. *Griffin*, 502 U.S. at 56. The Supreme Court rejected that argument. *Id.* at 59-60. It reasoned that on questions "concerning the weight or the factual import of the evidence," jurors' "own intelligence and expertise" generally leave them "well equipped to analyze the evidence" and avoid reliance on the "factually inadequate theory." *Id.* at 59. Because the record shed no light on the actual basis of the jurors' verdict, such that there was "merely" a "remote" "chance" that the jury convicted on the factually unsubstantiated theory, *id.* at 59 (quoting *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991)), the erroneous submission of that theory to the jury did not

warrant reversal. *Id.* at 59-60. The Court made clear, however, that the presumption of harmlessness does not apply where there is “anything in the record to show the contrary,” *id.* at 50 (quoting *Claassen v. United States*, 142 U.S. 140, 146 (1891)), or more than a “remote chance” that the jury based its verdict on a factually unsupported theory, *id.* at 59, as exists here.

This Court and others have reversed where the *Griffin* presumption was rebutted by evidence suggesting that the jury relied on an unsubstantiated theory to convict. In *Thomas*, this Court reversed after the jury sent a note asking whether it could rely on a theory of joint constructive possession that was unsupported by the evidence, and the trial judge responded in the affirmative. This Court held that *Griffin*'s presumption did not apply because “the jury’s note to the trial court suggested that it was considering a verdict based on joint constructive possession and the court’s response did not disabuse them of the availability of that theory on the facts of this case.” 806 A.2d at 630. This Court noted that the “case differ[ed] from *Griffin*” on its facts because of the “significance of the jury’s request for clarification” coupled with “the trial court’s answer,” *id.* at 630, which “may have encouraged Mr. Thomas’s conviction on a theory unsupported by the evidence,” *id.* at 629. To ignore these facts, the Court explained, would be to establish “an absolute rule.” *Id.* at 630. And *Griffin* was clear that its presumption is *not* an absolute rule.

Similarly, in *Henning*, the Sixth Circuit reversed Henning’s convictions after determining that record evidence rebutted the *Griffin* presumption. Henning was tried for conspiracy to commit fraud and several substantive counts of fraudulent conduct. 286 F.3d at 918. After being instructed that if it found Henning guilty of

conspiracy, it could convict him on the substantive counts under *Pinkerton* liability, based on the acts of his co-conspirators, the jury convicted Henning on both the conspiracy count and some of the substantive counts. The district court subsequently granted a post-trial motion for judgment of acquittal on the conspiracy count, but left the substantive convictions intact. *Id.* at 918-19. On appeal, the Sixth Circuit reversed the substantive convictions under the plain error standard. The court held that the judge erroneously failed to recognize, after granting post-trial acquittal on the conspiracy count, that the jury may have convicted Henning under *Pinkerton* vicarious liability, based on the crimes of a purported co-conspirator, even though, absent a conspiracy conviction, the only factually supported basis for conviction was his own “personal guilt.” *Id.* at 920-21. The court held that the *Griffin* presumption did not require affirmance because “[w]hile normally the Government could rely on the presumption that jurors convicted on the factually sufficient theory, in this case there [was] evidence to the contrary, indicating that the jurors may have convicted on the factually inadequate theory.” *Id.* at 922. Because the “jurors originally convicted Henning on the conspiracy charge, which the district court judge later determined was not supported by sufficient evidence,” it was “not only logical, but likely that the jurors may have convicted Henning of the substantive counts based upon *Pinkerton* liability,” warranting reversal. *Id.* Here, as in *Thomas* and *Henning*, the record evidence was “contrary” to the *Griffin* presumption and requires reversal.

The meaning of *Griffin* is not an “open question,” as the government claims (at 27 n.12). This Court has repeatedly acknowledged that the *Griffin* “presumption” is not an automatic rule of affirmance, though it may lead to affirmance in a

particular case because the record there does not rebut it. *See, e.g., Dickens v. United States*, 163 A.3d 804, 811-12 (D.C. 2017) (declining to decide whether record “rebut[ted] the presumption endorsed in *Griffin*” because both theories were substantiated by the evidence); *Inyamah v. United States*, 956 A.2d 58, 62-63 (D.C. 2008) (applying “the *Griffin* presumption” after evaluating record in case where jury was instructed on both a substantiated principal theory and an unsubstantiated aider-and-abettor theory and there was no indication that jury may have convicted on the unsubstantiated theory). And as the government acknowledges, other courts similarly have recognized that the *Griffin* presumption is not automatic. Gov. Br. 27-28 n.12 (“but see”). *See United States v. Bouchard*, 828 F.3d 116, 128 (2d Cir. 2016) (noting that *Griffin* “presumption” is only a “general[]” rule but affirming due to lack of “contrary” evidence rebutting the presumption); *United States v. Briscoe*, 65 F.3d 576, 585 n.9 (7th Cir. 1995) (under *Griffin*, court may “presume that the jury rejected the factually inadequate theory”); *United States v. Stone*, 9 F.3d 934, 941 (11th Cir. 1993) (affirming where “there [wa]s nothing in the record to overcome the presumption that the jury followed its instructions”).

The government does not cite a single case affirming a conviction under *Griffin* where, as here, there was evidence in the record suggesting the jury convicted on a factually unsubstantiated theory. The federal cases on which the government relies to argue that an instruction on an unsupported ground for conviction is always “harmless as a matter of law” when the jury is also presented with a factually supported ground do not stand for this sweeping proposition. Gov. Br. 26-27 (citation omitted). In each of those cases, the *Griffin* presumption applied due to “the

absence of anything in the record to show the contrary,” that the jury may have relied on the factually unsupported theory. *Griffin*, 502 U.S. at 50. *See, e.g., United States v. Gonzalez*, 906 F.3d 784, 791 (9th Cir. 2018) (affirming where evidence was sufficient as to one basis for conviction and it was “impossible to tell which of the two [bases] the jury agreed upon”); *United States v. Mari*, 47 F.3d 782, 785-86 (6th Cir. 1995) (holding that error in giving unsubstantiated deliberate ignorance instruction was harmless under *Griffin* because there was “no reason” in the record to think that jury convicted on that basis); *United States v. Mehanna*, 735 F.3d 32, 51 (1st Cir. 2013) (affirming under *Griffin* where at least one theory of guilt presented to jury had sufficient factual support and there was no evidence contradicting jury’s “presumed expertise” in factfinding); *United States v. Ayon Corrales*, 608 F.3d 654, 657 (10th Cir. 2010) (affirming under *Griffin* where there was nothing in record suggesting that jury may have convicted on unsupported ground); *United States v. Syme*, 276 F.3d 131, 147 (3d Cir. 2002) (applying *Griffin* to “presume” that jury relied on theory supported by sufficient evidence, when there was no indication to the contrary); *United States v. Dreamer*, 88 F.3d 655, 658 (8th Cir. 1996) (affirming under *Griffin* presumption where appellant had admitted “there [was] no way to determine” from record whether jury convicted on unsubstantiated ground); *United States v. Hill*, 659 F. App’x 707, 710 (3d Cir. 2016) (affirming under *Griffin* where there were no facts in the record to suggest the jury had relied on the theory unsupported by the evidence).⁹

⁹ To the extent that some of these decisions use broad language suggesting that *Griffin* prescribed a per se rule of harmlessness, *see, e.g., Mari*, 47 F.3d at 786, that
(Footnote Cont’d on Following Page)

With no case support of its own, the government attempts to cast *Thomas*, in which this Court reversed under circumstances nearly identical to these, as an “outlier.” It is not. Although it is true that the *Thomas* Court incorrectly labeled the error in that case a “legal error,” Gov. Br. 29-30, the error there was in fact the same one that occurred here. The trial court in *Thomas* erred by instructing the jury it could convict Mr. Thomas of joint constructive possession, despite a lack of evidence to support this theory. And despite its misplaced label for the error, the *Thomas* Court concluded that the *Griffin* presumption had been rebutted for the same reason this Court should do so here – because the jury’s note asking about the availability of a joint possession theory indicated that it doubted the theory of sole possession and was considering conviction on an unsubstantiated theory of joint possession. As in *Thomas*, this case “differs from *Griffin*,” *Thomas*, 806 A.2d at 630, because the jury’s note, along with the judge’s erroneous response, is exactly the kind of “contrary” evidence that the Supreme Court in *Griffin* explained would rebut the presumption that a jury will reject a factually unsupported ground for conviction, *Griffin*, 502 U.S. at 50. The misuse of the label “legal” to describe the error in *Thomas* does not change that result. And, here, the record evidence “contrary[] [to] the presumption,” *Griffin*, 502 U.S. at 50 (citation omitted), is even stronger than it was in *Thomas* because, here, the jury expressly communicated that it was “deadlocked on all other counts” when it asked about the availability of a joint possession theory after having deliberated for eight hours. 4/30/24 Tr. 2. After

language must be “read in the light of the facts of the case under discussion.” *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944).

receiving a response to its question, the jury returned a guilty verdict less than two hours after the judge’s supplemental instruction. Contrary to the government’s claim, the reversal in *Thomas* is consistent with the operation of the *Griffin* presumption and similarly requires reversal here.¹⁰

The government’s argument that, unlike in *Thomas*, the court’s response to the jury’s note here “*did* disabuse [the jury] of the availability” of the joint possession theory, Gov. Br. 32-33, also fails. According to the government, the supplemental instruction somehow made clear that joint possession was not a viable theory of conviction because the court stated that “mere presence near something or mere knowledge of its location . . . is not enough to show possession,” and because it added the language “notwithstanding the role of the front seat passenger” when reiterating that the government must prove beyond a reasonable doubt “that the defendant, voluntarily and on purpose, intended to exercise dominion and control over the item.” *Id.* at 32 (citation modified). But none of that language would have “disabused” the jury of the core understanding the full response explicitly imparted – that joint constructive possession was a permissible theory of conviction on the facts presented at trial.

¹⁰ *Thomas* is not in conflict with other cases from this Court, as the government claims (at 30). In *Dickens* and *White*, this Court acknowledged *Griffin* but did not analyze harm because there was no instructional error. *See Dickens*, 163 A.3d at 811-12 (affirming where both theories presented to jury were supported by sufficient evidence; *White v. United States*, 714 A.2d 115, 118 n.5, 120 (D.C. 1998) (affirming where there was sufficient evidence to support both theories presented to jury). And in *Roy v. United States*, 652 A.2d 1098, 1104-06 (D.C. 1995), a *Griffin* analysis was unnecessary because the Court determined that neither theory presented to the jury was supported by sufficient evidence and reversed.

The trial court unequivocally answered yes to the jury's question "Can two or more people have joint possession of an item?" R. 843. The court began by telling the jury in no uncertain terms that the record allowed it to find that Mr. Shelton and another person had joint constructive possession of the gun:

I'm now going to respond to the question you asked me about joint possession. The law recognizes the possibility that two or more individuals can jointly have property in their constructive possession. Two or more persons have property in their joint constructive possession when they each have both the power and the intent at a given time to control the property.

5/1/24 Tr. at 27.

The additional language the government cites did not change the import of that straightforward answer to the jury's question. The jury had already been instructed that "mere presence near something or mere knowledge of its location . . . is not enough to show possession," 4/29/24 Tr. 97. Repeating that language was insufficient to clear up any confusion the jury had about whether it could find joint constructive possession of the gun because it asked about joint possession after hearing the language the first time and despite having retained a copy of the instructions. 4/29/24 Tr. 100 (judge informing jurors that it would provide them "a written copy of my instructions" to "refer to"). *See Gray v. United States*, 79 A.3d 326, 337-38 (D.C. 2013) (judge erred in answering jury's question about aiding and abetting liability by "simply re-reading the aiding and abetting instructions," which jury already had in hard copy, because repetition did not "clear[] away the jurors' confusion" (citation omitted)). Moreover, this repeated language did nothing to stop the jury from finding that Mr. Shelton and Mr. Smith jointly possessed the gun based

on facts other than presence (such as ownership of the jacket) that still would not support conviction on that theory but would be consistent with the instruction.

Nor did the insertion of the phrase “notwithstanding the role of the front seat passenger” ameliorate the risk that the erroneous answer to the jury’s question may have caused it to convict Mr. Shelton, without sufficient evidence, of joint possession of the gun. That language did not change the meaning of the instruction but merely restated the first part of the court’s response – that the jury would have to find that Mr. Shelton and Mr. Smith “each ha[d] both the power and the intent at a given time to control the property.” The error in the instruction was not that it was legally erroneous, but that it allowed the jury to believe that the evidence at trial allowed it to make a finding that Mr. Shelton and “the front seat passenger,” Mr. Smith, “jointly ha[d] [the gun in the jacket] in their constructive possession,” 5/1/24 Tr. at 27, on insufficient proof. Adding this redundant phrase did not disabuse the jury of the notion that it could convict on a theory of joint constructive possession, a notion that the trial court’s response unambiguously sanctioned despite the lack of evidence to support it. Reversal is required.

Respectfully submitted,

/s/ Areeba Jibril

Jaclyn Frankfurt, Bar No. 415252

Shilpa S. Satoskar, Bar No. 457263

*Areeba Jibril, Bar No. 90024013

PUBLIC DEFENDER SERVICE

633 3rd Street, NW

Washington, DC 20001

Telephone: (202) 628-1200

*Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been served electronically via the Appellate E-Filing System, upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney on this 11th Day of February, 2026.

/s/ Areeba Jibril

Areeba Jibril