No. 06-50485

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARL ANTHONY NEVILS,

Defendant-Appellant.

_____

GOVERNMENT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

_____

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I

INTRODUCTION

Police officers found defendant sleeping on a sofa with a loaded, chambered, semi-automatic, 9 mm Luger (Tec 9) on his lap and a loaded, chambered, .40 caliber pistol leaning against his leg. Approximately one foot away, on a coffee table, were packaged drugs, cash, and a cell phone. No one else was in the apartment, and, just three weeks before, officers had found drugs and guns in the apartment and arrested defendant there for a parole violation. When defendant started to awaken and the officers, guns drawn, told him to get down on the ground, defendant initially "appeared like he was going to, you know, grab towards his lap and then he stopped and put his hands up." Later, when questioned by another officer who had arrived on scene, defendant did not disavow knowledge or possession of the

guns, but instead stated, "I don't believe this s***. Those motherf***ers left me sleeping and didn't wake me up." On this evidence, the jury convicted defendant of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g).

The divided panel reversed defendant's conviction, focusing on what it concluded was the government's failure to "produce evidence that would allow a rational jury" to reject the "innocent explanation," suggested by testimony provided by a witness called by the defense, that defendant was unaware of the guns and had instead "passed out at the wrong place, at the wrong time," and subsequently had the guns placed on him by unidentified individuals who then "absconded and left [defendant] surrounded by the incriminating evidence." United States v. Nevils, 548 F.3d 802, 810 (9th Cir. 2008). In reaching this holding, the majority improperly assessed the incriminating evidence item by item, failing to account for the cumulative force of the evidence as a whole and setting aside or disregarding evidence that supported an inference of knowing possession, as well as judgments regarding credibility, rationality, and plausibility that the jury may have made in rejecting this innocent explanation at trial. The majority's decision merits rehearing en banc for three reasons.

First, by substituting its own judgments regarding credibility, rationality, and plausibility to reject reasonable

inferences (from both particular items of evidence and the evidence as a whole) that would support the jury's verdict, the majority's approach conflicts with the familiar standard of review set forth by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 319 (1979) ("all of the evidence is to be considered in the light most favorable to the prosecution" with deference to jury's responsibilty to "draw reasonable inferences from basic facts to ultimate facts") (emphasis in original), and with decisions of this Circuit that follow Jackson, e.g., United States v. Yoshida, 303 F.3d 1145, 1149 (9th Cir. 2002) ("[w]e respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict"); United States v. Johnson, 229 F.3d 891, 894 (9th Cir. 2000) (reviewing court "must presume that the trier of fact resolved any conflicting inferences in favor of the prosecution"). Therefore, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. See Fed. R. App. P. 35(a)(1).

Second, as the dissent notes, the "innocent explanation" on which the majority rested its decision is "extraordinarily implausible" -- it relies on assumptions regarding the conduct of gang members and drug dealers that could readily be rejected by a

jury as "irrational" and "tax[ing] credulity." Id. at 812-14. The majority's decision effectively precludes the government from relying on a jury's exercise of common sense to reject a proffered "innocent explanation" based on determinations of this type, and instead requires it to present evidence directly rebutting the "innocent explanation." This position is at odds with Jackson, 443 U.S. at 326 (refusing to adopt theory that "prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt"); prior decisions of this court, e.g., United States v. Aichele, 941 F.2d 761, 763-64 (9th Cir. 1991); United States v. Talbert, 710 F.2d 528, 530 (9th Cir. 1983) (per curiam); and the holdings of a number of other circuits, e.g., United States v. Abumayyaleh, 530 F.3d 641, 647 (8th Cir. 2008); United States v. Humphreys, 468 F.3d 1051, 1054 (7th Cir. 2006); United States v. Hernandez, 433 F.3d 1328, 1334 (11th Cir. 2005); United States v. Iafelice, 978 F.2d 92, 97 n.3 (3d Cir. 1992). Rehearing en banc is also justified to address these conflicts. See Fed. R. App. P. 35(a)(1); Ninth Circuit Rule 35-1.

Finally, as the dissent notes, and for the reasons set forth above, the majority's approach represents a significant shift in sufficiency jurisprudence that may affect large numbers of cases. 548 F.3d at 814. Accordingly, it poses a question of exceptional

importance meriting rehearing en banc. See Fed. R. App. P. 35(a)(2).

II

ARGUMENT

A. THE PANEL MAJORITY IMPROPERLY CONDUCTED ITS OWN WEIGHING OF EVIDENCE TO FAVOR A PROFFERED "INNOCENT EXPLANATION" AND REJECT REASONABLE INFERENCES SUPPORTING THE JURY'S VERDICT

In reaching its conclusion that the evidence was insufficient to support a conviction, the majority relied on this Circuit's "innocent explanation" test:

> When there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one.

Nevils, 548 F.3d at 810 (quoting United States v. Vasquez-Chan, 978 F.2d 546, 549 (9th Cir. 1992)). Properly applied, this test is consistent with Jackson in that it merely restates the government's burden to prove guilt beyond a reasonable doubt. See United States v. Govan, 152 F.3d 1088, 1093 (9th Cir. 1998) (upholding rejection of defense request for "innocent explanation" jury instruction, on ground that concept is "necessarily" encompassed in instruction requiring jury to find guilt beyond reasonable doubt); United States v. Melvin, 91 F.3d 1218, 1223-24 (9th Cir. 1996) (same).

As applied by the majority, however, the "innocent explanation" test resulted in an improper divergence from Jackson

in two distinct ways. First, instead of deferring to the jury's interpretations of the evidence and its determinations of the reasonable inferences to be drawn therefrom, the majority used defendant's proffered "innocent explanation" as a basis to itself weigh competing inferences and select those it (as opposed to the jury) found more plausible. Second, the majority effectively incorporated into the "innocent explanation" test a requirement that the government produce evidence directly rebutting the proffered innocent explanation, a requirement at odds not only with Jackson, but with prior decisions of this and other courts.

Jackson makes clear that evaluation of and selection among competing interpretations of evidence are the province of the jury -- not the court of appeals. 443 U.S. at 319 (it is "responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). This court's decisions are to the same effect. See, e.g., Yoshida, 303 F.3d at 1149; Johnson, 229 F.3d at 894. While citing these standards, the majority effectively ignored them, repeatedly using defendant's proffered "innocent explanation" as a basis for itself weighing whether particular evidence better supported the government's explanation (that defendant knowingly possessed the guns) or defendant's explanation (that unknown perpetrators had left the guns on defendant's lap and against his leg). In so

doing, it improperly exceeded the proper scope of review for sufficiency.

Initially, as a basis for applying the "innocent explanation" test, the majority determined that defendant had offered "a plausible innocent explanation for the facts." 548 F.3d at 810. This determination rested on judgments and inferences of precisely the type reserved to the jury. The majority recognized that defendant's proffered explanation "might seem implausible in many towns and many apartment complexes," 548 F.3d at 810, and the dissent pointed out why a jury could reasonably conclude it remained "extraordinarily implausible" in this particular apartment complex given legitimate inferences regarding the rationality and motivations of gang members and drug dealers. 548 F.3d at 812-14. The majority, however, drew its own inferences from the evidence to conclude that defendant's proffered explanation was not implausible in "this neighborhood" and "this apartment complex." 548 F.3d at 810 (emphasis added). The majority's independent weighing of the evidence to select one inference over another was not properly part of a sufficiency review.

The majority's acceptance of defendant's "innocent explanation" also supplanted credibility determinations properly reserved to the jury. In support of his "innocent explanation," defendant offered a witness who testified that defendant became

drunk at a baby shower earlier in the day and was placed, with no guns or drugs nearby at the time, on the couch where the police later found him. (ER 354-63.) The jury, tasked with evaluating this witness's credibility, could have found part or all of her testimony not credible. See United States v. Heredia, 483 F.3d 913, 923 n.14 (9th Cir. 2007) (en banc) ("We have long held that juries are not bound to believe or disbelieve all of a witness's testimony."). In particular, based on its evaluation of the witness's demeanor, the content of her particular testimony, or a consideration of that testimony in context with the evidence as a whole, the jury could have believed that defendant was not as drunk as the witness asserted, that the witness had been untruthful in testifying that no guns or drugs were nearby, or even that the entire baby shower story was a fabrication. Alternatively, the jury could have believed her testimony, which addressed defendant's state earlier in the day, but concluded that even if several hours earlier defendant had been placed drunk on the couch with no guns nearby, the witness's testimony did nothing to negate the inference from the balance of the evidence that at some later point in time prior to arrest defendant knew that the guns were in his lap and by his leg. By initially accepting and then relying on defendant's proffered "innocent explanation," the majority effectively removed these credibility determinations from the jury.

The majority's disregard of the jury's role as factfinder is also supported by an event that occurred just before the jury retired to deliberate, when the district court permitted each juror to hold and examine the TEC 9 semiautomatic gun found on defendant's lap and the pistol found leaning against his leg. (2/18/06 RT 120.) In conducting this examination, the jurors may well have been evaluating whether they believed the defense's proffered "innocent explanation" was plausible, given the weight of the guns and their size. The jury's subsequent verdict suggests they concluded the proffered explanation was implausible. The majority's rejection of this conclusion, without viewing this and other jury determinations in the light most favorable to the verdict, is inconsistent with Jackson.

The majority also erred in evaluating individual pieces of evidence. For example, the majority recognized that defendant's post-arrest statement was "subject to multiple explanations," including an inculpatory one. 548 F.3d at 810. Moreover, as the dissent correctly noted, given defendant's incentives to provide his subsequently-proffered "innocent explanation" to the interviewing officer in the hopes of avoiding charges, defendant's failure to "express any consternation over waking up in a strange place, or amazement about finding guns on his person," certainly provided a rational basis for concluding that defendant's post-arrest statement was properly subject to the

"inculpatory interpretation" that defendant was angry that others who knew he was in possession of guns and drugs had not bothered to wake him up, leaving him at the mercy of the subsequent police investigation. 548 F.3d at 812. The majority, however, took it upon itself to weigh the competing interpretations and determine that the jury was obliged to accept the one that supported defendant's proffered "innocent explanation." This too improperly invaded the jury's province.

In applying the "innocent explanation" test, the majority repeatedly cited to the government's failure to produce evidence directly rebutting defendant's proffered "innocent explanation." Thus, the majority noted that it was "undisputed that [defendant] was asleep," that defendant's witness offered "unrebutted testimony that he had gotten drunk at a nearby party and had been taken to Apartment 6 to lie down," that the government did not "rebut evidence that there was open access to Apartment 6," and that there was "no direct evidence showing that [defendant] was ever conscious in Apartment 6 on April 14, 2006." 548 F.3d at 805, 808, 809. In focusing on whether the government had sufficiently rebutted defendant's "innocent explanation," as opposed to whether the evidence and reasonable inferences therefrom supported the jury's verdict, the majority opinion placed this Court in conflict with Jackson, prior decisions of this Court, and holdings of a number of other circuits.

In Jackson, the Supreme Court held that the government is not "under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." 443 U.S. at 326. Moreover, this Court, in cases predating Vasquez-Chan, held that the evidence need not exclude every reasonable hypothesis consistent with innocence. For example, in Aichele, 941 F.2d at 763-64, this Court rejected a challenge to the sufficiency of the evidence to support a conviction for conspiracy to manufacture methamphetamine, reasoning that, although the defendant "proffer[ed] innocent explanations for many of his actions, . . . such argument misses the mark." Id. at 763-64. Sufficiency of the evidence review, the Court held, requires an inquiry "whether any reasonable jury could find the elements of the crime, on these facts, beyond a reasonable doubt, not whether [the defendant] is plausibly not guilty." Id. at 764. Aichele properly placed the focus on whether the government's evidence met its burden, not on whether it rebutted a defendant's proffered explanation, however plausible, for his actions. Id. at 763-64; accord Talbert, 710 F.2d at 530 ("Circumstantial evidence is sufficient to sustain a conviction, and the government's evidence need not exclude every reasonable hypothesis consistent with innocence."); see also United States v. Shea, 493 F.3d 1110, 1114 (9th Cir. 2007) ("Circumstantial evidence and inferences drawn from it may be sufficient to

sustain a conviction.") (quoting United States v. Jackson, 72 F.3d 1370, 1381 (9th Cir. 1995)). In conflict with these decisions, the majority here, relying on the "innocent explanation" test, strayed from a straightforward analysis of whether the government met its burden into an incorrect evaluation of whether the government had sufficiently rebutted a proffered explanation.

Other circuits have also held that the government's evidence need not negate proffered innnocent explanations for a conviction to survive a challenge to the sufficiency of the evidence. E.g., Abumayyaleh, 530 F.3d at 647 ("presence of one possible innocent explanation for the government's evidence does not preclude a reasonable jury from rejecting the exculpatory hypothesis in favor of guilt beyond a reasonable doubt") (internal quotation marks omitted); Humphreys, 468 F.3d at 1054 (alternative explanations "even if plausible, do not ordinarily overcome the defendant's burden in challenging the sufficiency of the evidence" because "law does not require the government to disprove every conceivable hypothesis of innocence in order to sustain a conviction on an indictment proved beyond a reasonable doubt") (emphasis in original; internal quotation marks omitted); Hernandez, 433 F.3d at 1334 ("That [defendant's] statements and behavior are subject to innocent explanation is . . . immaterial. A jury is free to choose among reasonable constructions of the

evidence.") (internal quotation marks omitted); Iafelice, 978 F.2d at 97 n.3 (no requirement "that the government's evidence foreclose every possible innocent explanation."). The majority's application of the "innocent explanation" test conflicts with these circuits' holdings.

No other circuit has adopted a test for sufficiency of the evidence equivalent to this Court's "innocent explanation" test. Nor has the Supreme Court ever endorsed such an approach. The problem with the "innocent explanation" test, as the majority opinion demonstrates, is that it incorrectly shifts the focus of sufficiency review from evaluation of the evidence and reasonable inferences drawn therefrom in the light most favorable to the verdict to independent reweighing of competing innocent and inculpatory interpretations of the evidence. The test thus invites reviewing courts to themselves consider and select among competing interpretations of the evidence, improperly intruding on the jury's province. Rehearing en banc should be granted to resolve the majority's conflict with Jackson and prior decisions of this and other courts by making clear that the "innocent explanation" test is not an alternative to sufficiency review under Jackson, and that the only standard of review for sufficiency remains whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of act

could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (emphasis in original).

B. TAKEN AS A WHOLE, IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THE EVIDENCE PERMITTED A RATIONAL JURY TO CONCLUDE THAT DEFENDANT POSSESSED A LOADED GUN ON HIS LAP AND ANOTHER LEANING ON HIS LEG

The majority assessed certain of the incriminating evidence item by item, minimizing the potential significance of each item in light of defendant's proffered "innocent explanation" while failing to recognize that the cumulative force of the evidence could support defendant's conviction even if no single piece slone would itself be sufficient to persuade a reasonable jury of defendant's guilt. Moreover, the majority (in at least one instance because the government failed to highlight it) failed to consider certain pieces of inculpatory evidence. When "all the evidence" is considered together "in the light most favorable to the government," Jackson, 443 U.S. at 319, it was more than sufficient to support a reasonable inference that defendant knowingly possessed the TEC 9 found on his lap and the pistol leaning against his leg.

First, the TEC 9 was found not just near defendant or just touching him, but on his lap as he slept sitting, not lying down but slumped over, on the couch. In their testimony, the officers sometimes referred to defendant as seated and sometimes as lying down. (See 2/16/05 RT 166-67, ER 32-33 (Officer De La Cova testified defendant positioned head to the left, legs to the

right, with right leg off the couch); 2/17/05 RT 30, ER 77 (De La Cova says defendant lying on the couch); 2/17/05 RT 113, ER 160 (same); 2/17/05 RT 134, ER 181 (Officer Clauss testified that defendant was "sitting on the couch"); 2/17/05 RT 174-75, ER 221-22 (Officer Clauss testified that defendant was "seated on the couch").) But on cross examination, in response to a direct question whether defendant was sitting or lying down, Officer Clauss testified that defendant "was kind of seated, but slumped over a little." (2/17/05 RT 148; ER 195.) Officer Clauss further testified that defendant was "not really" on his side (id.), as the sole defense witness testified she left defendant (2/18/05 RT 54; ER 357.) Moreover, importantly, the officers consistently referred to one of the guns being on defendant's "lap." Supine people do not have laps, only sitting people do. Random House Unabridged Dictionary (2006) (definition of lap). The majority accepted the view that defendant was lying on the couch, 548 F.3d at 804, 805, and never addressed the more specific testimony that defendant was, in fact, sitting, albeit slumped over. Sleeping sitting with a loaded gun in one's lap provides strong support for the inference that the person fell asleep guarding something. The jury was entitled to credit the more specific testimony that defendant was sitting with the TEC 9 in his lap, not lying down with the TEC 9 on top of him, and the majority should have deferred to this determination, which would

support an inference consistent with guilt. United States v. Corona-Verbera, 509 F.3d 1105, 1117 (9th Cir. 2007) ("Conflicting evidence is to be resolved in favor of the jury verdict, and all reasonable inferences are to be drawn in favor of the government.") (internal quotation marks omitted).

Second, the testimony established that the TEC 9 was a big and heavy gun. (2/16/05 RT 167-68; ER 33-34; 2/17/05 RT 77, 84; ER 124, 131.) And, though the parties did not bring it to the Court's attention, the district court permitted each of the jurors to handle the gun while seated in the jury box before the jury retired to deliberate. (2/18/06 RT 120.)[1] Thus, each juror had facts from which to form his or her own opinion about the weight and size of the gun as it sat on defendant's lap and draw the reasonable inference that it was unlikely that defendant could have been unaware of the gun's presence.

Third, though it acknowledged one officer's testimony that after defendant was startled awake "he appeared like he was going to, you know, grab towards his lap and then he stopped and put his hands up," 548 F.3d at 804, the majority dismissed this

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[1] The parties' briefs and excerpts of record did not cite or discuss the portion of the trial transcript in which the district court instructed the government's case agent to give the firearms to the jurors while they were in the jury box and told the jurors to pass the firearms around. In light of this and the other overlooked facts discussed herein, even if rehearing en banc is not granted, panel rehearing is appropriate to reconsider the majority's decision. See Fed. R. App. P. 40(a)(2).

testimony in a footnote, first because the government did not argue to the jury that defendant's movement showed his awareness of the gun and second because the officer's testimony was "speculative and diffident." Id. at 808 n.6. The majority did not consider the same officer's testimony on cross examination, reiterating more clearly that defendant had initially reached toward his lap: "Well, I think if I recall sir, I actually said that as he came awake he startled, he didn't jump and he started to reach towards his, you know, center area and then he put his hands up." (2/17/05 RT 151; ER 198.) This testimony was consistent with the jury's verdict that defendant knew there was a gun on his lap.

Fourth, the majority rejected the government's argument that defendant's post-arrest statement, "Those motherf***ers left me sleeping and didn't wake me," supported a jury inference of knowing possession. 548 F.3d at 810. The majority concluded that the statement merely showed that defendant "realized he had been left high and dry, and was not happy about it," and was therefore not incompatible with defendant's innocent explanation. Id. The majority, however, overlooked the significance of defendant making this statement after he had already been handcuffed and taken into custody. (2/17/05 RT 192; ER 239.) As the dissent notes, in this context, the failure of defendant's statement to contain anything suggesting that upon awakening he

had been surprised to find a gun in his lap and another against his leg, supported the jury's inference that his statement in fact demonstrated a consciousness of guilt. 548 F.3d at 812.

Properly taken together as a whole, this evidence was more than sufficient to support reasonable inferences establishing guilt, even in light of defendant's proffered "innocent explanation." The dissent succinctly explained why this "innocent explanation" was "extraordinarily implausible" even for the gang and drug infested apartment complex in which defendant was found: "No one – not even drug dealers, and maybe especially drug dealers – are going to go off and abandon their loaded weapons, drugs, cash and cellphones with a man sleeping off a drunken binge. It makes no sense whatever." Id. at 813-14. As the dissent notes, "far more plausible" is the contrary "conclusion that [defendant] simply fell asleep while guarding the drugs." Id. at 813. This contrary conclusion is fully supported by reasonable inferences from the evidence as a whole -- the unlikelihood that defendant's fellow gang members would without defendant's knowledge leave chambered weapons that might accidentally discharge on his lap and leaning against his leg; the unlikelihood that defendant would remain unaware for some significant period of time of a heavy gun on his lap; the likelihood that defendant's initial reaction on being awakened of reaching towards his lap where the gun was resting demonstrated

that he knew the gun was there; and the likelihood that defendant's total failure when speaking with an officer after his arrest to express any surprise at having found loaded guns on his lap and leaning against his leg similarly demonstrated that he knew the guns were there.

Because, under the proper sufficiency standard, the evidence as a whole supports the jury's guilty verdict, rehearing or rehearing en banc should be granted and the jury's verdict of guilt affirmed.

III

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc.

Dated: January 5, 2009

Respectfully submitted,

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Jorge S Cardona

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. EARL ANTHONY NEVILS, a/k/a EARL NEVILS, JR., EARL BOWMAN; EARL JOHNSON, ALFRED JOHNSON, "BABYCRIPTOE", "LILAMIGO" and "BABY FROG," *Defendant-Appellant.*	No. 06-50485 D.C. No. CR-03-01269-CBM OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
December 3, 2007—Pasadena, California

Filed November 20, 2008

Before: Thomas G. Nelson, Richard A. Paez, and
Jay S. Bybee, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Bybee

COUNSEL

Elizabeth A. Newman, Assistant Federal Public Defender, Los Angeles, California, for the defendant-appellant.

Sandy N. Leal, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

PAEZ, Circuit Judge:

Earl Nevils appeals from a jury conviction for being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). We reverse the conviction because the evidence offered at trial was insufficient with regard to the element of knowing possession.[1]

[1]Because we reverse Nevils's conviction, we need not address his challenge to his sentence.

I. BACKGROUND

On April 14, 2003, LAPD officers specializing in anti-gang enforcement were investigating unrelated criminal activity at an apartment complex in a high-crime area of Los Angeles when they encountered Earl Nevils asleep on a couch in one of the apartments (Apartment 6). The officers were originally following another man because he ran away when they approached him and his friends on the street. As they followed the man into the courtyard of the apartment complex, he approached Apartment 6, started to enter, and then apparently changed his mind and entered another apartment on the other side of the courtyard. When the officers approached Apartment 6 to investigate, their attention was diverted from the other man to Nevils.

The wooden door of Apartment 6 was off its hinges and leaning against the interior wall, and the metal security door, or screen door, was ajar. Inside, the officers could see Nevils asleep on a couch. Leaning against Nevils's body were two firearms—one on his lap and another leaning against his leg. There was a coffee table approximately one foot from the couch. On the table were several items that the police later determined to be baggies full of marijuana and ecstasy, a cell phone, wrist watches, documents, and U.S. currency.

The police officers entered the apartment with guns drawn, conducted a "sweep," and then began to approach Nevils. As they approached, Nevils began to wake up. At that point, both officers identified themselves and yelled for Nevils to get down on the ground. Nevils either "rolled" or "slid[ ]" onto the ground, and the officers arrested Nevils for drug possession. Both officers testified that Nevils "startled" awake. One officer testified more specifically that, before Nevils's rolled or slid onto the ground, "his eyes . . . kind of came full — fully opened and for a brief second he appeared like he was going to, you know, grab towards his lap and then he stopped and put his hands up." The other officer did not mention any

brief pause; he stated that the events were "very quick" and "almost immediate," and that Nevils "jumped up as a startled jump and rolled over onto the ground." Some time after the arrest, a sergeant who had arrived on the scene was questioning Nevils to make sure he was not injured, when Nevils stated: "I don't believe this shit. Those motherfuckers left me sleeping and didn't wake me." Nevils was later booked on charges of possession of marijuana for sale.

Nevils was later charged and tried in federal court on a single count of being a felon in possession of a firearm and ammunition. The Government's case consisted primarily of the testimony of the two arresting officers setting forth the incriminating circumstances surrounding Nevils's arrest. In his defense, Nevils presented evidence that he had been at a party in a neighboring apartment all day, had become so drunk that he could not stand, and was taken by friends to Apartment 6 and laid on the couch (on his side "[s]o he wouldn't throw up") to sleep it off. Jonnetta Campbell, who helped take Nevils to Apartment 6, testified that at the time she left Nevils on the couch and closed the door behind her, there were no other people in Apartment 6, and no guns or drugs were visible. It was undisputed at trial that Nevils did not live in Apartment 6 and that many other people had access to the vacant apartment, although Nevils was the only person present when the police entered.

At the close of the Government's case and again at the close of all the evidence, Nevils moved under Federal Rule of Criminal Procedure 29 for a judgment of acquittal on the basis of insufficiency of the evidence. The district court denied both motions, and the jury found Nevils guilty.

Nevils timely appealed.[2] He argues that the evidence was insufficient on the element of knowing possession. Nevils points out that: (1) it is undisputed that he was asleep; (2) a

[2]We have jurisdiction under 28 U.S.C. § 1291.

witness offered unrebutted testimony that he had gotten drunk at a nearby party and had been taken to Apartment 6 to lie down; and (3) no evidence—other than his presence—tied Nevils to the firearms, or to the other items found in the apartment (i.e., the drugs, the cell phone, the watches, and the U.S. currency).

The Government argues that the evidence of knowing possession was sufficient because: (1) Nevils had "actual possession" of the firearms due to his physical contact with them; (2) there was evidence that Nevils had been in Apartment 6 at least once before; (3) Nevils's "gang affiliation . . . support[ed] the jury's finding that [he] knowingly possessed the firearms"; (4) Nevils "appeared like he was going to . . . grab towards his lap" when he was awakened by the police; and (5) Nevils made statements showing consciousness of guilt.

II. DISCUSSION

We review de novo the denial of a Rule 29 motion. *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007). In considering a challenge to the sufficiency of the evidence, we review the entire record, "[v]iewing the evidence in the light most favorable to the government," and "must determine whether any rational jury could have found [the defendant] guilty of each element of the crime beyond a reasonable doubt." *Id.* We do not "question [the] jury's assessment of witnesses' credibility, and must presume that the trier of fact resolved any conflicting inferences in favor of the prosecution." *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000) (internal quotation marks and footnote omitted). Applying this standard, as we explain below, the evidence was insufficient as a matter of law to support Nevils's conviction, and we therefore reverse and remand for entry of a judgment of acquittal.

A. Elements of an 18 U.S.C. § 922(g)(1) offense

[1] The crime charged, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), requires proof of three elements: "(1) that the defendant was a convicted felon; (2) that the defendant was in knowing possession of a firearm; and (3) that the firearm was in or affecting interstate commerce." *United States v. Beasley*, 346 F.3d 930, 933-34 (9th Cir. 2003). The first element was conceded by stipulation, and the third was not contested. The only disputed element at trial was Nevils's knowing possession of the firearms.[3]

[2] Proof of knowing possession in the context of 18 U.S.C. § 922(g)(1) requires "that the defendant consciously possessed what he knew to be a firearm." *Id.* at 934. "In general, a person is in possession of something if the person knows of its presence *and* has physical control of it, or has the power and intention to control it."[4] *United States v. Cain*, 130 F.3d 381, 382 (9th Cir. 1997) (emphasis in original) (internal quotation marks omitted); *see also United States v. Ruiz*, 462 F.3d 1082, 1088 (9th Cir. 2006) ("Possession of an item includes the ability and intent to exercise control over that item.").

[3] "[T]he element of control necessary for possession [is not] satisfied if it [i]s shown that the defendant was merely 'in the presence of the contraband and could reach out and take it' if he so desired." *United States v. Chambers*, 918 F.2d 1455, 1459 (9th Cir. 1990) (quoting *United States v. Terry*,

[3]The indictment also alleged possession of ammunition, but it was undisputed that the ammunition in question was loaded inside the firearms. The sufficiency analysis is thus identical with regard to both the ammunition and the firearms.

[4]This formulation is almost identical to that provided by our Circuit's model jury instructions. *See* Ninth Circuit Manual of Model Jury Instructions, Criminal § 3.18 ("Possession—Defined") (2003 ed.) ("A person has possession of something if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.").

911 F.2d 272, 280 (9th Cir. 1990)). Rather, "[w]e have held repeatedly that neither proximity to the contraband, presence on property on which contraband is recovered nor association with a person having actual possession of the contraband is sufficient proof of . . . possession." *Id.* (collecting cases). "Mere proximity, presence and association go only to the contraband's *accessibility*, not to the dominion or control which must be proved to establish possession." *Id.* (emphasis in original) (internal quotation marks omitted).

[4] Possession can be either actual or constructive. *See, e.g.*, *Chambers*, 918 F.2d at 1457-58. The Government argues that this case is an "actual" or "physical" possession case, and that "constructive" possession cases discussing "mere proximity" therefore do not apply. The tenuous distinction between "actual" and "constructive" possession, however, is not analytically useful in this case. *See* Ninth Circuit Manual of Model Jury Instructions, Criminal § 3.18 ("Possession—Defined"), cmt. (2003 ed.) (stating that instruction quoted above at note 4 is "all-inclusive" and that "[t]here is no need to attempt to distinguish further between actual and constructive possession"); *cf. Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914) ("[A]ctual possession and constructive possession . . . often so shade into one another that it is difficult to say where one ends and the other begins."). Ultimately, possession—of whatever type—requires a showing that Nevils had knowledge of the firearms and the ability and intention to control them. Accordingly, rather than attempting to sort this case as an "actual" or "constructive" possession case, we focus on the dispositive requirements of knowledge and ability and intention to control.

B. Sufficiency of the evidence of possession

[5] Noting that Nevils was alone in Apartment 6 when he was arrested, the Government argues that "a rational trier of fact could find that the physical location of the firearms on defendant's lap and leaning against his leg, as well as the

presence of packaged drugs, a cell phone, and money within a foot from where defendant lay, constituted possession of the firearms. In short, the jury was entitled to rely upon his actual possession of the firearms to infer that his possession was knowing." The Government argues that the "mere proximity" cases cited above are irrelevant because here the firearms were actually touching Nevils's body. But the pivotal circumstance in this case is the undisputed fact that *Nevils was asleep* (or passed out). Thus, the fact that the firearms were physically touching him is not sufficient to show that he was conscious of their presence, and the "mere proximity" cases are quite relevant.

[6] The Government is correct that, had Nevils been caught running with a gun in his hand—or sitting on top of a gun (while awake), *see United States v. Gutierrez*, 995 F.2d 169 (9th Cir. 1993)—the jury would be entitled to make an inference of knowledge, and the mere proximity cases would be superfluous. Because Nevils was asleep, though, this is not a paradigmatic "actual" possession case, and additional evidence is necessary to allow an inference of knowledge. That the weapons were touching Nevils is a factor tending to make knowing possession more likely, but without evidence that Nevils was aware of their presence, this fact is not enough. *See Chambers*, 918 F.2d at 1459 ("[P]roximity . . . go[es] only to the contraband's *accessibility*, not to the dominion or control which must be proved to establish possession." (emphasis in original) (internal quotations omitted)).

In *Gutierrez*, for example, proximity was coupled with the facts that: (1) the defendant—who was awake—was "sitting on top of a pistol" in the back seat of a car; (2) the police testified that the car's occupants appeared to be hiding things as they approached; and (3) the corner of the back seat appeared to have been "hastily" torn back to conceal the weapon. 995 F.2d at 171-72 (noting that "testimony that the defendant may have placed something in the spot where the police later

found the weapon can support a finding of possession" (internal quotation marks omitted)).

Similarly, in *United States v. Taylor*, 154 F.3d 675 (7th Cir. 1998), the court affirmed a conviction for possession of a firearm where evidence that the defendant was sleeping in the same room as the firearm was accompanied by additional evidence tying him to the apartment. There was "overwhelming" evidence that Taylor lived in the apartment, and "[t]he weapons were found in a padlocked closet near the bed in which he slept, and the closet contained only men's clothing and cologne, as well as a receipt with his name on it." *Id.* at 682. Moreover, "[t]he record reveal[ed] no evidence of any other man residing at the house." *Id. See also United States v. Castillo*, 866 F.2d 1071, 1086-88 (9th Cir. 1988) (affirming conviction for possession of cocaine on similar facts, where defendant had keys to apartment, defendant was sleeping in locked bedroom where cocaine was found, and defendant's clothes were found in bedroom closet).

On the other hand, in *Ruiz*, we reversed convictions under § 922(g)(1) because the defendants' ties to the firearms and the premises where they were found (a methamphetamine lab operated on property on which several buildings stood) were too undefined. 462 F.3d at 1090. Ruiz and codefendant Noriega—both of whom admitted participating in a criminal drug conspiracy on the property—were observed fleeing the premises during a police raid, and "firearms were found in the loft area, in the main part of the residence, in the garage and in the stairwell of the main part of the residence." *Id.* at 1088. In reversing the convictions, we stated: "The most that can be said in favor of a finding of possession of the firearms is that Diaz, one of the co-conspirators, resided on the premises where the drugs were found, and that Noriega and Ruiz both had access to the residence. However, access to the premises does not equate to possession." *Id.* at 1089. We noted that "there was no evidence . . . regarding a finite number of identified individuals who had access to the subject premises." *Id.*

We also rejected "the [Government's] argument that 'somebody must have possessed the weapons because they were there' [as] insufficient evidence of control or intent to control the weapons by one or more identified individuals." *Id.*

[7] None of the above cases is precisely on all fours with our case, because of the special circumstance that the guns were actually on or leaning against Nevils's body as he slept. Nevertheless, despite the close physical proximity of the guns to Nevils, the fact remains that the circumstantial evidence of knowledge and intent to control here falls far short of that found sufficient in cases like *Castillo* or *Taylor*. The Government did not offer evidence tying Nevils to any of the other personal items in the apartment,[5] as in *Taylor*, and it did not offer any evidence that Nevils's access to Apartment 6 was exclusive. Not only did the Government fail to offer "evidence . . . regarding a finite number of identified individuals who had access to [Apartment 6]," *Ruiz*, 462 F.3d at 1089, it was unable to rebut evidence that there was open access to Apartment 6. Nor did the Government establish suspicious behavior by Nevils similar to the defendants scrambling to hide the guns in *Gutierrez*. *See Gutierrez*, 995 F.2d at 171.[6]

The Government argues that "[h]ere, unlike *Ruiz*, witness testimony not only links defendant to the firearms and [Apart-

[5]A forensic officer testified that it was not possible to lift fingerprints from the guns, and that the items on the coffee table were not tested for fingerprints. The arresting officers testified that they did not recover ammunition, drugs, money, or keys to Apartment 6 from Nevils's person.

[6]As noted above, here one officer testified that, immediately after being awoken from a drunken stupor by screaming officers, Nevils "for a brief second . . . appeared like he was going to, you know, grab towards his lap." On appeal, the Government cites this testimony as evidence that Nevils was aware of the firearms' presence. At trial, the Government did not make any similar argument to the jury. In any case, unlike the specific evidence of " 'furtive' movements" in *Guttierez*, the officer's speculative and diffident testimony here is not the type of consciousness-of-guilt evidence on which a reasonable juror could rely.

ment 6], but defendant was in actual possession of both loaded firearms, and he was the only person in the apartment." First, this argument bootstraps by assuming the proposition—actual possession—that it must prove. Second, the Government fails to acknowledge that the defendants in *Ruiz* were also directly linked to the subject premises. Among other things, the *Ruiz* defendants were observed fleeing the premises, admitted participating in a meth-production conspiracy on the premises, and admitted having access to the premises. Finally, the Government fails to acknowledge that, although Nevils was the only person in Apartment 6 *when the police entered*, the evidence (1) established that other people generally had access to the apartment, and (2) strongly suggested—based on the various personal effects found on the coffee table—that other people had been in the apartment before the police arrived.

In *Ruiz*, there was no question that the defendants were at the subject premises, frequently, and were up to no good. The relevant question was whether there was specific evidence to show that they were *aware* of the weapons' presence and had the *intent* and ability to control the weapons. Similarly, here there is no doubt that Nevils was in Apartment 6, or that he had been there once before, allegedly up to no good (he was arrested there several weeks earlier for violating his parole by associating with gang members). The question was whether there was sufficient evidence to allow a finding that he had knowledge of, and the intent and ability to control, the firearms. The Government claims that the officers' observation of Nevils—admittedly, asleep—with one gun on top of him and the other next to his leg was sufficient to support a finding of possession. But this argument amounts to little more than the argument rejected in *Ruiz*—that "somebody must have possessed the weapons because they were there." 462 F.3d at 1089.

The Government did not present any other evidence linking Nevils to the guns or to the other items in Apartment 6 (the

drugs, the phones, etc.). Further, Nevils was only slightly linked to the apartment itself, having been there at least one other time. Finally, as in *Ruiz*, and unlike in *Taylor*, there was no reason to believe that Nevils regularly stayed in Apartment 6, much less that he had exclusive access to the apartment. To the contrary, there was every reason to believe that the apartment was open to all comers.

[8] Nor does Nevils's gang affiliation, familiarity with the apartment complex, or Nevils's prior experience with drugs provide sufficient evidence to support an inference *that he was in knowing possession of a firearm on April 14, 2003*. Nevils's mere presence at the scene and his general character and history as a gang member are insufficient evidence of the required mental state. *See Spivey v. Rocha*, 194 F.3d 971, 978 (9th Cir. 1999).

In short, there is little to distinguish this case from cases like *Ruiz*, other than the physical proximity of the firearms to Nevils. If the firearms in this case had been found on the coffee table—along with the drugs, cell phone, watches, U.S. currency, and documents—there is no doubt that a judgment of acquittal would be required, as no other evidence tied Nevils to the firearms or the apartment, other than his presence in the apartment on one other occasion. *See, e.g.*, *Ruiz*, 462 F.3d at 1088-89. Indeed, the district court here did not hesitate at sentencing to find that the Government had failed to prove—even by a preponderance of the evidence—that Nevils possessed the drugs on the coffee table. In declining to make such a finding, the district court emphasized that Nevils "was asleep at the time."

The sufficiency of the Government's evidence thus depends on the distinction between the guns being found on the coffee table and their being found on and leaning against Nevils's body as he slept. Despite the Government's insistence that the distinction itself is enough to demonstrate Nevils's "actual possession" of the firearms, possession—

whether labeled actual or constructive—requires *knowledge* of the object possessed *and intent* to control that object. Knowledge and intent obviously require consciousness, at some point. There was no direct evidence showing that Nevils was ever conscious in Apartment 6 on April 14, 2003. All of the evidence presented indicated that he was asleep and/or passed out. The circumstantial evidence bearing on Nevils's mental state was similar to that we have repeatedly rejected as insufficient. *See, e.g.*, *Esquivel-Ortega*, 484 F.3d at 1226-27; *Ruiz*, 462 F.3d at 1088-89; *United States v. Corral-Gastelum*, 240 F.3d 1181, 1184 (9th Cir. 2001). *Cf. United States v. Vasquez-Chan*, 978 F.2d 546, 551 (9th Cir. 1992) (noting that we have held "evidence legally insufficient to establish possession when the evidence suggested that a defendant was merely caught in 'extremely incriminating circumstances' ").

[9] "When there is an innocent[7] explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." *Vasquez-Chan*, 978 F.2d at 549; *see also Esquivel-Ortega*, 484 F.3d at 1227-28. Here, the Government did not produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that Nevils was guarding the drugs or otherwise consciously in possession of the guns, as opposed to being passed out at the wrong place, at the wrong time.

[7]Innocence in this instance is used in a narrow sense. The question is not whether the defendant was innocent of all wrongdoing, but whether the inference in question renders him legally innocent of the crime charged. For example, if a defendant was charged with possession of a shotgun found in the trunk of a car he was driving, evidence that (1) the defendant had stolen the car only minutes before being pulled over, and (2) the shotgun was registered to the car's rightful owner, would support an "innocent" inference that the defendant lacked the requisite knowledge to be convicted *of possessing the shotgun*.

Although Nevils's proffered explanation might seem implausible in many towns and many apartment complexes, *cf. United States v. Perlaza*, 439 F.3d 1149, 1177 (9th Cir. 2006) ("[This court] will accept a defendant's allegedly 'innocent explanation' only when that explanation is plausible."), it is not implausible given the evidence that *this* neighborhood, *this* apartment complex, and Apartment 6 itself, were neck-deep in gang activity and the illicit drug trade. Further, the presence of several watches, a cell phone, other personal items, and drugs packaged for retail sale—none of which were tied to Nevils—supports the inference that other people were in Apartment 6 before the police arrived.

Finally, we reject the Government's reliance on Nevils's post-arrest statement as supporting a jury inference of knowing possession. The statement "[t]hose motherfuckers left me sleeping and didn't wake me" is ambiguous and is subject to multiple interpretations, and the Government did not produce evidence sufficient to allow a jury to choose an inculpatory interpretation. The Government argues that "the most reasonable inference . . . from this statement was that defendant was angry that his friends failed to warn him . . . something he expected them to do because he knew he was illegally in possession of guns and drugs." To the contrary, the statement merely demonstrates Nevils's mastery of the obvious: some person or persons (1) had been in Apartment 6, and then (2) absconded and left him surrounded by the incriminating evidence. The fact that Nevils realized he had been left high and dry, and was not happy about it, is hardly incompatible with his innocent explanation of his circumstances (i.e., that he was asleep), and it does not show that Nevils had knowledge of the firearms *before being arrested*.

[10] Because there was a plausible innocent explanation for the facts, the Government was required to "produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that [an inculpatory] explanation [was] the correct one." *Vasquez-Chan*, 978 F.2d at 549. Here—given the lack

of any corroborating details connecting Nevils to the guns or the other items in the apartment, combined with the very slight evidence connecting Nevils to Apartment 6, and the evidence that Apartment 6 was essentially accessible to the public—the Government has not provided evidence that would allow a rational jury to conclude beyond a reasonable doubt that Nevils knew, prior to awaking, of the firearms' presence and had the intention to exercise control over them.

III. Conclusion

Nevils could not be convicted for his mere sleeping presence in Apartment 6 during criminal activity by others, and he also could not be convicted of a violation of § 922(g) based on "mere presence" even if he were, at some point, awake and aware that others were committing crimes involving guns and drugs in the apartment. The Government did not produce sufficient evidence beyond evidence of "mere presence" and gang affiliation. The undisputed evidence established that Nevils was asleep when the police arrived. On this record, we hold that the Government failed to produce evidence that would have allowed a rational jury to infer knowing possession beyond a reasonable doubt. It may be natural to assume that "somebody must have possessed the weapons because they were there," *Ruiz*, 462 F.3d at 1089, but the Government did not offer sufficient evidence to prove that that "somebody" was Nevils.

REVERSED and REMANDED for entry of a judgment of acquittal.

BYBEE, Circuit Judge, dissenting:

It is said that the wife of English lexicographer Samuel Johnson returned home unexpectedly in the middle of the day, to find Dr. Johnson in the kitchen with the chambermaid. She

exclaimed, "My dear Dr. Johnson, I am surprised." To which he reputedly replied, "No my dear, you are amazed. We are surprised."[1]

Earl Nevils was surprised when two LA police officers with guns drawn ordered him not to move. But Nevils was not amazed in the least by the circumstances in which he found himself: he had a loaded, chambered semiautomatic Tec 9 on his lap and a loaded, chambered .40 caliber pistol by his leg. Nor was he astonished by the marijuana, ecstasy, cash and a cellphone on a table a foot away. Although the unoccupied apartment was not his, Nevils wasn't the least bewildered at finding himself in Apartment #6—officers had found drugs and guns in the apartment just three weeks earlier and had arrested Nevils there for parole violation. According to one of the officers, Nevils first impulse was to "grab towards his lap" where the Tec 9 lay and "then he stopped and put his hands up." He later exclaimed to an officer, "I don't believe this s---. Those m----------left me sleeping and didn't wake me." The jury found him guilty of being a felon in possession.

The majority overturns his conviction because it finds the evidence insufficient to show that Nevils knowingly possessed the guns. It surmises that it is equally plausible that someone—anyone, actually, since the defense couldn't finger any person in particular—set Nevils up by placing the guns on him while he was in a drunken stupor. Thus, the majority concludes, no reasonable juror—certainly not the twelve who did—could have found that Nevils knowingly possessed the guns. Like Mrs. Johnson, I am both amazed and disappointed. I respectfully dissent.

I

To overturn a jury's conclusion that evidence introduced in a trial was sufficient to convict the defendant we must, as the

[1]The story has occasionally been attributed to Noah Webster.

majority admits, "determine whether any rational jury could have found [the defendant] guilty of each element of the crime beyond a reasonable doubt." *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007). Under this inquiry, we must not "question [the] jury's assessment of witnesses' credibility, and must presume that the trier of fact resolved any conflicting inferences in favor of the prosecution." *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000). This standard is extraordinarily high. It means that to overturn a jury conviction based on sufficiency of evidence, the majority must conclude that *no rational jury* could have convicted Nevils under the evidence properly presented at trial. *United States v. Barron-Rivera*, 922 F.2d 549, 552 (9th Cir. 1991).

In this case, for the purposes of 18 U.S.C. § 922(g), the jury had to find that the defendant had "knowing possession" of a firearm; that is, the jury must have concluded that Nevils "consciously possessed what he knew to be a firearm." *United States v. Beasley*, 346 F.3d 930, 934 (9th Cir. 2003). This conscious possession can either be actual or constructive, *see United States v. Chambers*, 918 F.2d 1455, 1457-58 (9th Cir. 1990), but in either case the government must prove "a sufficient connection between the defendant and the [firearms] to support the inference that the defendant exercised dominion and control over the [firearms]." *Gutierrez*, 995 F.2d at 171 (quoting *United States v. Terry*, 911 F.2d 272, 278 (9th Cir. 1990)). There is a "sufficient connection" in this case.

There was ample circumstantial evidence for a rational jury to conclude that Earl Nevils knew he possessed, at the least, the 9mm Luger semi-automatic handgun (also referred to in the record as a Tec 9) on his lap. The gun was loaded with several live rounds of ammunition, including one in the gun's chamber. The jury heard evidence from which it could easily have inferred that Nevils knew the gun was there. Officer Clauss, one of the two police officers who apprehended Nevils, testified that when they came upon Nevils and

announced themselves, "at that point, you know, his eyes, you know, kind of came full—fully opened and for a brief second he appeared like he was going to, you know, grab toward his lap and then he stopped and put his hands up." A rational juror could equally infer from Nevils' behavior that his first instinct was to reach for his weapon—an instinct that was suppressed when Nevils realized the officers had already drawn their guns and one of the officers had flanked him. Nevil's subsequent behavior is consistent with the jury's finding. When he talked to Sergeant Coleman after his arrest, Nevils did not express any consternation over waking up in a strange place, or amazement about finding guns on his person. He didn't say "Hey, how did I get here?" or "Where did those guns come from?" Instead, he simply expressed anger over being left alone, proclaiming, "I can't believe this s---. Those m---------- left me sleeping and didn't wake me."

II

The majority rejects these perfectly plausible explanations because it finds another explanation in equipoise with the government's case and relies on the rule that where the evidence presented at trial does not "establish any reason to believe that an innocent explanation of that evidence was any less likely than the incriminating explanation advanced by the government," it cannot establish the defendant's guilt beyond a reasonable doubt. *United States v. Vasquez-Chan*, 978 F.2d 546, 551 (9th Cir. 1992). The majority's "innocent explanation" in this case, however, is extraordinarily implausible. The defense's theory, adopted by the majority, is that Nevils, after arriving at the apartment complex for a baby shower, became drunk, passed out, and was carried into the notorious Apartment #6 by several female friends. He then remained unconscious for some seven hours (from approximately 4:00 or 5:00 p.m., a few hours after the baby shower ended, until around 11:45 p.m., when the police officers entered the apartment complex). During that period, one or more persons, whose identities and reasons are unknown, entered Apartment #6,

placed drugs in small baggies, a cell phone, and cash on the coffee table in front of Nevils and left a loaded semiautomatic handgun on Nevils' lap and another loaded pistol leaning against his leg. This activity, apparently, did not wake the lethargic Nevils. Instead, the majority believes, he continued to sleep soundly until the police arrived, was awakened, and was amazed to find himself surrounded by drugs and guns.

Even more curious than Nevils' behavior under the majority's "innocent explanation" is the behavior of the anonymous drug dealers. What did the drug dealers do? There are a couple of options, none of them very good. As Mark Twain wrote, "[i]t would take you thirty years to guess, and even then you would have to give it up." MARK TWAIN, *Fenimore Cooper's Literary Offenses*, *in* IN DEFENSE OF HARRIET SHELLEY AND OTHER ESSAYS 60, 68 (1918). These drug dealers, according to one version of the theory, were surprised by the presence of a police car outside the apartment complex, got scared, and ran off. They decided it was best to leave their drugs and weaponry with the sleeping Nevils, and either threw or placed the heavy guns unto Nevils' lap and leg (all without waking him) as they rushed to leave the premises. Although ordinary drug dealers might, with an eye towards profits, stuff the drugs, cash, and cellphones in their pockets while they were leaving, the majority's anonymous constructs are no ordinary drug dealers. Instead, these guys were so frightened of being caught by the police that they left all their loot on the coffee table, ran out the front door of the apartment, and disappeared before the police arrived. Ironically, their haste did not appear to be necessary—the police officers saw no one leaving Apartment #6 and were only drawn to the apartment after noticing a person furtively trying to enter it later.

Alternatively, the drug dealers deliberately decided to leave their paraphernalia in the apartment. But rather than leave one of their number behind to guard the loot, they set up a scarecrow of sorts—arming the unconscious Nevils and propping

him up on the couch to look menacing. This plan, of course, was foiled by the arrival of the police, who weren't impressed with the sleeping Nevils. This theory, like the first, is so far-fetched that a rational jury could easily have rejected it in favor of the far more plausible conclusion that Nevils simply fell asleep while guarding the drugs.

The majority recognizes that its theory is implausible "in many towns and many apartment complexes." Maj. Op. at 15706. But it finds that its "innocent explanation" is "not implausible given the evidence that *this* neighborhood, *this* apartment complex, and Apartment 6 itself, were neck-deep in gang activity in the illegal drug trade." *Id.* In other words, the alternate theory would be implausible if Nevils had been found in an ordinary apartment complex, but because this was a notorious drug area, *anything* can happen. The majority's admission that its theory is generally implausible is healthy, but it can't make its implausible theory plausible just because these events took place in a drug-infested area. No one—not even drug dealers, and maybe *especially* drug dealers—are going to go off and abandon their loaded weapons, drugs, cash and cellphones with a man sleeping off a drunken binge. It makes no sense whatsoever. If we are to assume, without any evidence, that people are that irrational, then we are going to have to revise our "innocent explanation" jurisprudence and overturn a bunch of our cases.

III

We don't have any cases that address precisely how much the government must prove to show that a sleeping defendant is a knowing possessor. The two cases that are closest to this case come to opposite conclusions and each is distinguishable. The majority relies principally on *United States v. Ruiz*, 462 F.3d 1082 (9th Cir. 2006). In that case, the defendants were arrested following a raid on a meth lab in a house. The officers found weapons in a couch in the loft area, in the main part of the residence, in a stairwell and under a sofa cushion

in the garage. *Id.* at 1085. Other than the defendants' mere presence at the house, nothing linked them to the weapons; there was no fingerprint evidence and they did not own the residence. *Id.* at 1088. Our decision is a model of common sense: although the men were present in a dwelling where weapons were found, there is nothing to show that they knowingly possessed the weapons. Like the defendants in *Ruiz*, Nevils did not own Apartment #6, nor were his fingerprints found on the gun. However, unlike in *Ruiz*, where the defendants were simply present in the same house as the weapons, here Nevils had the weapons on his person, and they were loaded and chambered.

Our decision in *United States v. Gutierrez*, 995 F.2d 169 (9th Cir. 1993), is closer to this case. In that case, the police stopped a car on a possible traffic violation. After taking the driver for a sobriety test and determining that the remaining two men did not possess a valid driver's license, the police decided to tow the car. The officers discovered a loaded firearm under the left rear seat, where Gutierrez had been sitting. Acknowledging that " 'mere presence as a passenger in a car from which the police recover weapons does not establish possession,' " we found that "there was much more than 'mere proximity' or 'mere presence" in the car. *Id.* at 171 (quoting *United States v. Soto*, 779 F.2d 558, 560 (9th Cir. 1986)). Rather, "[i]t would tax credulity to assert that Gutierrez was sitting on top of a pistol without knowing of its presence, or that he just happened to be a passenger in an automobile equipped with a pistol for each passenger, and the he knew nothing of that odd coincidence." *Id.* If the majority applied its "innocent explanation" theory to *Gutierrez*, we would have deemed the evidence insufficient in that case. In *Gutierrez*, we might have easily said that Gutierrez's explanation sounded implausible, but in *this* car, in *this* neighborhood, and with *this* defendant, anything was possible—including the possibility that Gutierrez was sitting in the back seat of a car with a loaded pistol under it and didn't know it.

If the guns had been found elsewhere in the apartment, Nevils would have a good claim under *Ruiz*. If the guns were found on the table, the case would be a close one. The majority, however, has no *plausible* explanation—certainly nothing with a shred of evidence to support it—for how Nevils ends up with a loaded semiautomatic on his lap and a pistol against his leg.

Because the majority's "innocent explanation" "tax[es] credulity," *Gutierrez*, 995 F.2d at 171, a reasonable juror could find Nevils had control of the guns. I would affirm the district court's determination that the evidence was sufficient to convict Nevils of knowing possession of the weapons. Thus, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EARL ANTHONY NEVILS Defendant-Appellant.	No. 06-50485 D.C. No. CR 03-1269-CBM

APPELLANT'S OPPOSITION TO GOVERNMENT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CONSUELO B. MARSHALL, SENIOR DISTRICT JUDGE, PRESIDING

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EARL ANTHONY NEVILS Defendant-Appellant.	No. 06-50485 D.C. No. CR 03-1269-CBM

APPELLANT'S OPPOSITION TO GOVERNMENT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

I

Introduction

This appeal involves facts that are highly unusual, in a legal framework that is absolutely ordinary. Indeed, the legal analysis in this case is as quotidian as the facts are strange. Since the legal analysis is unremarkable, and since the facts are simply facts, nothing about this appeal – neither the facts, nor the law, or the Court's analysis – merits rehearing.

First, the facts. They are indeed unusual: a sleeping defendant, on a sofa in an apartment open to the world, with a gun on his lap and a gun by his leg – a defendant who, only a short time earlier, had been laid on that sofa in a drunken

stupor with no guns nearby at all. The question presented on appeal was whether the government had proved at trial that the defendant, Mr. Nevils, had knowingly possessed the two guns. Short of an epidemic of sleep disorders, such an unusual factual scenario is unlikely to present itself again any time soon. There is nothing, then, about the facts of this case that merits rehearing of any sort.

Nor is there anything about the legal analysis of Judge Paez (joined by Judge T.G. Nelson) that warrants rehearing. The legal analysis is simply a straightforward application of the sufficiency test: whether any rational juror could have found that the government proved its case beyond a reasonable doubt. Judge Paez and Judge T.G. Nelson applied the Court's well-established jurisprudence, which the Court has developed over decades to decide cases of this sort, in which the defendant contends that he did not commit a crime but was merely present at the scene.

Since the facts of this case are just facts and the law is just the law, well-established and normally applied, the government's only hope to convince the full Court to rehear this case is to claim that Judge Paez and Judge T.G. Nelson have misconstrued the law, that they have not applied it normally at all – in short, that they have expanded and perverted the sufficiency test. That is the government's claim, but it should fail. Judge Paez and Judge T.G. Nelson have done nothing of the sort. The government's true quarrel is with a routine legal analysis as applied to the strange facts of this case, and with the panel's well-reasoned outcome.

The crux of this appeal is that Mr. Nevils was not a participant in a crime, but was merely present. A mere presence analysis necessarily requires a court to assess the evidence piece by piece, as well as in its totality, to decide whether a jury could properly have found guilt. That is what the Court has done for decades in its "mere presence" sufficiency cases, and what other courts do as well. Such an analysis involves no reweighing and no substitution of judgments, as the

government claims. It involves only what the Court has always done in cases of this type: looking at the evidence and, drawing all inferences in favor of the verdict, measuring that evidence against the government's burden of proof. That is all that the panel has done here. The Court should reject the government's petition.

II

The Court Applied Its Ordinary Jurisprudence in this Appeal

The Court has many times over the past decades decided appeals in which the defendant has contended that the evidence does not show that he committed a crime, but only that he was present while others did so. When the Court considers such "mere presence" cases, it must decide whether a jury could conclude, based on the evidence presented at trial, that the government met its burden of proof beyond a reasonable doubt. In looking at the evidence, the Court must focus its scrutiny through the lens of the Supreme Court's test in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), but the *Jackson* test does not mean that the jury's verdict is completely insulated from review. The *Jackson* test is a lens, not a blindfold. Even in applying *Jackson*, the Court must give appropriate weight to the government's burden of proof.

Here, the Court's decision in *United States v. Nevils*, 548 F.3d 802 (9th Cir. 2008), is consistent with the Court's sufficiency jurisprudence over at least the last twenty years. At least as far back as *United States v. Penagos*, 823 F.2d 346 (9th Cir. 1987), the Court has done what it did in *Nevils*: It has considered complex factual patterns, assessed the evidence both piece by piece and in its totality, and found it insufficient even though juries had unanimously found it to be sufficient. It has done so using the same analysis, the same degree of scrutiny, and sometimes virtually the same language as the Court in this case.

In *Penagos*, for example, the defendant stood on the sidewalk and looked up and down the street as a box (which later proved to contain cocaine) was placed in the trunk of a codefendant's car. He also accompanied a different codefendant to a restaurant, where they picked up a third man, who emerged from their car carrying a bag that contained cocaine. In addition, he and one of the codefendants spent close to an hour making and receiving calls at public telephones. The government's theory at trial was that the defendant was a member of a drug conspiracy and, specifically, that his role was that of lookout. 823 F.2d at 347-48. The jury convicted, and the Court reversed.

Notably, in finding the evidence insufficient, the *Penagos* Court made exactly the sort of points that it made in this case. First, it pointed out that the defendant's counter-surveillance activities did not occur during all of the crucial moments when one would expect them to occur. 823 F.2d at 349. Second, it noted that the defendant had not been present on all of the occasions when cocaine was loaded or unloaded: "If defendant's role in the conspiracy was to act as lookout while cocaine was shuttled between an apartment and automobiles, one would expect him to have been visible on other similar occasions." 823 F.2d at 349. His absence on those other occasions, said the Court, "casts serious doubt on the government's interpretation" of his behavior on the sidewalk. *Id.* Third, although the government contended that the defendant had "scanned" the street, it "offered no evidence in support of this inculpatory characterization." *Id.* When the defendant had looked up and down the street, he had indeed been under police surveillance, but that did "not establish that defendant must have been looking for police." *Id.* Fourth, the defendant did not accompany other codefendants to drug deliveries and did not try to escape when he was arrested. In short, the Court stated, the "defendant's behavior was perfectly consistent with that of an innocent person having no stake or interest in drug transactions." *Id.*

In *Penagos*, then, the Court made exactly the sort of observations and drew exactly the sort of inferences that the Court did here: that the defendant's behavior was not completely consistent with the government's theory, that his conduct "cast[] serious doubt" on the likelihood that he was truly participating in the crime, and that the government had not supported its characterization of the defendant's conduct. The Court in *Penagos* could make those observations and draw those inferences because that is what the *Jackson* test requires: not a blind affirmance, but an active, though deferential, examination of the evidence, measured against the government's burden of proof.

Nor is *Penagos* in any way unusual in the Court's jurisprudence. Six years later, in *United States v. Bautista-Avila*, 6 F.3d 1360 (9th Cir. 1993), the Court found evidence of the defendants' participation in a drug conspiracy to be insufficient even though (1) the defendants drove into the United States from Mexico only one minute behind the car in which the drugs were found; (2) on the day of the drug transaction, the keys to the car that carried the drugs were retrieved from the defendants' motel room; (3) a conspirator implicated the defendants upon his own arrest; (4) the defendants had received and hidden the exact amount of money that one of the conspirators was due to receive for his part in the conspiracy; (5) the defendants were arrested in the motel room where the drug transaction was scheduled to take place, right in front of both their own car and the car that had carried the cocaine; and (6) both defendants had tried to conceal their identity. 6 F.3d at 1361-63. The Court called the case "extremely close," *id.* at 1363, but ultimately held that "we simply cannot conclude that the government showed that [the defendants] had knowledge of the conspiracy and acted in furtherance of it." *Id.* (internal punctuation omitted).

In coming to this conclusion, the Court looked at the evidence piece by piece, as well as in its totality. It pointed out that "the government offered no

evidence that either [defendant] knew that the car in which they were riding was involved" in a conspiracy, that "the government offered no evidence that either [defendant] knew that the [lead car] contained cocaine as it entered the United States or as it sat in front of their motel room," and that "the government offered no evidence that either [defendant] knew that the $5000 they were handling possibly could be involved in a drug conspiracy." *Id.* This language, and this analysis, is completely consistent with the language and analysis in *Nevils*, where the Court similarly looked to see whether the government had offered evidence at trial that showed that Mr. Nevils actually knew, in a conscious state, that he possessed the guns that were found on and by his body.

It is not the case, then, that the Court in *Nevils* broke new ground, or required a new test. It simply required the government to meet its burden. The Court in *Bautista-Avila* stated that, although the defendants' conduct was "consistent with that of people tangentially involved in a drug conspiracy," it was "also consistent with that of people who are unwittingly associating with individuals involved in a drug conspiracy." *Id.* at 1363. That reading of *Jackson* is neither new nor improper. It is simply a reading that gives weight to the government's burden of proof beyond a reasonable doubt, as the government itself concedes. Govt. Petition at 5.

The same analysis in which the Court engaged in *Penagos* and *Bautista-Avila* is the analysis in which it engaged in the cases on which the opinion in *Nevils* relies. The government does not address the facts of any of those cases in its petition for rehearing. Yet those cases, too, show that the Court's analysis in *Nevils* is nothing new. In each of these cases, the Court measured the defendant's conduct against the government's proffered inculpatory explanation and the defendant's proffered innocent explanation. In each of these cases, the Court concluded that the defendant's behavior was as consistent with one explanation as

it was with the other – that is, it concluded that the government had failed in its proof. That is all that the Court did in this case. The analysis in *Nevils* is consistent with the analysis in those cases. Indeed, it mirrors the analysis in those cases. It is ordinary, run-of-the-mill sufficiency jurisprudence.

One of the cases on which the Court's decision in *Nevils* rests is *United States v. Ruiz*, 462 F.3d 1082, 1087-88 (9th Cir. 2006). *See Nevils*, 548 F.3d at 807-09 (discussing *Ruiz*). In *Ruiz*, two men were charged with possessing firearms in furtherance of drug trafficking (18 U.S.C. § 924(c)). One of the elements of that offense is possession of a firearm, and it was that element as to which the proof failed. 462 F.3d at 1088-89. No fingerprint evidence, and no witnesses, linked either man in the case to the firearms. The house in which the guns were found, and from which the men had fled, did not belong to either one of them. *Id.* at 1088. Although a co-conspirator lived at the house, he did not attribute possession to either of the men; and although both men had access to the house, "access to the premises does not equate to possession." *Id.* at 1089 (citations omitted). In other words, the two defendants had the ability to enter the house and had fled from it, but their innocent explanation that the gun was not theirs was as consistent with the evidence as the government's inculpatory explanation that the gun was indeed theirs.

Similarly, in *United States v. Corral-Gastelum*, 240 F.3d 1181 (9th Cir. 2001), *see Nevils*, 548 F.3d at 809 (discussing case), the defendant was convicted of conspiracy to possess drugs with intent to distribute them, possession of the drugs with intent to distribute them, and use of a firearm during a drug trafficking crime. All three of those charges were reversed when the Court found insufficient evidence to establish possession. The defendant had been found at Arizona's border with Mexico, with a group of other people, with a handgun, and near seven duffel bags of marijuana. 240 F.3d at 1182-83. But no physical evidence, such as

footprints or abandoned clothing, tied the defendant to the drugs. None of the other men arrested testified against the defendant or made statements tying him to a conspiracy or even established that a conspiracy existed. On the evidence presented, the defendant "*could as easily have been* an alien illegally crossing the border, or even a trafficker in illegal aliens, as a drug trafficker." *Id.* at 1184 (emphasis added). The undeniable fact that "strong circumstantial evidence" existed was simply not enough. *Id.* *See also United States v. Ocampo*, 937 F.2d 485, 488-89 (9th Cir. 1991) (insufficient evidence of possession of cocaine hidden in truck where defendant was found in house the garage of which contained the truck, possessed keys to house and to another car associated with house, and had left a fingerprint on inside truck window, but did not have keys or title to truck).

Finally, in *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007), *see Nevils*, 548 F.3d at 809-10, the Court considered the case of a defendant caught up in a drug investigation. The investigation had yielded information that a white minivan containing drugs would be traveling from Southern California north to Washington. The defendant's van fit the description and was stopped in Washington. Inside the van were the defendant, whose relative owned the vehicle; the defendant's wife and young daughter; and another man. The defendant said that the group was taking a vacation, but his information about the person he was going to visit was sketchy, trash was on the floor of the van, and the one suitcase contained mostly children's clothing, suggesting that this was not a vacation after all. The defendant reacted emotionally when he was told that the van was going to be impounded. Hidden behind the van's bumper was fifteen kilograms of cocaine. 484 F.3d at 1223, 1226-27. This evidence, said the Court was not sufficient to show the defendant's knowledge of the drugs. "[T]he government's incriminating explanation [was not] any more likely than [the defendant's] innocent

explanation." *Id.* at 1227. In other words, the government had not proved guilt beyond a reasonable doubt.

In these cases, as in *Penagos* and *Bautista-Avila*, the Court has done exactly what it did in *Nevils*: It looked at the evidence through the lens of *Jackson*, giving appropriate weight to the government's burden of proof beyond a reasonable doubt. Doing so requires the Court to evaluate the evidence against the defendant, the government's assertions about what that evidence means, and whether, drawing every inference in favor of the verdict, the government met its burden. That is all the Court did in the cases above, and all that it has done here. That is how the Court evaluates an appeal in which the defense is mere presence. That is how it assesses the question whether the evidence shows that the defendant was going about his business in proximity to criminal acts, or whether he was part and parcel of those acts.

The Court does nothing in *Nevils* that it has not done many, many times before. It has not required the government to rebut an innocent explanation of Mr. Nevils' presence on the sofa in Apartment 6. Assessing the evidence against competing explanations, one innocent and one inculpatory, is what the Court has always done in cases like this. It is what other circuits do in reviewing claims of insufficiency of the evidence in "mere presence" cases. *See, e.g.*, *United States v. Jenkins*, 90 F.3d 814, 819-20 (3d Cir. 1996) (defendant was found sitting on a sofa in his underwear in a third person's apartment near cocaine, two scales, and other drug paraphernalia, but "without other proof of dominion and control, we can only conclude that it was sheer happenstance" that he was sitting there when police arrived); *United States v. Dunlap*, 28 F.3d 823 (8th Cir. 1994) (defendant was found in apartment holding gun; his hat was in the kitchen of the apartment along with large amounts of cocaine, and other drugs and distribution paraphernalia were elsewhere in the apartment; conviction for constructive possession of the drugs

reversed on sufficiency grounds). The Court's well-reasoned decision in *Nevils* is nothing new.

Indeed, the Court's analysis in *Nevils* is identical to the analysis in which the Court engages when it affirms a conviction against a sufficiency challenge. The question in such cases inevitably turns, as it does when the Court reverses, on the strength of the evidence that the government has presented – specifically, on the strength of the tie that has linked the defendant to the premises and the contraband property on it. In *United States v. Castillo*, 866 F.2d 1071, 1086-88 (9th Cir. 1988), for example, the defendant was convicted of possession of cocaine with intent to distribute it. (He was also convicted of a firearms offense.) He argued that he had simply been present with the drugs, and that his presence did not show knowing possession. But he had a key to the apartment building and was found in a locked bedroom in which the cocaine was also found and in which his clothing was in the closet. He was found with a gun and thousands of dollars in cash under the mattress of the bed, on which he was lying. *See Nevils*, 548 F.3d at 807-08 (discussing *Castillo*).

Similarly, in *United States v. Taylor*, 154 F.3d 675, 678-79 (7th Cir. 1998), a shotgun and a semi-automatic handgun were in the bedroom where the defendant and his girlfriend were found sleeping. Charged with being a felon in possession, the defendant argued that he did not live at the apartment where he had been found and thus did not possess the contraband even constructively. *Id.* at 682; *cf. United States v. Reese*, 775 F.2d 1066, 1073-74 (9th Cir. 1985) (joint access to a residence where contraband is discovered, without more, is insufficient to prove constructive possession). But the defendant's links to the premises and the other property on it were too strong: the guns had been found in a locked closet that contained no women's clothing, but rather men's clothing, men's cologne, and a receipt with the defendant's name on it. Other items connected the defendant to the house: a

driver's license, a car title, and a hospital billing statement. Witness testimony also linked the defendant to the house; his girlfriend had told police that he lived there and that the shorts beside bed belonged to him. *Taylor*, 154 F.3d at 681-82. *See Nevils*, 548 F.3d at 807-08 (discussing *Taylor*).

These cases show that neither the language nor the analysis of which the government complains is either new or alarming. The Court's analysis simply does what the government says it is supposed to do: evaluate, through the lens of *Jackson*, whether the government met its burden of proof. Govt. Petition at 5. That is all that this Court has done in *Nevils*, just as it as all that the Court has done in the decades of caselaw that preceded *Nevils* and on which *Nevils* is based.

III

Conclusion

For the reasons above, the Court should reject the government's petition for panel rehearing and rehearing en banc.

Respectfully submitted,

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February 27, 2009

By /s/
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February 27, 2009 /s/
ELIZABETH A. NEWMAN

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