

# “ACTUAL” AND “CONSTRUCTIVE” POSSESSION IN ALASKA: CLARIFYING THE DOCTRINE

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## ABSTRACT

*In two cases, one recent and one now nearly a decade old, Judge David Mannheimer has raised important questions about Alaska’s jury instruction on “possession.” In particular, Judge Mannheimer has expressed a worry that Alaska’s definition of “constructive possession” invites juries to find possession where the defendant is only near an object and has knowledge of its presence. As Judge Mannheimer correctly points out, such a definition is too expansive. But how can we avoid this problem?*

*My short article takes Judge Mannheimer’s opinions in *Alex v. State* and *Dirks v. State* as the starting point for an investigation of Alaska’s possession doctrine. After summarizing the two opinions in Part II, Part III attempts to clarify the seemingly straightforward idea of “actual possession,” and finds that many courts wrongly treat many cases of actual possession as cases of constructive possession. Part IV tries to provide a solution to the problem – as presented by Judge Mannheimer – with Alaska’s instruction on constructive possession. It offers that the key to constructive possession is not the idea that one intends to have control over an object, but that one has a legal right (or the functional equivalent of a legal right) over the object, or the space where the object is. If we understand this idea of “authority” as essential to constructive possession, it turns out that pure cases of constructive possession are actually quite rare, and that many supposed cases of constructive possession are really cases of past actual possession. Part V proposes a new jury instruction on actual and constructive possession.*

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## I. INTRODUCTION

Consider the following three cases, each ostensibly dealing with a case of criminal “possession”:

After he is arrested outside of a nightclub, police search a man and find car keys on him. The keys lead to his girlfriend’s car, parked nearby. Inside the car the police find two guns, one under the front passenger seat, and another in the trunk. The girlfriend says – and the police believe her – that the guns were not in the car when she lent it to him. A fingerprint matching the man’s is found on one of the guns. The man, who has a prior felony conviction, is charged with being a felon in possession of a firearm. On what theory of possession, actual or constructive, is the charge properly justified, and can the theory be justified as to both guns?<sup>1</sup>

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A man is found unconscious on his couch. In front of him on the coffee table is a small quantity of drugs, along with some drug paraphernalia. He is the owner of the apartment in which he is found and there is no evidence that anyone else lives there, or even that anyone has recently visited. No drugs are found on the man’s person, and the drugs and drug paraphernalia have no DNA or fingerprints that would tie them to the man. Does he possess the drugs, and if he does, is the possession actual or constructive?<sup>2</sup>

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A woman arranges the purchase of a large quantity of drugs. In exchange for money, she receives a key to a storage locker. The drugs are in the locker. She is arrested before she accesses the drugs in the storage locker. After the police open the locker and find the drugs, she is charged with possession with the intent to distribute. She argues that she never, in fact, has possessed the drugs, either under a theory of actual or constructive possession. Is she right that she never “possessed” the drugs?<sup>3</sup>

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1. The facts in this example are based on *Ward v. State*, No. A-10011, 2009 WL 5154103, at \*2 (Alaska Ct. App. Dec. 30, 2009).

2. This example is loosely derived from the facts in *Harrison v. State*, 860 P.2d 1280, 1282 (Alaska Ct. App. 1993).

3. This case is modeled on *State v. Gasperino*, 859 S.W.2d 719 (Mo. Ct. App. 1993), which involved a sting operation where the defendant paid in full for drugs but was never able to physically possess the marijuana because he was arrested.

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Despite the high number of possession cases, and their importance,<sup>4</sup> what counts as sufficient for a conviction for "criminal possession" remains unclear.<sup>5</sup> These cases, where possession can seem difficult to define are not bizarre cases, stretching our notion of what it means to possess something, but common, everyday cases like the hypotheticals above: cases where drugs or guns are not found *on* a person, but near a person, or on that person's property. The difficulties are compounded when we introduce the purportedly helpful distinction between actual and constructive possession – two concepts that courts have not consistently applied. Courts have a tendency to group all possession that does not involve finding the relevant contraband *on* the person into the category of "constructive possession," or even to treat actual and constructive possession as points on a continuum, as a matter of degree rather than of kind.<sup>6</sup>

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The court in *Gasperino* held that there was at least a jury question on the issue of whether Gasperino constructively possessed the drugs. *See also* *Castillo v. State*, 821 P.2d 133 (Alaska Ct. App. 1991) (reversing the conviction of Castillo, who arranged for delivery of drugs but never physically possessed them, because the jury instructions were insufficient to produce a unanimous verdict).

4. As Markus Dirk Dubber notes, "Possession offenses have not attracted much attention. Yet they are everywhere in modern American criminal law, on the books and in action. They fill our statute books, our arrest statistics, and, eventually, our prisons. By last count, New York law recognized no fewer than 153 possession offenses; one in every five prison or jail sentences handed out by New York courts in 1998 was imposed for a possession offense. That same year, possession offenses accounted for over 100,000 arrests in New York State, while drug possession offenses alone resulted in over 1.2 million arrests nationwide." Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 834–35 (2001) (internal citations omitted).

5. *See* Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 751 (1972) ("[P]ossession . . . remains one of the most elusive and ambiguous of legal constructs.").

6. *See, e.g.*, *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914) ("[A]ctual and constructive possession . . . often so shade into one another that it is difficult to say where one ends and the other begins."); *United States v. Walker*, 734 F.3d 451, 456 (6th Cir. 2013) ("To be sure, the line of demarcation between 'actual' and 'constructive' possession is not analytically crisp."); *Morgan v. State*, 943 P.2d 1208, 1211 (Alaska Ct. App. 1997) (suggesting that a law that makes it a crime for a felon to knowingly reside in a dwelling where there is a gun is merely an "extension" of the "traditional rule regarding a felon's 'constructive possession' of a concealable firearm"). *See also* *Morgan v. State*, 943 P.2d at 1211 ("One plausible rationale for AS 11.61.200(a)(10) is the determination that a felon's act of residing in a dwelling, knowing that a concealable firearm is kept there, should be criminal because it is sufficiently similar to constructive possession . . ."). For reasons developed in Parts I and III, *infra*, I do not think this is correct.

In a pair of cases, one very recent<sup>7</sup> and one now over a decade old,<sup>8</sup> Judge David Mannheimer of the Alaska Court of Appeals has suggested that Alaska's instructions regarding possession need to be rethought, particularly when it comes to the distinction between "actual" and "constructive" possession. Part of Judge Mannheimer's concern over the instructions stems from cases where juries are instructed as to both actual and constructive possession, when in fact only actual possession was at issue, risking juror confusion. But Judge Mannheimer's deeper worry is that the definition of constructive possession given in the pattern instructions is simply mistaken, as it allows for a finding of constructive possession just when a person is near contraband and is aware that it is contraband. The current instruction, Judge Mannheimer warned in both of these cases, runs the risk that juries will find possession when in fact there is only proximity and knowledge, which may be necessary for possession in some cases, but not sufficient.

This paper takes Judge Mannheimer's two opinions as an invitation to try to clarify the law of possession in Alaska, and to suggest a helpful amendment to the current jury instructions regarding "possession." Part I summarizes Judge Mannheimer's two opinions, *Dirks* and *Alex*, and elaborates on what Judge Mannheimer sees as the difficulties with Alaska's law of possession. In both opinions, Judge Mannheimer stops short of giving his own solution to the problem he finds in the current Alaska jury instructions, although he does give some recommendations. Parts III and IV work towards a solution. Part III attempts to clarify the seemingly straightforward idea of actual possession. Many cases where courts see "constructive possession" are in fact cases of "actual possession." Courts confuse *past* actual possession with constructive possession as a result of construing "actual possession" too narrowly. In fact, many times, courts should instruct only on actual possession, as when a jury only needs to infer that at some point the defendant was in actual physical control of the contraband. Part IV outlines pure cases of constructive possession, which are quite rare: cases where a person never has the contraband on his or her person, but has a legal right, or something approximating a legal right, to the contraband or the place where the contraband is located. Although there can be cases where a jury should be instructed on both actual and constructive possession, they are still two distinct types of possession, not mere variations on one another, as is sometimes suggested. Part V offers concluding remarks, as well as a proposal for revised jury instructions on "possession."

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7. *Dirks v. State*, 386 P.3d 1269 (Alaska Ct. App. 2017).

8. *Alex v. State*, 127 P.3d 847 (Alaska Ct. App. 2006).

## II. ALEX AND DIRKS

In two cases, *Alex* and *Dirks*, Judge Mannheimer spends several pages questioning the basis of Alaska’s jury instructions on possession, especially as to how they articulate “constructive” possession. In both cases, the discussion is likely dicta, or at least Judge Mannheimer presents it as such. In *Alex*, Judge Mannheimer says that if there was possession in the case at all, it was actual, and not constructive.<sup>9</sup> And in *Dirks*, Judge Mannheimer characterizes the state’s case as one of actual and not constructive possession.<sup>10</sup> Both cases present Judge Mannheimer with an opportunity to show how the idea of constructive possession can be confusing, potentially misleading juries and lawyers. While Judge Mannheimer does not solve the problem of Alaska’s possibly erroneous instructions on possession by offering his own model instruction, he does point to some things to avoid. If there is to be something like “constructive possession,” Judge Mannheimer concludes, it *cannot* amount to only (a) having knowledge that the object is there, and (b) being near the object.<sup>11</sup> There has to be something more for the object to be constructively possessed. Although Judge Mannheimer does not specifically identify what that is, he presents two alternatives to consider: there has to be some *right* or *authority* over the object; or there has to be some *intention* to control the object.<sup>12</sup>

Even though Judge Mannheimer says *Alex* and *Dirks* are actual possession cases, one can see from their facts how they could involve constructive possession. The facts in both cases are very similar. In *Alex*, during a traffic stop, an officer asked Alex and the driver, Leonard Torres, to step out of the vehicle.<sup>13</sup> Apparently, Alex then told the officer that

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9. *Id.* at 848 (“It is not clear that this case even raises an issue of constructive possession . . . . It would therefore appear that, if Alex indeed possessed the pistol, he had actual possession of it, not ‘constructive’ possession.”).

10. *Dirks*, 386 P.3d at 1270 (“For instance, even though the instruction makes a great point of distinguishing between ‘actual’ and ‘constructive’ possession, there was no evidence of constructive possession in Dirks’s case . . . . [T]he prosecutor never argued a theory of constructive possession.”). However, Judge Mannheimer earlier characterizes the state’s theory of possession as one in which Dirks possessed the weapon, because Dirks knew that the gun was “in the interior of a vehicle in which [he] was present.” *Id.* This certainly does not sound like “immediate physical possession,” and on appeal, the State did not characterize it as such. *Id.*

11. *Id.* at 1271-72 (Arguing a person does not constructively possess something simply because someone else has brought “property to the defendant’s residence, vehicle, or place of business, and has placed the property within the defendant’s reach, and the defendant is aware that the property is there.”).

12. *Id.* at 1271.

13. *Alex*, 127 P.3d at 849.

there was a gun under the passenger seat of the vehicle.<sup>14</sup> Because Alex was a convicted felon, he was prohibited from possessing a firearm, and was charged under Section 112.61.200(a)(1) of the Alaska Statutes.<sup>15</sup> *Dirks* was also a firearm case. This time, however, the gun was in the backseat of the car and Dirks was in the driver's seat.<sup>16</sup> Dirks was charged with possessing a firearm while impaired by alcohol.<sup>17</sup> In both cases, the defendants argued that the gun belonged to someone else: Alex said that the gun was Earl Smith's, who owned the vehicle,<sup>18</sup> and the gun in the *Dirks* case belonged to Dirks's passenger, Matthew Pemberton, and not Dirks.<sup>19</sup> The appeals court affirmed Alex's conviction, but reversed the conviction in *Dirks*.

As noted above, Judge Mannheimer presents these cases as exclusively involving issues of actual possession, not constructive possession. This is not an obvious conclusion. For one, it is not obvious that these are cases of *actual* possession, if by that we mean "direct physical control."<sup>20</sup> Alex was riding in the passenger seat of a car where a gun was *under* his seat. It was not in his personal physical possession or "direct control," unlike the beer can that was between his legs.<sup>21</sup> The lack of "actual" possession seems even clearer in *Dirks*: the gun was in a holster and in the backseat.<sup>22</sup> If actual possession is "physical possession," then the fact that the guns were not in the hands or on the person (in the jacket or pants pocket, or in the sock) of Alex or Dirk would seem to show lack of actual possession. If there was a state theory of possession in these cases, it would have to be *constructive* possession. At the appellate level, the state's theory of possession in the *Dirks* case was indeed one of constructive possession.<sup>23</sup> The idea was that because Dirks was the owner or even the driver of the car Dirks had enough control over the gun, and the vehicle, to be in "constructive" possession of the gun.

In any event, Judge Mannheimer took the objections to the language of the constructive possession instruction in both cases as opportunities to raise concerns about it. That instruction reads, in relevant part:

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14. *Id.*

15. *Id.*

16. *Dirks*, 386 P.3d at 1269.

17. *Id.*

18. *Alex*, 127 P.3d at 849.

19. *Dirks*, 386 P.3d at 1270.

20. As Alaska does, see the discussion *infra* Part III.

21. *Alex*, 127 P.3d at 849.

22. *Dirks*, 386 P.3d at 1269.

23. Brief of Appellee at 12, *Dirks v. State*, 386 P.3d 1269 (Alaska Ct. App. 2017) (No. A-11534) ("The State Presented Sufficient Evidence of Constructive Possession.").

The law recognizes two kinds of possession: actual possession and constructive possession. Actual possession means to have direct physical control, care, and management of a thing.

A person not in actual possession may have constructive possession of a thing. Constructive possession means to have the power to exercise dominion or control over a thing. This may be done either directly or through another person or persons.<sup>24</sup>

In *Alex*, Judge Mannheimer titles a section of his opinion, "Potential problems with the definition of 'constructive possession.'"<sup>25</sup> The main problem, as Judge Mannheimer sees it, derives from the phrase "have the power to."<sup>26</sup> He cites a Louisiana appeals court opinion that he thinks illustrates the problem.<sup>27</sup> The case, *State v. Harvey*, involved a woman who was convicted of drug possession after drugs were found in her mother's house where she was living.<sup>28</sup> Although the evidence showed that the woman (Harvey) knew that the drugs were in the house and that drug dealing was going on in the house, the evidence didn't show that Harvey herself exercised any "dominion and control" over the drugs.<sup>29</sup>

This example illustrates, in Judge Mannheimer's mind, the problem with defining constructive possession in terms of having *power* over something.<sup>30</sup> In a purely descriptive sense, Harvey might have had *power* over the drugs, because she knew they were in the house and she had access to them.<sup>31</sup> Harvey could have "exerted[ed] control over the drugs

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24. *Alex*, 127 P.3d at 850; see Definitions, ALASKA STAT. § 11.81.900(b)(50) (2018) ("[P]ossess' means having physical possession or the exercise of dominion or control over property.").

25. *Alex*, 127 P.3d at 850.

26. *Id.* at 851 ("There is an ambiguity in the word 'power.'").

27. *Id.*

28. 463 So. 2d 706 (La. Ct. App. 1985).

29. *Alex*, 127 P.3d at 851 (citing *Harvey v. State*, 463 So. 2d at 708). Judge Mannheimer may mischaracterize *Harvey* here. It is not obvious that Harvey did know there were drugs in the house, or even lived in the house. See *Harvey*, 463 So. 2d at 708 ("Carolyn Harvey was in the house when it was searched and the drugs were discovered. She may live there. There is no evidence, however, that she exercised dominion or control over the drugs."); see also *id.* (indicating only that she "may have been aware" of the presence of drugs in the house). For a similar case which makes the point better than *Harvey*, see *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996) ("The evidence showed that she had access to or resided in the house and knew of the presence of the drugs, but did not show she had dominion and control [sic] them.").

30. See *Dirks v. State*, 386 P.3d 1269, 1271 (Alaska Ct. App. 2017) ("[T]he word 'power' is ambiguous. It can refer to a person's right or authority to exert control over people or property, but it can also refer to anything a person might be physically capable of doing if not impeded by countervailing force.").

31. *Alex*, 127 P.3d at 851.

if she had wished.”<sup>32</sup> But this does not amount to having *possession* of those drugs, either actual or constructive. Judge Mannheimer adds his own example to further illustrate the point. If there is beer in the refrigerator of a house, and children know that the beer is in there, and it is within their physical power to get the beer, do the children have “constructive possession” of the beer?<sup>33</sup> If power simply means ability, then it would seem that they are guilty of constructive possession (and therefore guilty of being minors in possession of alcohol). Judge Mannheimer concludes this is a problematic result because it means that “a person could be convicted of possessing contraband merely because the person knew of the contraband and had physical access to it.”<sup>34</sup> Interpreting “power” to mean “physical power,” creates issues where people can “constructively” possess things simply because they can reach out and grab them.<sup>35</sup>

This discussion in *Alex* suggests that constructive possession should in some sense be a *normative* notion, so that in order to constructively possess something, one must not merely have the “power” to exercise control, but also in some sense have a legal *right* to it. The person who merely lives in a house where drugs are located may not own the drugs or indeed have any relationship to them, except knowing that they are there. The beers in the fridge that the children know about and are near to are similarly not theirs because they do not own them. The idea that there may need to be some extra element of “authority” or “right” over the item in question is one possibility Judge Mannheimer considers.<sup>36</sup>

Judge Mannheimer also suggests that it may be enough to add an element of *intent* to exert control over an object.<sup>37</sup> On this theory, one

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32. *Id.*

33. *Id.*

34. *Id.*

35. See *United States v. Maldonado*, 23 F.3d 4, 10 (1st Cir. 1994) (Coffin, J., dissenting) (“To the extent that the court jettisons all idea of legal right or practical claim to the contraband and assesses ‘power’ in terms of physical capacity to seize, it vastly widens the concept of constructive possession. Contraband stored in the locked box of a [sic] another person could be found within the power of a defendant skilled in the use of lock picking or explosives. Or, in a case like *Wight*, the finding as to constructive possession would turn on whether the driver was bigger and tougher than the passenger.”); see also *State v. Barger*, 247 P.3d 309, 315 (Or. 2011), *adhered to as modified on reconsideration*, 253 P.3d 1030 (Or. 2011) (“It is clear from that decision that the mere fact that an object is within a person’s reach, and that the person thus has a physical *ability* to exercise some directing or restraining influence over it, is insufficient to establish constructive possession of the object.”).

36. *Alex*, 127 P.3d at 851 (“[S]ome courts have worded their definitions of ‘constructive possession’ in terms of a person’s ‘authority’ or ‘right’ to exert control over the item in question.”).

37. *Id.* at 851.

might in fact possess drugs that are present in a house you are living in if you *intend* to exercise control over them; so too, apparently, might the children possess the beer if they *intend* to grab it. Judge Mannheimer does not choose either of these options, i.e., that constructive possession involves either a claim, right, or an intention to possess in the future.<sup>38</sup> He simply argues that proximity and knowledge – even along with access – are not enough for possession.<sup>39</sup>

In *Dirks*, Judge Mannheimer largely continues in the same vein, arguing against certain concepts of constructive possession. He adds two other helpful examples, one negative and one positive. The negative example again demonstrates why knowledge and access are not enough. If possession were only knowledge and access, then a person walking down the aisle in a store would “possess” all of the store’s merchandise.<sup>40</sup> The positive example is less developed, but is intuitively plausible: when we are not home, Judge Mannheimer says, we still possess the belongings that are in our home, despite our lack of physical presence.<sup>41</sup> This, presumably, is because we have the *authority* to exercise power and control over the items in our home, even though we are not actually exercising power and control. Judge Mannheimer makes a further observation that is also worth noting (it is something I will take issue with later in the paper<sup>42</sup>). Constructive possession, Judge Mannheimer says, relying on Black’s Legal Dictionary, is not *true* possession, but its “legal equivalent.”<sup>43</sup> It is a legal fiction. We say that someone may “constructively know” something even though he does not – as when the law imputes knowledge to someone who has gone to great lengths to *avoid* knowing something.<sup>44</sup> So too might someone possess something, albeit “constructively,” when he in fact does not possess it – as when a person possesses things that are not in his immediate physical possession.

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38. In *Ward*, however, the court implicitly endorses the authority view. *See generally* *Ward v. State*, No. A-10011, 2009 WL 5154103, at \*5 (Alaska Ct. App. Dec. 30, 2009).

39. It follows that Judge Mannheimer rejects – rightly, in my view – the so-called “proximity test,” where liability can be imposed “for being in an area where drugs are used or present.” *See Whitebread & Stevens, supra* note 5, at 764 (describing the proximity test).

40. *Dirks v. State*, 386 P.3d 1269, 1271 (Alaska Ct. App. 2017) (“Shoppers walking down the aisle of a store do not ‘possess’ all of the merchandise lying before them on the shelves, nor do museum visitors ‘possess’ all of the artwork they pass within reach of.”).

41. *Id.* at 1270.

42. *See infra* Part IV.

43. *Id.* (“The law uses the adjective ‘constructive’ to refer to a situation where an action or a state of affairs does not actually fit within the normal definition of some relevant concept, but the action of state of affairs will nevertheless be treated as the legal equivalent.”).

44. *Id.*

### III. ACTUAL POSSESSION

The conviction in *Dirks* was reversed because the appeals court found neither actual nor constructive possession.<sup>45</sup> There was no actual possession because the gun was not in Dirks's actual *physical* possession. Nor was there constructive possession, presumably because Dirks did not *own* the gun.<sup>46</sup> Dirks was only near a gun and maybe knew of the gun, but as Judge Mannheimer emphasized in the closing sentence of the opinion, knowledge and proximity are not enough to find possession:

A defendant may not be found guilty of 'possessing' an item of property that belongs to someone else merely because the owner of the property has brought the property to the defendant's residence, vehicle, or place of business, and has placed the property within the defendant's reach, and the defendant is aware that the property is there.<sup>47</sup>

This may make the result in *Alex* appear confusing. In that case, Judge Mannheimer rejected the idea that an erroneous constructive possession instruction would matter, because Alex denied that he knew the gun was there, suggesting that he was not in actual, physical possession of the gun.<sup>48</sup> But the jury *also* heard testimony that the gun didn't belong to Alex, and that it instead belonged to Earl Smith, the owner of the car.<sup>49</sup> Although Judge Mannheimer rightly surmises that the defense theory was that Alex did not actually possess the gun, it is possible that the jury could have concluded both that Alex wasn't the owner of the gun *and* that he knew it was under the seat.<sup>50</sup> This would raise the possibility that Alex was merely proximate to the gun and knew of its presence — mirroring the facts in *Dirks*, and seeming to warrant a

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45. *Id.* at 1270-71.

46. *Id.*

47. *Id.* at 1271-72.

48. *Alex v. State*, 127 P.3d 847, 851 (Alaska Ct. App. 2006) ("Alex's attorney denied that Alex knew about the pistol . . ."). Recall, however, that the police officer testified that Alex told him there was a gun under the passenger seat, something Alex's attorney had to suggest never happened. *Id.* at 849-50.

49. *Id.* at 849.

50. Judge Mannheimer in fact contemplates this possibility. *See id.* at 851 ("[O]ne can imagine Alex conceding that he was aware of the pistol under his seat, but then asserting that he had no connection to the pistol and that he only became aware of its presence underneath his seat when, during his ride in the vehicle, the pistol bumped against his feet."). The point in the text is that the jury might have guessed that this is what in fact happened, or something like it: Alex knew the gun was there, but still never touched the gun and did not own it. From this, they might have concluded that Alex neither actually nor constructively possessed the gun.

reversal of Alex’s conviction given the mistaken and potentially misleading jury instruction on constructive possession.<sup>51</sup>

But there is another possibility, which explains why Judge Mannheimer viewed both *Alex* and *Dirks* as cases where the state had to prove actual possession. To see why, consider that actual possession is not the same as *current* actual possession. If a police officer is chasing someone, and the suspect drops a baggie of drugs as he flees, he can still be charged with possession of the drugs, even if the drugs are not found currently in the physical possession of the suspect. To put it more formally, actual possession can be shown either by the object being *on* the person or by circumstantial evidence that indicates that the object was recently in the physical possession of the person. Once we understand this, *Alex* becomes easier to see as a case of *actual* possession. The fact that the gun was under the passenger seat does not show that Alex had the gun in his current physical possession, but might support an inference that Alex had *recently* been in physical possession of the gun. *Dirks*, of course, properly emerges as the harder case: the gun is in the backseat and is registered to the passenger. The inference that *Dirks* at one time physically held the gun becomes more difficult to make.

A case from Missouri demonstrates how “actual” possession has to include past and not just current possession.<sup>52</sup> A search of an over-the-counter drug registry revealed that Randy Twitty had made four purchases of pseudoephedrine in the last 38 days.<sup>53</sup> Detectives went to Twitty’s house and observed him shredding several small boxes and putting them into his trash.<sup>54</sup> Twitty later consented to a search of his house and the detectives found that the boxes were in fact empty pill boxes for pseudoephedrine.<sup>55</sup> Their search also turned up two receipts for the purchases of the pseudoephedrine.<sup>56</sup> In an interview, Twitty admitted to the officers that he had bought the drugs in order to give them to

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51. In other words, the defendant’s attorney may have been trying to anticipate that the jury might believe the police officer (i.e., that Alex had told the officer he knew the gun was there) and so wanted to rebut the notion that merely because Alex knew the gun was under the seat, he was in constructive possession of it. Judge Mannheimer also argues that because the jury found Alex guilty of being in possession of a weapon “in furtherance of a felony” this means that the jury had to have found Alex was more than merely aware of the gun under his seat. *Id.* at 852. It is of course possible that the juries *first* found possession—whether actual or constructive—of a weapon and then concluded, given the presence of drugs, the two were somehow related.

52. *State v. Twitty*, No. ED 102606, 2016 WL 2731943 (Mo. Ct. App. May 10, 2016), *transferred to Missouri Supreme Court*, 506 S.W.3d 345 (Mo. 2017).

53. *Id.* at \*1.

54. *Id.*

55. *Id.*

56. *Id.*

someone in exchange for methamphetamine, knowing that the recipient would use the pseudoephedrine to make more methamphetamine.<sup>57</sup> He was charged with possessing pseudoephedrine with the intent to process the chemical to create methamphetamine.<sup>58</sup>

On appeal, Twitty argued that the state had never proved that he possessed the drug “because said controlled substance was not discovered at the time the police searched” Twitty’s apartment or when they arrested him.<sup>59</sup> Amazingly, the Missouri Court of Appeals *agreed* with Twitty. They said that, despite Twitty admitting that he in fact possessed the controlled substance “just mere hours” before he was arrested, this was insufficient.<sup>60</sup> This was not “actual possession” because the “unambiguous language” of Missouri’s statute defined actual possession as when a person has the substance “on his person or within easy reach and convenient control.”<sup>61</sup> Nor was this a case of constructive possession, because holding that Twitty constructively possessed the drugs, the court went on, would “drastically broaden” the circumstances sufficient to find constructive possession.<sup>62</sup> To find that Twitty constructively possessed the drugs, the court concluded, would be to create a “third category of possession,” where a defendant’s conviction “would be upheld for *past* actual possession under a theory of constructive possession.”<sup>63</sup>

But the reasoning by the Missouri Court of Appeals misses the point that past actual possession *is* actual possession. We do not need to create an additional (third) category of possession, or even to appeal to “constructive possession,” to find that Twitty possessed the drugs.<sup>64</sup> The fact that Twitty no longer had the drugs on him does not negate the fact that he very recently had the drugs on his person, or at least within his easy reach and convenient control. The Missouri Supreme Court later

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57. *Id.* at \*2.

58. *Id.* at \*1.

59. *Id.* at \*2.

60. *Id.* at \*4.

61. *Id.*

62. *Id.*

63. *Id.*

64. For a clear statement of the (mistaken) view that past possession is a kind of “constructive possession,” see *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975) (“The purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.”); see also *Whitebread & Stevens*, *supra* note 5, at 755 (explaining that constructive possession is when there is an inference of possession “at one time”).

reversed the court of appeals, writing that "a reasonable inference drawn from these circumstances is that Twitty actually possessed pseudoephedrine on the date of the offense."<sup>65</sup>

A more subtle but related error is when courts correctly use various indicia of recent possession to show that a person has had actual possession, but then mistakenly call this "constructive" possession.<sup>66</sup> Courts in many of these cases seem to confuse *indirect (or circumstantial) proof* of actual possession with constructive possession, using "constructive possession" as shorthand for "very strong evidence that the defendant knew the contraband was there because he put it there and had access to it."<sup>67</sup> Courts will look to the fact that the drugs were found in a place where the defendant had exclusive access or that the drugs were near some of the defendant's possessions or the defendant him- or herself.<sup>68</sup> These elements are not always proof of constructive possession, but rather they provide facts from which a judge or jury could infer that the defendant had at some point actually possessed the drugs.<sup>69</sup>

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65. *State v. Twitty*, 506 S.W.3d 345, 348 (Mo. 2017). The court elaborated in a footnote: "If this Court adopted Twitty's reasoning, evidence establishing that a police officer observed a defendant flush 40 pseudoephedrine pills down the toilet would be insufficient to prove actual possession because the officer did not seize the pills themselves. Criminal defendants could always avoid culpability even if the evidence overwhelmingly suggests possession of a controlled substance on the date of the offense. The General Assembly could not have intended such an absurd result." *Id.* at 348 n.4.

66. *See Whitebread & Stevens*, *supra* note 5, at 771 ("The state will often rely on circumstantial evidence to establish prior possession of the drug on defendant's person.").

67. For a good example of such a case (in which constructive and not actual possession was found), see *State v. Ludemann*, 386 S.W.3d 882, 886 (Mo. Ct. App. 2012) ("Defendant was the sole tenant of the rock house, and he had the equivalent of a key; he had access and control over the safe's contents because he had the combination that unlocked the safe. Wedgeworth told Officer Hilty that Defendant normally kept a copy of the combination on a slip of paper near the safe.").

68. For an example of such factors, under the guise of what is necessary for proof of constructive possession (rather than actual possession), see *State v. Clark*, 490 S.W.3d 704, 709 (Mo. 2016); *see also id.* at 712 (discussing a case where defendant's duffel bag, birth certificate, wallet, handgun, and personal hygiene items next to marijuana supported the inference that defendant controlled drugs); *Wallace v. State*, 932 S.W.2d 519, 523 (Tex. Ct. App. 1995) (noting the fact that the "[a]ppellant *himself* was found in the described vehicle with the cocaine in close proximity" contributed to showing constructive possession); Dana L. Weinstein, *Recent Decisions: The Maryland Court of Appeals*, 57 MD. L. REV. 795, 801 (1998) (describing Maryland's "four factor test" to determine constructive possession, where factors include proximity to drugs and evidence that the defendant was participating in the "enjoyment" of the contraband).

69. For an excellent example of how circumstantial evidence can strongly support an inference of past actual possession, see *Davis v. State*, 499 P.2d 1025 (Alaska 1972), *rev'd*, 415 U.S. 308 (1974). The court in *Davis* noted that "[t]here is

Ownership is another relevant fact, although *lack* of ownership would not be enough to defeat an inference of actual possession, e.g., I can have something in my hand that I do not own. Proximity to the object is another fact that can be used to infer past actual possession. *Alex* is probably best seen as a case of actual possession based on proximity and knowledge, although the inference of possession is not incredibly strong (i.e., “I knew the gun was there, but it wasn’t mine, and I never touched it.”). If this characterization is correct, then Judge Mannheimer’s conclusion in that case—that the constructive possession instruction was irrelevant to the resolution of the case—seems on surer footing.

With these points in mind, we can return to the first two examples raised in Section I. The case of the two guns in the car turns out to be a fairly straightforward case of past actual possession — and thus “actual possession” — at least for one of the guns.<sup>70</sup> The fingerprint suggests that the gun was physically held at one point and the girlfriend’s testimony points to the boyfriend physically putting the other gun into the car.<sup>71</sup> The second example, where a man is found slumped and unconscious *near* a lot of drugs and drug paraphernalia is a little harder but strongly points to past actual possession (how else did the drugs get there?). What is important to note is that what courts are trying to determine is not whether the drugs are somehow “constructively” possessed because they are near the individual. What courts are doing in most of these cases is trying to figure out whether, in the words of the Alaska instruction, the person had direct physical control of the drugs at some point. It is no contradiction to say that direct physical control can be proved indirectly by making inferences from available facts.<sup>72</sup> Indeed, that is likely what is being asked of the jury in nearly *all* possession cases. Understood correctly, true constructive possession accounts for only a very small number of possession cases.

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no direct evidence that Davis was at any time in possession of the safe.” Nevertheless, it concluded that “[t]he evidence of possession of the safe in the instant case, though circumstantial, is comparable in persuasiveness to any direct evidence short of the defendant being caught with the safe in hand.” *Id.* at 1034.

70. See *Ward v. State*, No. A-10011, 2009 WL 5154103, at \*5 (Alaska Ct. App. Dec. 30, 2009) (“[T]he State’s evidence was that Ward had actual possession of the firearms.”).

71. *Id.* at \*5–6 (in the actual case, there was DNA on one of the guns, not a fingerprint).

72. See *United States v. Walker*, 734 F.3d 451, 457 (6th Cir. 2013) (collecting cases in which “actual possession can be shown when there is no direct evidence of possession”).

#### IV. CONSTRUCTIVE POSSESSION

If most possession cases involve actual possession — either because the person is in physical control or because there is a reasonable inference that the person had physical control at one time — then what constitutes constructive possession?

Here, we turn to the third example from Section I, which is a true case of constructive possession. A person may have something akin to a legal right to the item itself or have a right to access the place where the item is stored. That will amount to possession of the item, even if the person has never touched the item in the past or may never be able to touch it in the future, e.g., because he is apprehended before he can access the item. Such possession in this case is “constructive,” in the sense that we are imputing possession in the absence of any physical contact with the item.

When we look at constructive possession this way, we have something genuinely distinct from either present physical possession or past physical possession, so it would be wrong to view constructive possession as on a continuum with actual possession, as if the two concepts might shade into one another.<sup>73</sup> Constructive possession is a distinct *kind* of possession. It points, at best, to something more like *future* actual possession, although it is not necessary that constructive possession in fact ever ripen into actual possession.<sup>74</sup> A person who has paid someone to mail him drugs may have constructive possession of the drugs when they arrive in his mailbox, even if he hasn’t touched the package yet.<sup>75</sup>

In this manner, constructive possession can mean having a sort of *right* or *authority* over the objects,<sup>76</sup> rather than physical power over them. Legal ownership of the object is certainly one way of establishing constructive possession, but it is not the only way. It cannot be, moreover, that *only* established legal rights create constructive possession. Many

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73. See *Alex v. State*, 127 P.3d 847, 848 (Alaska Ct. App. 2006) (noting that constructive possession as a concept “suffers from lack of precision” and attributing that, in part, to the fact that actual and constructive possession may “shade into” one another).

74. See *State v. Gasperino*, 859 S.W.2d 719, 722 (Mo. Ct. App. 1993) (“There is no requirement for constructive possession that a person have had actual possession or absolute certainty that constructive possession will ripen into actual possession.”).

75. For a recent case with these facts, see *State v. Shigemura*, 552 S.W.3d 734, 741 (Mo. Ct. App. 2018) (finding constructive possession of drugs that “were in an unopened package, delivered that day, to an outside mailbox”).

76. In this, I side with what Whitebread and Stevens call the “proprietary interest test,” although I am not sure I agree with all of the ways in which they apply it. See Whitebread & Stevens, *supra* note 5, at 763.

times, people may have no legal right in the object or in the place where the object is stored. Suppose I pay someone for a gun, and he puts it in “my” car (a car that I have recently stolen) to retrieve later. Suppose further that the gun I plan to retrieve is stolen as well. Here, I have no legal right in the place where the item is found (the car is stolen) nor in the gun that I have purchased (the gun is stolen). Still, it makes sense to say in this case, by paying for the gun and by virtue of the fact that the gun is deposited in the car I currently possess, that I have authority over the gun—i.e., people would recognize that the gun is “mine” in a conventional, if not a legal, sense. This would be enough, in my view, to establish constructive possession. I do not have a *legal* right to the gun in my example, or to the place (the stolen car) where I am able to access the gun—both are legally someone else’s property—but I do have a sort of *authority* over the gun: I have bought it, and I have privileged access to the gun.<sup>77</sup> A focus on my “authority” over the object moves us towards a more *normative* conceptualization of constructive possession.<sup>78</sup>

We can see why focusing on authority is important by recognizing an issue with Judge Mannheim’s other option for unpacking constructive authority: the idea that one may have the *intention* to exercise control over the object.<sup>79</sup> On this view, I do not need any sort of legal or moral right over something to *intend* to exercise control over it, where “intent” is meant descriptively. But this has absurd results similar to making constructive possession only a matter of knowledge and proximity. I do not “possess” the items in a supermarket when I walk down the aisle merely because I know the items are there and I am near them. Does adding the fact that I *intend* to take them without paying for them make it the case that I possess them? In other words, am I now in “constructive possession” of a can of soup on the shelf that I am close to,

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77. Judge Posner explained a version of this point well: “[The defendant] need not have them literally in his hands or on premises that he occupies but he must have the right (*not the legal right, but the recognized authority in his criminal milieu*) to possess them.” *United States v. Manzella*, 791 F.2d 1263, 1266 (7th Cir. 1986) (emphasis added). The larger point here may be that the idea of “constructive possession” relies on social meanings about “authority” or what it is to “own” or “control” a thing.

78. See *United States v. Maldonado*, 23 F.3d 4, 9 (1st Cir. 1994) (Coffin, J., dissenting) (“More importantly, in this and other circuits, the case law supports a reading of ‘power’ as the *right* or *authority* to exercise control, or dominion and control, over something not in one’s actual possession.”).

79. See *Alex*, 127 F.3d at 851 (“Other courts have worded the test as the defendant’s ‘power and intention’ to exert control or dominion over the object”); see also *id.* at 848 (“There is, in fact, some case law to support Alex’s contention that a person should not be convicted of constructively possessing an object merely because the person *could* have exercised dominion or control over the object—that the government must also prove either that the person *did* exercise dominion or control over the object, or at least *intended* to do so.”).

that I know is there, and that I *mean* to steal shortly? For that matter, am I in constructive possession of the drugs in a house if I am present in the house, know the drugs are there, and *intend* to take control over them? Surely not. In this case, we would have to wait until I actually possessed the can of soup or the drugs before we have a case of possession (in this case, actual possession). Anything less than this would amount to punishing me for my thoughts. By contrast, if I was in the house and I knew there were drugs there and I had *paid* for the drugs, I think we have a clear case of constructive possession, even before I lay hands on the drugs. And this shows why the third example from Section I is a clear case of constructive possession, where I have authority over the drugs—I paid for them—even though I have not yet (and in fact may never) come into actual possession of them.<sup>80</sup>

There is a further wrinkle with the idea of constructive possession and it involves another one of Judge Mannheim's hypotheticals. Judge Mannheim says that I "constructively" possess all the items in my house. But suppose someone comes into my house with a gun in his jacket pocket. Do I now constructively possess that gun? The answer is "no" because the person with the gun in his pocket retains (actual) possession of it. Things change if the person leaves his jacket in my house, and then informs me that the gun is in the jacket in my house. Now, I am in a position where I have dominion and control over the gun, and so I could be said to constructively possess it, even if I have never held it in my hands. Does it follow that I am in real trouble if I am a felon who is not allowed to possess guns? Maybe. Two things need to be noted. First, I can only be said to possess the gun if there was sufficient time for me to get rid of the gun after I was made aware of its existence. This goes to the more basic requirement that in order to *voluntarily* possess something, I must be aware of that possession for a "sufficient period to have been able to terminate it."<sup>81</sup> Secondly, and somewhat relatedly, Alaska allows that I can briefly possess the gun so that I may dispose of it.<sup>82</sup> In other words, I

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80. Is intention to at some point *actually possess* nonetheless a necessary condition of constructive possession? It may not be. Suppose I buy some drugs and my supplier places them in a storage locker for me. I have no intention of actually, i.e., physically, possessing them myself; I only intend to store them until I can sell them. I think it is clear that I constructively possess the drugs in the storage locker, even absent an intention to ever take control of the drugs myself.

81. ALASKA STAT. 11.81.900(b)(66) (2018); *see also* Pulusila v. State, 425 P.3d 175, 182 (Alaska Ct. App. 2018) ("Under Alaska's criminal law, to prove that a person 'possessed' an item, the government must prove that the person engaged in a *voluntary act* of possessing or controlling the item. AS 11.81.600(a). In this context, a 'voluntary' act of possession means physical possession or control where the person 'was aware of the physical possession or control for a sufficient period to have been able to terminate it.' AS 11.81.900(b)(66).")

82. *Jordan v. State*, 819 P.2d 39, 40 (Alaska Ct. App. 1991) ("[M]omentary or

only constructively possess the gun that someone has left in my house if I do not act to get rid of it within a reasonable amount of time.<sup>83</sup>

Of course, there will be cases where a jury should be instructed as to both actual and constructive possession. These cases may be quite common, even if cases of *only* constructive possession will be quite rare. For example, a gun is found in the bedroom of a defendant, which only he has access to.<sup>84</sup> Is this a case of actual or constructive possession? On the one hand, the jury may be asked to make an inference from the facts that the defendant has at one point had physical control over the gun and even that he put the gun in the bedroom. On the other hand, the jury may be asked to consider the defendant's *authority* over the room, especially given his exclusive access. Although this seems more likely to be a case of past actual possession, the prosecution would be within its rights to ask for an instruction on constructive possession as well.<sup>85</sup> And here we can return to the other two examples from Section I. The case of someone found in his apartment, unconscious, and near drugs and drug paraphernalia looks like a case of actual possession. But supposing only the defendant had access to and authority over the apartment, perhaps a jury could find constructive possession as well.<sup>86</sup> By contrast, the example

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passing control of drugs for purposes of disposal does not amount to unlawful possession.”).

83. See also Brief of Appellee at 12, *Dirks v. State*, 386 P.3d 1269 (Alaska Ct. App. 2017) (No. A-11534), 2014 WL 7715453 (finding constructive possession in a case where “a homeowner who allows his neighbor to keep beer in the homeowner’s refrigerator, thereby possessing [sic] the neighbor’s beer.”). *Dirks*, however, is more like a case where a neighbor is in the home, holding the beer. In this case, the homeowner does not constructively possess that beer. But it is still the case that I could have constructive possession of a gun that you actually possess (i.e., have in your hand), if for example, I am the owner of the gun or otherwise have the authority to control what happens to the gun. See, e.g., *Simmons v. State*, 899 P.2d 931, 936–37 (Alaska Ct. App. 1995) (“In arguing the state’s case to the jury, the prosecutor specifically maintained that, even though at times Herrera may have had actual possession of the gun, the gun had always remained in Simmons’s constructive possession.”).

84. See *Woods v. State*, No. A-1128, 1986 WL 1161007 (Alaska Ct. App. Apr. 30, 1986) (guns found in defendant’s bedroom upheld on a theory of constructive possession).

85. In *Nelson v. State*, stolen goods were found in a crawlspace to which only Herring (one of the defendants) had a key. 628 P.2d 884, 889–90 (Alaska 1981). A fingerprint of Herring’s was also found on another item in the crawlspace. *Id.* Here, a jury might find either past actual possession of the goods or constructive possession in Herring’s ability to exercise dominion over the goods. Instructions on both actual and constructive possession will be warranted when there is evidence of a person’s authority over an area as well as evidence that allows an inference to past actual possession.

86. Also relevant to this case is that he was the only person who seemed to have access to the apartment—“exclusivity” is a good indicator of dominion and control.

of the two guns in the girlfriend's car looks to be only a case of actual possession, given the lack of ownership and authority over the car.<sup>87</sup>

Even though there may be cases where a jury should receive instructions in both actual and constructive possession, constructive possession remains a distinct kind of possession. It is not a mere variation on actual possession, as if possession becomes constructive when the object is *close* to you, but not actually *on* you. That would be to see constructive possession as a sort of fictional kind of actual possession,<sup>88</sup> "figurative actual possession," as one court put it,<sup>89</sup> and as somehow a point on an arbitrary line between non-possession and physical possession.<sup>90</sup> It is, rather, a kind of *legal* possession, or "possession as a matter of law."<sup>91</sup> Understood in this way, however, constructive possession will not always require having a legal right in something or a right in the place where it is held. There can be the functional equivalent of such a right, which one Alaska court put as having "capacity *and* authority to control the property."<sup>92</sup> This is why one may have constructive possession of a stolen gun in a stolen car, provided that one has the ability to control that gun, or to control what is in that car. Constructive possession exists so long as there is the ability and the power to exercise the type of control that would usually flow from having a legal right.<sup>93</sup> In a case of sole constructive possession the relevant question

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87. And for related reasons, *Dirks* is a case of neither actual nor constructive possession.

88. See, e.g., Michael S. Deal, Case Note, *United States v. Walker: Constructive Possession of Controlled Substances: Pushing the Limits of Exclusive Control*, 2 J. PHARMACY & L. 401, 401 (1993) ("Constructive possession is a legal fiction created by courts to find possession where it does not exist in fact.").

89. *State v. Gasperino*, 859 S.W.2d 721 (Mo. Ct. App. 1993).

90. *Contra* George H. Singer, *Constructive Possession of Controlled Substances: A North Dakota Look at a Nationwide Problem*, 68 N.D. L. REV. 981, 983 (1992) ("Drawing a distinct line between actual and constructive possession is difficult because the terms so embody one another that it is nearly impossible to pinpoint where one begins and the other ends."); see also David Caudill, *Probability Theory and Constructive Possession of Narcotics: On Finding that Winning Combination*, 17 HOUS. L. REV. 541, 546 (1980) (constructive possession is "the gray zone between actual physical possession and proximity to [an object]").

91. *Whitebread & Stevens*, *supra* note 5, at 761–62 (constructive possession is used when courts "want an individual to acquire the legal status of a possessor"). *Whitebread & Stevens*, however, insist on calling this a sort of "fictional possession." *Id.* at 761. Constructive possession, however, is a different kind of possession, but it is still legal possession.

92. *Thompson v. State*, No. A-6666, 1998 WL 652176, at \*2 (Alaska Ct. App. Sept. 23, 1998).

93. See *United States v. Carter*, 130 F.3d 1432, 1441 (10th Cir. 1997) (finding constructive possession of drugs transported by a third party because the agreement defendant had with the third party made it "reasonable to infer [that the defendant] had the ability to guide the destination of the cocaine").

might be something like: if I wanted to, would I be able to easily gain control of this item?<sup>94</sup> Or to put it another way, am I in the sort of relationship to the item where I have a kind of privilege or entitlement to it, so that I can straightforwardly “reduce [that] object to [my] control”?<sup>95</sup>

## V. CONCLUSION

The current Alaska instruction on possession is problematic, if only because of the ambiguity of “power” and perhaps “direct control.” Courts must be careful to read actual possession as meaning “direct control,” including *past* physical possession, which may be proven by inferences from circumstantial evidence. Cases of past physical possession are cases of actual possession, not of constructive possession. The instruction on constructive possession is, too, subject to ambiguities of interpretation. If courts read “power” in “power to exercise dominion or control” as simply the *ability* to exercise control, then the instruction makes everything that we know about and are near to potentially within our “possession,” so long as we have the *ability* to possess it.<sup>96</sup> Nor is this issue solved by requiring that we have the intention to possess the thing. This solution, again, sweeps too broadly and makes anything that we are near and *want* to possess somehow “in our possession.” These are the dangers that Judge Mannheim was rightly concerned about.

This is why the paradigm case of constructive possession is having a legal right to something. If I legally own something, I possess it, even before I ever physically lay hold of it (and indeed, even if I never do). Exercising *dominion* comes close to this idea, but the phrasing is archaic, and liable to mislead or confuse jurors, but the idea behind it is essential.<sup>97</sup>

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94. See *United States v. Hernandez*, 290 F.2d 86, 90 (2d Cir. 1961) (“Moreover, a person who is sufficiently associated with the persons having physical custody so that he is able, *without difficulty*, to cause the drug to be produced for a customer can also be found by a jury to have dominion and control over the drug, and therefore possession.”) (emphasis added).

95. 1 WAYNE LAFAVE ET AL., *SUBSTANTIVE CRIMINAL LAW* § 6.1(e) (3d ed. 2017) (“It is not uncommon, however, for constructive possession to be even more broadly defined to include as well circumstances in which the defendant had the ability to reduce an object to his control.”); see also *Singer*, *supra* note 90) (“It is not uncommon for constructive possession to be judicially interpreted even more broadly to include a right, a capacity, or an ability to reduce the substance to one’s control.”).

96. See *Alex v. State*, 127 P.3d 847, 851 (Alaska Ct. App. 2006). (“[Power] can also refer to anything a person might be physically capable of doing if not impeded by countervailing force.”).

97. See *United States v. Maldonado*, 23 F.3d 4, 9 (1st Cir. 1994) (Coffin, J., dissenting) (“I am persuaded that this reliance on physical power of access understates the law’s requirements. Although, as the court points out, a lay person’s understanding of ‘possession’ is not helpful, I cannot so easily sidestep

In addition, there may be cases of constructive possession without a legal right – I may have a sort of exclusive control over property or over a place where the property is, and this may suffice for constructive possession.<sup>98</sup>

The exact way to word constructive possession is thus elusive. We may want to use “power,” but even this has to be qualified, in such a way that having the power means the ability to *maintain* control and to *reduce* it to one’s possession. That is, we need to phrase “power over” something to be as close as possible to – and deliberately suggestive of – a legal right in an item, or a place where the item is, which “authority” comes closest to capturing. My suggestion, then, for a revised jury instruction would be something like the following:

The law recognizes two kinds of possession: actual possession and constructive possession. Actual possession means to have direct physical control, care, or management of a thing. Actual possession does not have to be current possession; it is enough for actual possession to show that the defendant recently had physical control, care, or management over the item.

A person not in actual possession may have constructive possession of an item. Constructive possession means to have ownership of an item, or power and authority over that item or over a place where that item is such that one can without difficulty or opposition reduce it to one’s direct physical control.<sup>99</sup>

What these instructions attempt to do is to remove the ambiguities from the current instruction that might lead juries to interpret “possession” either more narrowly or more broadly than the law intends. Actual possession need not only be present; it can also be past. Constructive possession does not merely mean having the power to potentially physically possess an item, but neither does it only mean having a legal right to a thing. Undoubtedly, improvements to these instructions on possession can be made, but if courts and litigators are to take *Dirks* and

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our and other courts’ use of the word ‘dominion,’ which connotes ownership or a right to property.”).

98. See *United States v. King*, 632 F.3d 646, 651 (10th Cir. 2011) (“This inference of knowing dominion over or control of a firearm is appropriate where the defendant has exclusive possession over the premises.”).

99. See, e.g., Brief of Appellant at 20–21, *Ward v. State*, (No. A-10011), 2008 WL 6588976 (Alaska Ct. App. Oct. 28, 2008) (The trial court’s instruction on constructive possession stated that “constructive possession means to have the power and authority to exercise control over an item.”). The Alaska Court of Appeals approved of this language in *Ward v. State*, No. A-10011, 2009 WL 5154103, at \*6 (Alaska Ct. App. Dec. 30, 2009) (“The instruction which the trial court gave was similar to the instruction we suggested in *Alex v. State*.”).

*Alex* seriously, then it is desirable that some changes be made. Here I have only tried to flesh out Judge Mannheimer's worries, add some of my own, and to suggest a way forward in addressing them.