

<p><b>SUPREME COURT, STATE OF COLORADO</b>  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	<p>DATE FILED: October 25, 2022 7:12 PM  FILING ID: 6BC84ADEC5AD3  CASE NUMBER: 2021SC665</p>
<p>Court of Appeal, State of Colorado 18CA1212  Opinion by Judge Lipinsky, Judges Roman and Harris, concurring</p> <p>Adams County District Court  Honorable Donald Spence Quick and Honorable Brian Nathaniel Bowen, Judges  Case Number(s): 17CR2274</p>	
<p>SYLVIA JOHNSON  Defendant-Appellant</p> <p>v.</p> <p>THE PEOPLE OF THE STATE OF COLORADO  Plaintiff-Appellee</p>	<p>COURT USE ONLY</p>
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<p style="text-align: center;"><b>REPLY BRIEF</b></p>	

## CERTIFICATE OF COMPLIANCE

This brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 57, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 5,700 words or less. Specifically, the reply brief contains 2,343 words, not including the certificate of service page, the table of contents and authorities, and this certificate of compliance page.

It does not exceed 18 pages.

The brief complies with C.A.R. 28(k).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/S/ Patrick R. Henson  
Signature of Attorney of Party

## TABLE OF CONTENTS

TABLE OF CONTENTS AND AUTHORITIES.....	i-ii
INTRODUCTION.....	2
ARGUMENT.....	2-11
I.    The court of appeals reversibly erred in holding that Ms. Johnson waived her right to challenge whether C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and is unconstitutionally vague as applied to Ms. Johnson when defense counsel “resisted the prosecutor’s attempt to provide the jury with a definition of ‘transfer’” [RENUMBERED- PREVIOUSLY ISSUE II].....	2-4
II.   C.R.S. § 18-12-111(1) is unconstitutionally vague as applied to Ms. Johnson because it does not define “transfer” [RENUMBERED- PREVIOUSLY ISSUE III].....	4-9
III.  The court of appeals reversibly erred and violated Ms. Johnson’s due process right in affirming Ms. Johnson’s conviction on the sole count of unlawful purchase of firearms where the government failed to prove that Ms. Johnson purchased a firearm “for transfer to” a person ineligible to possess a firearm [RENUMBERED-PREVIOUSLY ISSUE I].....	10-11
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Abramski v. U.S.</i> , 573 U.S. 169, 171 (2014) .....	7
<i>Cardman v. People</i> , 445 P.3d 1071, 1077 (Colo. 2019) .....	3, 4
<i>People v. McIntier</i> , 134 P.3d 467 (Colo. App. 2005) .....	10
<i>People v. Perez</i> , 367 P.3d 695, 697 (Colo. 2016) .....	11
<i>People v. Perry</i> , 68 P.3d 472, 475 (Colo. App. 2002) .....	10
<i>People v. Rediger</i> , 416 P.3d 893 (Colo. 2018) .....	2
<i>Spahmer v. Gullette</i> , 113 P.3d 158, 162 (Colo. 2005) .....	9, 11
<b>Statutes</b>	
C.R.S. § 18-12-111(1).....	2, 3, 4, 6, 8, 9, 10
<b>Other Authorities</b>	
Black’s Law Dictionary 1636 (9 <sup>th</sup> ed. 2009) .....	5, 6
Colo. Jury Instr., Criminal 12-1:34.....	8

## INTRODUCTION

The government makes several arguments and assertions in its answer brief that require a response, and which will be addressed below. For all arguments not addressed below, Ms. Johnson stands on the arguments set forth in her opening brief which she incorporates by reference herein.

## ARGUMENT

**I. The court of appeals reversibly erred in holding that Ms. Johnson waived her right to challenge whether C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and is unconstitutionally vague as applied to Ms. Johnson when defense counsel “resisted the prosecutor’s attempt to provide the jury with a definition of “transfer”” [RENUMBERED-PREVIOUSLY ISSUE II].**

In its answer brief, the government argues that, because trial counsel for Ms. Johnson resisted the prosecutor’s attempt to provide the jury with a non-statutory definition of the word “transfer” as used in C.R.S. § 18-12-111(1), Ms. Johnson waived her right to assert on appeal that the statute was unconstitutionally vague (AB, pp 7-15). In support of its position, the government relies on *People v. Rediger*, 416 P.3d 893 (Colo. 2018). Specifically, the government argues that, unlike the appellant in *Rediger*, Ms. Johnson’s trial counsel affirmatively told the court not to further define “transfer” and removed the issue from the court’s consideration (AB, p 13). The government is incorrect in its characterization of Ms. Johnson’s trial counsel’s conduct.

During deliberations, the jury asked the trial court “if there is a legal definition of a transfer of a firearm or otherwise.” (TR. 5/16/18, p 2:8-9). In response, defense counsel correctly informed the court that no legal definition of “transfer” as used in C.R.S. § 18-12-111(1) existed (TR 5/16/18, p 2:21-23). In response, the prosecution and court suggested to send the jury an instruction stating that the jury should either use its best judgment or that “transfer” carries its common meaning (TR 5/16/18, p 3:10-24). In response, defense counsel stated, “My position is you have been given all the instructions as is, I don’t think starting to talk about common sense --” (TR 5/16/18, pp 3-4). The court then agreed to—properly—instruct the jury that there is no statutory definition of transfer in the context of a transfer of a firearm, and the jury received the instructions it may use (TR 5/16/18, p 4:3-6).

This exchange between defense counsel, the prosecutor, and the court did not demonstrate Ms. Johnson’s “*intentional* relinquishment of a *known* right or privilege.” *Cardman v. People*, 445 P.3d 1071, 1077 (Colo. 2019). To the contrary, defense counsel’s position merely reflected the reality of the situation; no statutory definition existed for the term “transfer” as used in C.R.S. § 18-12-111(1), and telling the jury to use its common sense or the common meaning did nothing to further elucidate the meaning of the word “transfer” as used in the statute. And, to be sure, in no way did defense counsel’s conduct demonstrate Ms.

Johnson’s intent to relinquish her ability to challenge the constitutionality of the statute under which she received an erroneous conviction. *See Cardman*, 445 P.3d at 1077. Simply put, defense counsel’s objection to the jury receiving an imprecise—and perhaps wholly inapplicable—definition of “transfer” did not demonstrate that she was *intentionally relinquishing her right to challenge the constitutionality of the statute*. Instead, counsel’s objection was a trial strategy decision occasioned by the lack of a definition of transfer as used in the statute, and which forms the basis for Ms. Johnson’s claim that the statute was unconstitutional. Wherefore, the court of appeals’ conclusion that Ms. Johnson waived her right to challenge the constitutionality of the statute should be reversed.

For all remaining issues related to this argument, Ms. Johnson stands on the arguments raised in her opening brief which she incorporates by reference herein.

**II. C.R.S. § 18-12-111(1) is unconstitutionally vague as applied to Ms. Johnson because it does not define “transfer” [RENUMBERED-PREVIOUSLY ISSUE III].**

Although originally addressed in Argument I of the opening brief, the government, in response to Ms. Johnson’s argument that C.R.S. § 18-12-111(1) is unconstitutionally vague, argues that the term “transfer” is not ambiguous, and that the legislative history and intent of the statute support the government’s position

that the term “transfer” applied to Ms. Johnson’s alleged conduct in this case (AB, pp 16-47)<sup>1</sup>.

As a threshold matter, the government spends much time discussing several potential definitions of transfer (AB, pp 21-25). For instance, the government cites to the Black’s Law Dictionary definition of “transfer” both as a verb and as a noun (AB, p 22). Yet, the government never explains how Ms. Johnson’s conduct fell within the purview of any of the proposed definitions. This is because, even if you accept the government’s proposed definition of “transfer,” Ms. Johnson’s conduct cannot be considered a “transfer.”

Black’s Law Dictionary defines “transfer,” as a verb, as “to convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of” or “to sell or give.”

Black’s Law Dictionary 1636 (9<sup>th</sup> ed. 2009). Here, there was no evidence establishing a conveyance of a firearm from Ms. Johnson to Mr. Trujillo, nor was there any evidence establishing that she (1) removed a firearm from one person to another, (2) changed possession of the firearm to Mr. Trujillo, or (3) sold or gave Mr. Trujillo the firearm. Instead, the evidence established that Ms. Johnson

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<sup>1</sup> Why the government moved the analysis of the term “transfer” is unclear, but perhaps the government improperly moved its analysis in an attempt to have the plain error standard of review apply instead of the proper standard of review for the preserved issue raised in Argument I of the opening brief.

purchased a firearm—for herself—in the company of a person who was ineligible to purchase a firearm, Mr. Trujillo. Ms. Johnson then allegedly placed that firearm in her clothes closet. Mr. Trujillo then took the firearm from Ms. Johnson’s clothes closet—while she was at work—and went outside of Ms. Johnson’s apartment to smoke a cigarette with the firearm in his pocket.

Similarly, Black’s Law Dictionary defines “transfer,” as a noun, as a means of disposing of property, as well as a “conveyance of property or title from one person to another,” including a “gift,” “release,” “lease,” or the “creation of a lien or other encumbrance.” Black’s Law Dictionary 1636 (9<sup>th</sup> ed. 2009). Again, there was no evidence to establish that Ms. Johnson disposed of the firearm by means of a conveyance of property or title from one person to another. To the contrary, Ms. Johnson simply placed a firearm in her closet, and Mr. Trujillo knew where the firearm was located and took it. Further, there was absolutely no evidence to establish that Ms. Johnson intended to provide Mr. Trujillo with the firearm as a gift, release, lease, or by creating a lien or encumbrance.

Thus, even if the government’s list of potential definitions of “transfer” applied and captured the legislature’s intent, Ms. Johnson’s conduct still did not run afoul of C.R.S. § 18-12-111(1).

Moreover, the government repeatedly argues, in its answer brief, that both the meaning of the word “transfer,” as well as the legislative history and purposes

of the statute, support the government’s conclusion that Ms. Johnson purchased a firearm for transfer to Mr. Trujillo. For example, the government states:

- because Mr. Trujillo had possessory control of the firearm, a transfer occurred (AB, p 26);
- by allowing Mr. Trujillo access to the firearm, and by ensuring Mr. Trujillo was protected, Ms. Johnson transferred it to him for his use (AB, p 35); and
- a firearm cannot be obtained at all to enable possession by an ineligible person (AB, p 36).

In support of this broad reading, the government cites to the legislative history of the act as a whole, not the particular provisions only defining “transfer” (AB, pp 35-36). Similarly, the government points to the United States Supreme Court decision in *Abramski v. U.S.*, 573 U.S. 169, 171 (2014) to support its position, to wit: the government alleges that the Court in *Abramski* held that a person is a straw purchaser when that person, claiming it for herself, buys a gun so someone else can have it (AB, pp 41-42).

The government’s arguments regarding the legislative history and purposes of the statute fail to account for one important fact, and in so doing the government attempts to redefine “transfer.”

The Model Jury Instructions for the crime of unlawful purchase of a firearm provide:

## 12-1:34 Purchasing or Obtaining a Firearm for a Person Who Is Ineligible

The elements of the crime of purchasing or obtaining a firearm for a person who is ineligible are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. purchased or otherwise obtained a firearm,
5. on behalf of, or for transfer to, a person whom the transferor knew, or reasonably should have known, was ineligible to possess a firearm pursuant to federal or state law....

Colo. Jury Instr., Criminal 12-1:34.

Here, the court instructed the jury on the elements of unlawful purchase of a firearm in Instruction No. 9 (CF, p 48). In that elemental jury instruction, the court—at the prosecution’s request—removed from the model jury instructions the phrase “Or otherwise obtained” from element 4 and “on behalf of” from element 5. Thus, the prosecution was required to prove—pursuant to Instruction No. 9—that Ms. Johnson purchased a firearm for transfer to a person ineligible to possess a firearm, namely, Jaron Trujillo (CF, p 48). C.R.S. § 18-12-111(1); Colo. Jury Instr., Criminal 12-1:34.

What the government is now attempting to do, by argument and citation to the legislative history, is redefine “transfer” to also include the meaning of the

words excised from the jury instruction, i.e., the government is trying to get “transfer” to subsume and eradicate the need for the words “or otherwise obtained” “on behalf of” in the statute. To be sure, when the government argues that allowing a felon possessory control of a firearm is a transfer, the government is trying to redefine “transfer” to mean “otherwise obtained” “on behalf of.” Similarly, when the government argues that a firearm cannot be obtained at all to enable possession by an ineligible person, the government is trying to redefine or expand the definition of “transfer” to mean “otherwise obtained” “on behalf of.” If this Court were to adopt the government’s position, the phrases “otherwise obtained” “on behalf of” would cease to have applicability in the statute because such terms would be superfluous in the face of the government’s proposed overly broad definition of “transfer.” *Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005) (“We construe a statute so as to give effect to every word, and we do not adopt a construction that renders any term superfluous.”).

In light of the above, Ms. Johnson respectfully requests that this Court find that the term “transfer” does not encapsulate Ms. Johnson’s alleged conduct in this case and reverse her conviction because C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and as applied to Ms. Johnson. For all remaining issues related to this argument, Ms. Johnson stands on the arguments raised in her opening brief which she incorporates by reference herein.

**III. The court of appeals reversibly erred and violated Ms. Johnson’s due process right in affirming Ms. Johnson’s conviction on the sole count of unlawful purchase of firearms where the government failed to prove that Ms. Johnson purchased a firearm “for transfer to” a person ineligible to possess a firearm [RENUMBERED-PREVIOUSLY ISSUE I].**

In its answer brief, the government argues that the jury was free to assess Ms. Johnson’s credibility and disbelieve her testimony (AB, p 52). While it is true that the jury is free to assess credibility, the evidence must create more than an unsupported inference or a possible ground for suspicion. *See People v. Perry*, 68 P.3d 472, 475 (Colo. App. 2002) (“To avoid encouraging a jury to speculate, evidence must create more than an unsupported inference or a possible ground for suspicion.”); *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

Here, because the evidence did not establish that Ms. Johnson purchased a firearm for “transfer” to Mr. Trujillo, the jury was not free to speculate based on unsupported inferences or possible grounds for suspicion. *Perry*, 68 P.3d at 475. Moreover, the government’s attempt to characterize such speculation as a credibility determination should be rejected as no evidence established that Ms. Johnson purchased a firearm for “transfer” to Mr. Trujillo. C.R.S. § 18-12-111(1).

Finally, the government argues—in essence—that because the evidence could possibly support an inference that Ms. Johnson purchased “or otherwise obtained” a firearm “on behalf of” Mr. Trujillo, Ms. Johnson purchased a firearm for transfer to Mr. Trujillo (AB, pp 51-52). However, as noted above, because the

phrases “or otherwise obtained” and “on behalf of” were removed from the elemental jury instruction, the jury could not, and the government cannot now on appeal, rely on those provisions to support Ms. Johnson’s conviction by changing the meaning of “transfer” to include the phrases “otherwise obtained” and “on behalf of.” *Spahmer*, 113 P.3d at 162 (“We construe a statute so as to give effect to every word, and we do not adopt a construction that renders any term superfluous.”).

Thus, the evidence, even when viewed in the light most favorable to the prosecution, was not both substantial and sufficient to support the conclusion by a reasonable mind that Ms. Johnson purchased a firearm so that she could transfer that firearm to Mr. Trujillo. *People v. Perez*, 367 P.3d 695, 697 (Colo. 2016). Ms. Johnson, therefore, respectfully requests that this Court reverse her conviction.

For all remaining issues related to this argument, Ms. Johnson stands on the arguments raised in her opening brief which she incorporates by reference herein.

### **CONCLUSION**

For the reasons and authorities presented in the opening brief and above, Ms. Johnson respectfully requests that this Court reverse her conviction.

Respectfully submitted,

/s/ Patrick R. Henson  
Patrick R. Henson

## **CERTIFICATE OF SERVICE**

I certify that I have duly served the within REPLY BRIEF upon all parties below via the Integrated Colorado Courts E-Filing System (ICCES) and/or via regular U.S. mail service on this 25th day of October 2022.

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