IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50086

United States of America,
Plaintiff – Appellee

v.

Coy Jones,
Defendant – Appellant

Appeal from the United States District Court
for the Western District of Texas
Case No. 1:17-CR-253-SS

BRIEF OF APPELLANT COY JONES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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The Honorable Sam Sparks
United States District Judge
Western District of Texas

/s/ Santosh Aravind
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STATEMENT REGARDING ORAL ARGUMENT

Coy Jones respectfully requests oral argument. Argument will permit counsel to address the application of this Court's recent on-point precedent interpreting the Confrontation Clause and the nuanced law governing the admissibility of evidence of prior convictions, all in light of the unique factual circumstances at issue in this case.

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STATEMENT OF JURISDICTION

This is a direct appeal of a federal criminal conviction. The district court had jurisdiction under 28 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the government's questioning of law enforcement agents regarding the out-of-court statements of a confidential informant admitted testimonial hearsay in violation of the Confrontation Clause and the hearsay rules in light of this Court's opinions in *United States v. Kizzee*, 877 F.3d 650 (5th Cir. 2017), and *United States v. Rodriguez-Martinez*, 480 F.3d 303 (5th Cir. 2007).
2. Whether the district court abused its discretion in failing to order the government to disclose the identity of the confidential informant whose critical testimony filled inferential evidentiary gaps in the government's case.
3. Whether the district court erred in admitting evidence of a prior conviction where the government deployed that evidence in an impermissible manner to obtain a guilty finding on the possession elements.
4. Whether the evidence is sufficient to support a conviction for possession of a firearm where the government adduced no evidence tying Mr. Jones to the firearm in question.
5. Whether, setting aside any inferences the jury may have drawn improperly from other evidence, the admissible evidence is sufficient to support a conviction for possession of methamphetamine or conspiracy to possess methamphetamine.

INTRODUCTION

This is a case of prosecutorial overreach. Instead of working up the case brick by brick, factual element by factual element, the government predetermined a grand overarching theory and then backfilled inferential gaps with post hoc rationalizations. Where hard evidence ran thin, the government resorted to a number of artful but impermissible tactics to stretch across open evidentiary gaps to obtain a guilty finding on all counts.

First, through the prosecution's questioning of law enforcement agents regarding the out-of-court statements of a confidential informant ("CI"), the government admitted testimonial hearsay in violation of the Confrontation Clause. Second, the government repeatedly suggested to the jury that it could infer from the fact of the defendant's prior conviction that the defendant had a propensity for possessing firearms and methamphetamine and, therefore, possessed those items in this case—a classic offer of improper propensity evidence. When stripped bare of all impermissible inferences drawn from these tactics, the evidence is insufficient to sustain the judgment of conviction.

For the reasons discussed herein, this Court should reverse the judgment of conviction on all counts.[1]

[1] Mr. Jones has also appealed the judgment in a related case revoking Mr. Jones's supervised release. *See United States v. Jones*, No. 18-50088 (5th Cir.). Mr. Jones's brief in that case is due June 4, 2018. Because the judgment revoking Mr. Jones's supervised release is based on the same conduct at issue in this case, Mr. Jones's brief in the revocation case will involve largely the same facts and arguments.

STATEMENT OF THE CASE

I. Factual Background

Coy Jones is a thirty-nine-year-old father of three from South Carolina. ROA.1529. Mr. Jones is addicted to methamphetamine and that addiction has gotten him into trouble throughout his life. ROA.613.

A. May 3, 2017 Arrest

On May 3, 2017, agents conducted surveillance of a suspected drug transaction involving Mr. Jones at a Valero gas station in Liberty Hill, Texas. According to the agents, Mr. Jones arrived at the gas station driving a white Dodge truck and pulled alongside a silver Nissan truck driven by an "unknown Hispanic male." ROA.1055. Agents suspected that the "unknown Hispanic male" was an associate of known drug dealer Eredy Cruz-Ortiz, *see* ROA.971, 762, but the "unknown Hispanic male" was not stopped or arrested that day, ROA.1055. Agents did not observe any exchange between Mr. Jones and the "unknown Hispanic male" at the Valero. ROA.1054.

The two trucks left the Valero and traveled down County Road 213, with the silver Nissan following Mr. Jones's truck. ROA.973, 1054. The two trucks stopped on the side of County Road 213, "one behind the other." ROA.975. The case agent, Detective Michele Langham, who observed that portion of events, did not see either driver leave either truck, and she did not see any transaction between the drivers while the trucks were stopped along County Road 213. ROA.975. Likewise, Special Agent Royce Clayborne, who also witnessed that portion of events, did not see any interaction between Mr. Jones and the other driver. ROA.747. Nevertheless, the government elicited testimony from Agent Clayborne stating that he "knew" as a factual matter

that Mr. Jones had purchased methamphetamine from the "unknown Hispanic male" because an informant who has not been identified and who did not testify at trial told him. ROA.730; *see* ROA.722, 723, 762.

When Mr. Jones drove away from County Road 213, other surveilling agents followed him. ROA.978. Mr. Jones subsequently turned onto County Road 201. ROA.980. Although up to this point agents had observed no exchange involving Mr. Jones, they instructed Williamson County Sherriff's Deputy Matthew Paniagua to initiate a pretextual traffic stop of Mr. Jones based on an obstructed license plate. ROA.1057. Deputy Paniagua first activated his emergency lights and, later, activated his sirens. ROA.702. Mr. Jones did not stop immediately. ROA.703. Mr. Jones drove about a mile down County Road 201 to an intersection where he stopped and was arrested by Deputy Paniagua and taken into police custody; Mr. Jones complied with Deputy Paniagua's instructions during the arrest. ROA.704.[2] At the time Mr. Jones stopped the truck, the windows on both sides of the truck were rolled down. ROA.983. Mr. Jones was not in possession of a firearm or narcotics at the time of his arrest, and no firearms, narcotics, or drug paraphernalia were present in Mr. Jones's truck. ROA.1058.

To be clear, despite the presence of "over half a dozen" surveilling agents, not a single witness observed Mr. Jones possess a firearm at any time; not a single witness observed Mr. Jones participate in a drug transaction on May 3, 2017; not a single witness saw an exchange take place between Mr. Jones and the "unknown Hispanic

[2] Deputy Paniagua also improperly interrogated Mr. Jones after Mr. Jones was arrested without administering *Miranda* warnings, but the district court properly suppressed that evidence before trial. *See* ROA.187–95.

male" at the Valero; and not a single witness saw an exchange between Mr. Jones and the "unknown Hispanic male" on the side of County Road 213. *See* ROA.1054–56. Not a single witness observed Mr. Jones throw anything from his truck on County Road 201 between the time Deputy Paniagua activated his emergency lights and the time Mr. Jones stopped. *See* ROA.704, 981, 1059, 1064.

B. Government's May 3, 2017 Evidence Gathering

Nevertheless, law enforcement officers began searching along both sides of County Road 201 using three canine units. *See* ROA.751–52, 824, 1058. Approximately one to two hours into the search for methamphetamine, one of the canine units found an unloaded gun on the side of County Road 201.[3] *See* ROA.734, 739, 999. The gun was lodged in and beneath a cactus, ROA.836–38., 1261–65, 1526, on what would have been the right (passenger) side of the road from the perspective of Mr. Jones's direction of travel. ROA.734. Agents also found a magazine ten to fifteen feet away from the unloaded gun. ROA.734, 845.

Approximately two-and-a-half hours into the search, Deputy William Steffen was sent to photograph and collect the unloaded gun and magazine. ROA.823. Deputy Steffen approached from the same direction of travel as that taken by Mr. Jones hours earlier. While Deputy Steffen was driving toward the gun and magazine he spotted in the ditch out his driver's side window—about a quarter of a mile away and on the opposite (left) side of the County Road 201 from the unloaded gun—a Ziploc bag containing a substance later determined to be approximately one kilogram of meth-

[3] The officer who allegedly discovered the unloaded gun did not testify at trial. *See* ROA.735, 739, 758.

amphetamine. ROA.827, 1002. The Ziploc bag containing the methamphetamine was found next to a plastic HEB bag. ROA.1258–60. The Ziploc bag and the HEB bag were found in an area where other agents had already searched with canine units but had not found anything. ROA.829–30.

Deputy Steffen's dash camera and body microphone were activated shortly after he located the methamphetamine. ROA.807.[4] Although it was Deputy Steffen who located the Ziploc bag and HEB bag, Special Agent Clayborne can be heard suggesting that Deputy Steffen "put down the canine unit that found it." ROA.759, 829–30. Agent Clayborne then asked Deputy Steffen, "[A]re you hot right now?" which meant "Is your microphone on?" ROA.831. Deputy Steffen responded, "Let me kill it," and turned off the dash camera and body microphone because someone "was concerned about something being recorded." ROA.831–32. Based on the metadata retained by Deputy Steffen's digital camera there then followed a delay of about thirty minutes before the first photograph was taken of the Ziploc bag and the HEB bag. *See* ROA.761.

After photographing and collecting the Ziploc bag and the HEB bag, Deputy Steffen continued driving down County Road 201 toward the gun and magazine, which were located about "a quarter of a mile" away on the opposite side of the road. ROA.836. The gun was "wedged into [the] cactus" such that it was situated "under a bunch of . . . thick of grass between the road and the fence." ROA.837, 1261, 1526. By the time Deputy Steffen arrived to photograph the gun and magazine, someone had broken the cactus above where the gun was positioned. ROA.838, 1261–62. De-

[4] The recording was admitted at trial as Exhibit 13E.

tective Langham testified that "an investigator broke the cactus to better take photographs of the firearm and how it was located." ROA.1004. Interestingly, Deputy Steffen—the investigator who took photographs of the unloaded gun, ROA.753–54—testified that he did not "break the cactus to take photos of [the gun]," ROA.838, and that he "[had] no idea" who broke the cactus or how it was broken. ROA.847.

The unloaded gun was covered in dirt and cactus pollen. ROA.842, 1320. The dirt and cactus residue also covered part of the surface of the barrel located under the slide that would be unexposed unless the slide of the gun had been locked back prior to the gun being lodged in the cactus. ROA.842–43. Deputy Steffen testified that the dirt and debris could not have accumulated on the unexposed part of the barrel if the slide had been closed at the time when the unloaded gun was lodged in the cactus. ROA.842. Deputy Steffen also testified that locking back the slide of the gun would require two hands. ROA.842.

During an interrogation conducted the night of the arrest, Detective Donald Foiles asked Mr. Jones to explain what happened. ROA.773. Mr. Jones initially offered an explanation for his interactions with the "unknown Hispanic male" that was inconsistent with what agents had observed. *See* ROA.773–74. As for why he failed to stop immediately once Deputy Paniagua activated his emergency lights, Mr. Jones explained that he failed to see the emergency lights for a period of time. ROA.774. In any event, Detective Foiles conceded that even when he pressured Mr. Jones with a demonstrably false assertion that "the lady saw you toss [the gun] out [of your truck]," and an uninformed assertion that "the surfaces of the handgun and the Ziploc bag were perfect for obtaining fingerprints," Mr. Jones did not admit to possessing the unloaded

gun or the methamphetamine found on the side of County Road 201. ROA.777, 782, 786.

The HEB bag, the Ziplog bag containing the methamphetamine, the unloaded gun, and the magazine were eventually sent to the forensic laboratory for fingerprint analysis and DNA testing. ROA.856, 862. There was no fingerprint evidence or DNA evidence tying the methamphetamine to Mr. Jones. ROA.860, 874, 1071. In fact, the only conclusive fingerprint evidence showed that Mr. Jones was excluded as the source of the two fingerprints on the HEB bag. ROA.874. There was no fingerprint evidence or DNA evidence tying the unloaded gun or magazine to Mr. Jones. ROA.1069.

C. Government's Investigation of Eredy Cruz-Ortiz

The government, not content with charging Mr. Jones with gun and methamphetamine possession arising from the events leading up his May 3, 2017 arrest, also claimed that Mr. Jones was part of an extensive drug conspiracy that started when Mr. Jones was in jail.[5] According to trial testimony, at least nine months before Mr. Jones was arrested, the government had identified Eredy Cruz-Ortiz as a suspected dealer of methamphetamine. ROA.622. FBI and DEA agents conducted surveillance in August 2016 and observed Mr. Cruz-Ortiz meet with a subject named Imran Rehman in a McDonald's parking lot in what agents alleged to be a drug transaction. ROA.626–27, 629. However, neither Mr. Cruz-Ortiz nor Mr. Rehman was arrested that day, and agents did not seize any narcotics or narcotics-related materials. ROA.637. The gov-

[5] Mr. Jones has a prior federal conviction for conspiracy drug possession and being a felon in possession of a firearm. He was released on September 19, 2016. *See* ROA.889, 1536.

ernment observed Mr. Rehman conduct drug transactions with Mr. Cruz-Ortiz on multiple other occasions. ROA.636.

At trial, Mr. Rehman testified that he met twenty-five to thirty times with an individual identified only by the nickname "Flaco"—presumably Mr. Cruz-Ortiz—and that at some of those meetings he purchased different amounts of methamphetamine from Flaco. ROA.693, 1046. The government arrested Mr. Rehman and charged him with a single count of possession with intent to distribute 50 grams of methamphetamine. ROA.635, 1047. The government has not charged Mr. Rehman with a drug conspiracy involving Mr. Cruz-Ortiz or Mr. Jones. *Id.* Mr. Rehman had never met or even seen Mr. Jones prior to his serving as a witness for the prosecution in Mr. Jones's case. ROA.687.

The government also elicited testimony about another surveillance operation involving Mr. Cruz-Ortiz and a suspected buyer named Julio Rogel-Diaz—an operation that had nothing to do with Mr. Jones. ROA.648, 654. As with Mr. Rehamn, the government has not charged Mr. Rogel-Diaz with a drug conspiracy involving Mr. Jones. ROA.653. None of the evidence recovered in that operation is connected to Mr. Jones and none of the witnesses or informants interviewed even mentioned Mr. Jones. ROA.654.

In conducting surveillance related to their investigation of Mr. Cruz-Ortiz, agents observed Mr. Jones on several occasions. ROA.946. The government introduced as trial exhibits several photographs taken on those occasions. ROA.1238–56. Although several of those photographs depict Mr. Jones, and several appear to depict vehicles used by Mr. Cruz-Ortiz on other occasions (albeit not that used by the "un-

known Hispanic male" on May 3, 2017, *see* ROA.746), not one of those photographs even purports to depict Mr. Cruz-Ortiz. ROA.1238–56.

On these occasions, agents interpreted Mr. Jones's behavior as being consistent with that of someone purchasing drugs—moving between vehicles with packages, undertaking counter-surveillance measures, and the like. *See, e.g.*, ROA.946–49; *but see* ROA.657–60. However, as far as surveillance involving Mr. Jones is concerned, at no point in time did law enforcement officers observe or seize any narcotics or arrest anyone.[6] *See* ROA.660 1041. In short, the government conceded that it does not "have any conclusive hard proof that a drug deal happened" on any of the occasions during which they observed Mr. Jones. ROA.1041. The government also conceded that it has not produced any evidence regarding the existence of a drug conspiracy involving the shipment of narcotics from Mexico. ROA.1085–86.

The government also attempted to establish the existence of a conspiracy through a cell phone seized from Mr. Jones the night of his arrest. ROA.1074. Detective Langham testified that, at least two weeks after the arrest, she reviewed the contents of the phone and saw a phone number listed for a contact named "Sapo" that matched a phone number associated with an individual named Armando Medrano-Garcia, an alleged co-conspirator of Mr. Cruz-Ortiz. ROA.1004, 1007. The government worked to draw a tenuous connection between Mr. Jones and Mr. Medrano-Garcia by eliciting testimony that both individuals were among 170 federal inmates incarcerated in the Bastrop County jail facility during a thirty-five-day period in 2016.

[6] Moreover, at no point in time during the entire investigation did law enforcement officers observe Mr. Jones possess a firearm. *See* ROA.1163.

ROA.888–90. However, there is no evidence of any contact whatsoever between Mr. Jones and Mr. Medrano-Garcia during those thirty-five days. There is no evidence of any contact whatsoever between Mr. Medrano-Garcia and Mr. Cruz-Ortiz at any time. And there is no phone-related evidence of any contact between Mr. Jones and Mr. Cruz-Ortiz.

The government elicited testimony that Mr. Jones's phone records indicated that on the day of his arrest he communicated with "Sapo" and had a single communication with a phone number bearing a country code for the Republic of Mexico and several communications with a phone number suspected of being associated with Mexico but reflecting the United States as the dial country. ROA.1013–15, 1082. Later, after the defense showed that Mr. Medrano-Garcia was incarcerated the day of Mr. Jones's arrest and therefore could not have communicated with Mr. Jones on that day, the government offered a new story about an individual named Gustavo Ambriz-Casas or "Johnny," who the government asserted was using Mr. Medrano-Garcia's phone number. *See* ROA.1076. The government conceded it has no evidence that Mr. Jones was communicating about anything illegal with "Sapo"—whether Mr. Medrano-Garcia or Mr. Ambriz-Casas or anyone else using that phone number. ROA.1076.

The government did not introduce the contents from the phone seized the night of Mr. Jones's arrest because, as the government conceded, someone erased the phone while it was in the possession of the Cedar Park Police Department, during which time Mr. Jones was incarcerated without access to the internet. ROA.1076–78. The phone contents were erased, of course, only after Detective Langham had an op-

portunity to review the contents of the phone and all of the alleged communications. ROA.1074–78.

II. Procedural History

Mr. Jones was indicted on July 18, 2017, and charged with one count of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). ROA.13. On September 19, 2017, the government issued a superseding indictment charging Mr. Jones with (1) possession with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A); (2) conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A); (3) possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and (4) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (the "Superseding Indictment"). ROA.53.

On October 6, 2017, Mr. Jones filed omnibus pretrial motions. ROA.65. Mr. Jones moved, *inter alia*, for disclosure of the identity of the government's CI and to exclude testimony related to the CI under Federal Rule of Evidence 403 and under the Confrontation Clause of the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004). ROA.89–92. The district court denied Jones's motion for disclosure of the CI, and it denied Jones's motion to exclude testimony related to the CI. ROA.196. The court repeatedly overruled renewed objections to such testimony at trial. *See, e.g.*, ROA.764–765, 1035–36.

On October 13, 2017, Mr. Jones filed a motion *in limine* to exclude evidence of other crimes, including evidence of Mr. Jones's prior convictions for conspiracy to possess with intent to distribute methamphetamine and possession of a firearm by a convicted felon. ROA.120. The district court admitted this evidence over Mr. Jones's renewed objections at trial. ROA.921 (admitting judgment of prior conviction as "Government's Exhibit No. 1"); *see* ROA.1231 (Government Exhibit No. 1).

On November 2, 2017, after a four-day jury trial, Mr. Jones was convicted of all four counts charged in the Superseding Indictment. ROA.303. At the close of the government's case, counsel for Mr. Jones moved orally for judgment of acquittal on all four counts, which the district court denied. ROA.308. Mr. Jones subsequently filed a written motion for judgment of acquittal or, alternatively, for a new trial. ROA.309–32. Mr. Jones asserted that the district court erred in admitting evidence of statements made by the CI at trial, ROA.325–29, and in admitting evidence of his prior conviction, ROA.321–25, and that the government adduced insufficient evidence to support his conviction on all counts, ROA.314–21. The district court denied in full Mr. Jones's post-trial motion on December 11, 2017. ROA.366–75.

On January 24, 2018, the district court entered a final judgment of guilty on all four counts charged in the Superseding Indictment and sentenced Mr. Jones to three-hundred months of imprisonment. ROA.396–401.[7]

Mr. Jones timely filed his notice of appeal on February 2, 2018. ROA.402.

[7] On October 6, 2017, the government filed a prior felony information, which subjected to Mr. Jones to a twenty-year mandatory minimum if he was convicted of a drug felony at trial. ROA.61.

SUMMARY OF THE ARGUMENT

The government failed to adduce any direct evidence that Mr. Jones possessed either the firearm or the methamphetamine in question. Facing a dearth of hard evidence to meet its burden of proof, the government resorted to alternative tactics designed to obtain a guilty finding by improper means. The judgment of conviction cannot stand for three primary reasons:

First, the government admitted testimonial hearsay in violation of the Confrontation Clause. This Court recently reaffirmed the principle that law enforcement officers acting as government witnesses "cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant." *United States v. Kizzee*, 877 F.3d 650 (5th Cir. 2017). But that is exactly what the government did here. The prosecutor crafted both his questioning of government witnesses and his closing argument to introduce and emphasize the CI's out-of-court statements as proof that Mr. Jones, in fact, possessed the methamphetamine. Because the CI was not made available for cross examination, the government's introduction of the CI's statements violated Mr. Jones's rights under the Confrontation Clause.

Second, the government deployed Mr. Jones's prior conviction as the cornerstone of its prosecution—Exhibit Number One—and used it in a targeted manner to cause the jury to conflate permissible and impermissible uses of that evidence. The prosecutor repeatedly suggested to the jury that because Mr. Jones was convicted of possessing a firearm and methamphetamine in the past, he more likely possessed those items here. By design, these references led the jury to convict Mr. Jones because

of his past criminal conduct, not the charges for which he was on trial. Given the government's weak evidence otherwise, the prejudicial effect of the prior conviction outweighed its probative value, and the lower court erred in admitting that evidence in light of the manner in which it was used.

Third, once stripped bare of all impermissible inferences drawn from the CI's statements and the prior conviction, the body of evidence adduced by the government at trial is insufficient to sustain the judgment of conviction as to any of the four counts. As to the firearm-related convictions, the government adduced absolutely no evidence that Mr. Jones possessed a firearm at any time. As to the methamphetamine-related convictions, to the extent the government adduced any evidence, that evidence is riddled with inferential gaps that preclude a finding of guilty beyond a reasonable doubt. At most, the government adduced evidence to show some modicum of physical proximity between Mr. Jones and an unloaded gun and a bag containing methamphetamine. Under this Court's precedents, however, "[i]t is well-established that proof of mere proximity to contraband is not sufficient to establish actual or constructive possession." *United States v. Canada*, 459 F.2d 687, 688 (5th Cir. 1972).

STANDARD OF REVIEW

This Court reviews claimed violations of the Confrontation Clause "de novo, subject to a harmless error analysis." *United States v. Kizzee*, 877 F.3d 650, 656 (5th Cir. 2017) (citation omitted). "The [g]overnment has the burden of defeating a properly raised Confrontation Clause objection by establishing that its evidence is non-testimonial," and the government has the burden to "prove[ ] harmless error beyond a reasonable doubt," *id.* at 656, 661. This Court "review[s] a district court's decision to

grant or deny disclosure of a confidential informant's identity for abuse of discretion." *United States v. Ortega*, 854 F.3d 818, 824 (5th Cir. 2017).

This Court reviews a district court's admission of evidence of a prior conviction for abuse of discretion. *United States v. Cockrell*, 587 F.3d 674, 678 (5th Cir. 2009). In the criminal context, the abuse-of-discretion standard is "necessarily heightened," *id.*, because "[e]vidence in criminal trials must be strictly relevant to the particular offense charged."' *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003). Where a district court abuses its discretion under this heightened standard, this Court conducts a harmless error analysis. *United States v. Wallace*, 759 F.3d 486, 493 (5th Cir. 2014).

Finally, this Court reviews the sufficiency of the evidence supporting a criminal conviction *de novo*, in the light most favorable to the verdict, asking "whether a rational jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Cessa*, 785 F.3d 165, 174 (5th Cir. 2015). This Court applies the same standard of review regarding sufficiency "whether the evidence is direct or circumstantial." *United States v. Mergerson*, 4 F.3d 337, 341 (5th Cir. 1993).

ARGUMENT

The government's introduction of the out-of-court statements of the CI admitted testimonial hearsay in violation of Mr. Jones's rights under the Confrontation Clause. The trial court erred in refusing to order the government to disclose the identity of the CI and in admitting evidence of Mr. Jones's prior conviction. The evidence was insufficient to support a conviction on any of the four counts charged. This Court should reverse and remand for entry of a judgment of acquittal on all counts or, in the alternative, vacate the judgment of conviction as to all counts.

I. The Government's Introduction of the Confidential Informant's Out-of-Court Statements Admitted Testimonial Hearsay in Violation of the Confrontation Clause.

Law enforcement officers acting as government witnesses "cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant." *United States v. Kizzee*, 877 F.3d 650, 656 (5th Cir. 2017) (citation omitted) (vacating conviction based on Confrontation Clause violation). This rule applies to the introduction of the out-of-court statements of a confidential informant. *United States v. Rodriguez-Martinez*, 480 F.3d 303, 308 (5th Cir. 2007) (vacating conviction for lack of harmless error where government "concede[d] that the admission of the [confidential] informant's out-of-court identification through [law enforcement officer's] testimony violated the Confrontation Clause"). The government's introduction of the CI's out-of-court statements in this case violated Mr. Jones's rights under the Confrontation Clause and the hearsay rules.[8]

Moreover, the CI in this case was not "merely a tipster" who provided information about uncertain future events to assist in the government's investigation. *Cf. United States v. Potwin*, 136 F. App'x 609, 611 (5th Cir. 2005). Rather, at trial the prosecution relied on the CI's statements to prove what it alleged happened, in fact, in the past. The CI functioned as the prosecution's star witness whose testimony filled critical inferential evidentiary gaps and provided an invaluable metanarrative for the government's theory of the case. As such, regardless whether a Confrontation Clause vio-

[8] The district court also should have excluded the CI's statements under Federal Rule of Evidence 403 because they are overly prejudicial.

lation occurred, the district court abused its discretion in failing to order the government to disclose the identity of the CI.

A. The government offered the testimonial hearsay statements of the confidential informant through the testimony of other witnesses in violation of the Confrontation Clause.

Because the CI was not made available for cross-examination at or before trial, the government's elicitation of the CI's testimonial statements violated Mr. Jones's rights under the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). This Court's recent opinion in *Kizzee* is instructive. In that case, the prosecutor inquired about a detective's questioning of a nontestifying informant. 877 F.3d at 655. The prosecutor asked the detective whether he spoke with the informant, whether he asked the informant if the informant had obtained narcotics from the defendant, and whether he subsequently obtained a search warrant based on his conversation with the informant. *See id.* Although the detective never "utter[ed] one single word that [the informant] replied in response to any of [his] questions," but rather "testified only to his own observations," this Court concluded that the prosecutor's questioning, combined with "the content of [the detective's] testimony[,] implicitly revealed [the substance of the informant's] statements," which inculpated the defendant. *See id.* at 657–58. This Court vacated the defendant's conviction because the prosecutor's questioning of the detective admitted testimonial hearsay in violation of the Confrontation Clause. *Id.* at 663.

1. Under *Kizzee*, the statements of the confidential informant were testimonial in nature and were offered for their truth.

This case would be on all fours with *Kizzee* but for the fact that the government's extensive and blatant use of the CI's statements here made for a clearer and more egregious constitutional violation. At the very least, the prosecution's questioning of law enforcement officers was "designed to elicit hearsay testimony [of the CI] without directly introducing [the CI's] statements." *See Kizzee*, 877 F.3d at 657–58. But in any event, that questioning and the testimony it elicited gave the overwhelming implication that Mr. Jones was guilty of the crimes charged, and led "to the clear and logical inference that [the CI] believed and said that" Mr. Jones possessed methamphetamine and participated in a narcotics conspiracy. *See id.* at 658.

The government repeatedly offered the CI's statements to prove the truth of the matter asserted. For example, to support its case on possession the government offered the CI's statements to prove that on May 3, 2017, Mr. Jones engaged in a drug transaction in which he, in fact, received methamphetamine. In questioning Agent Clayborne, the prosecutor openly volunteered testimonial hearsay from the CI:

> [**Government**]: You didn't see any interaction or meeting [between Mr. Jones and the "unknown Hispanic male"] at this time?
>
> [**Clayborne**]: I did not.
>
> [**Government**]: But based on the information you'd received, Coy Jones had received a large amount of methamphetamine?
>
> [**Defense**]: Objection. Hearsay.
>
> [**Government**]: I'll withdraw the question.
>
> **The Court**: That objection is overruled.

> [**Government**]: I'll withdraw the question, your Honor.
>
> **The Court**: All right.
>
> [**Government**]: Why did you follow Coy Jones as opposed to the other guy?
>
> [**Clayborne**]: Well, we knew that Coy Jones had just received a large amount of methamphetamine.

ROA.730. On re-direct, the government went all in and asked how Agent Clayborne "knew" that a drug transaction had occurred. ROA.762. His answer? "I made a phone call to my confidential source, who then made some phone calls himself and got back to me that the deal had happened."[9] *Id.* The government's "we-knew-the-deal-happened-because-the-CI-said-so" theory pervaded the entire trial. *See* ROA.723, 726, 730, 978 ("[W]e knew Mr. Jones had the methamphetamine.").

The government also used the CI's testimony to prove its conspiracy case against Mr. Jones. Detective Langham testified that the CI provided the government with information about where and when Mr. Cruz-Ortiz, Mr. Jones's supposed drug supplier, would be supplying methamphetamine to buyers. ROA.943–46. Detective Langham testified that every surveillance the government conducted (and ultimately used to argue that Mr. Jones was involved in a drug conspiracy) was based on a tip from the CI. *Id.*; ROA.962, 965, 969, 977, 1035–36, 1038. Highlighting the fact that the government offered these statements to prove the truth of the matter asserted, Langham conceded that, as to every surveillance conducted during the investigation,

[9] This testimony also raises a hearsay-within-hearsay issue. The government failed to articulate a theory of admissibility for the testimonial statements of the person or persons with whom the CI allegedly spoke phone, which should have been excluded, *see Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 814 (5th Cir. 2017), and comprise an additional Confrontation Clause violation.

the government did not "have any conclusive hard proof that a drug deal happened . . . except for what [the] CI told [her]." ROA.1041.

Finally, the government referenced the statements of the CI multiple times during its closing argument. The prosecutor used the CI's statements to bolster the government's allegations regarding the events on May 3, 2017: "[L]uckily, we have more [evidence]. We have an informant tip, again, that someone from Eredy Cruz's organization is going to be delivering methamphetamine at this gas station in Liberty Hill." ROA.1152. The prosecutor could not leave the CI well enough alone, emphasizing later, "We called the informant and said, did the deal happen and *he just said yep, it sure did* and that's why they chose to follow Coy Jones because *they knew he had the drugs*." ROA.1153 (emphasis added). The prosecutor also referenced the CI's statements as substantive evidence regarding the conspiracy charge:

> You know that [Mr. Cruz-Ortiz is] part of a Mexican drug trafficking organization. . . . We had an informant in this case, as you know. We've heard a lot about an informant. This is an informant who has provided, as you heard from the witness stand from Agent Clayborne and from Detective Langham, reliable information about where and when Eredy Cruz is going to be delivering drugs. Over and over again, they were able to set up surveillance and *watch him and, in some cases, as you heard, stop people and make arrests and they're in possession of methamphetamine. They were able to confirm what they're being told by their informant based on the information he gives them.*

ROA.1144–45 (emphasis added); *see* ROA.1149, 1151, 1154.

Mr. Jones objected both before and during trial to testimony relating to the CI's statements, but the district court overruled those objections. The court allowed such testimony because the government asserted it was "not offering [the testimony] for its truth[, but] [j]ust to explain why Agent Clayborne and the other units were there."

ROA.723. The court noted initially that the testimony was "not offered for the truth of the matter, but is offered so that you can determine the witness' testimony as to what he did and why he did it." *Id.* Despite this instruction, the government was later allowed to introduce evidence that Agent Clayborne "knew" a drug transaction occurred because the CI stated that "the deal had happened." ROA.762. And, as highlighted above, the prosecution used the statements of the CI over and over again for that purpose. The CI's testimony was clearly offered for the truth of the matter asserted and "was not limited to merely explaining [Agent Clayborne's] actions." *See Kizzee* at 660; *United States v. Hernandez*, 750 F.2d 1256, 1257 (5th Cir. 1985) ("The government's protestation that the evidence was not elicited to prove [defendant] was a drug smuggler, but merely to explain the motivation behind DEA's investigation is unconvincing from both a common sense perspective, and from the government's subsequent use of that testimony.").

Moreover, the CI statements were testimonial in nature because—from the testimony of other government witnesses and as implied by the prosecutor's questioning—those statements would allow the jury to reasonably infer Mr. Jones's guilt. *See Kizzee* at 657; *United States v. Johnston*, 127 F.3d 380, 395 (5th Cir. 1997) (noting that Confrontation Clause is violated where "the jury would reasonably infer that information obtained in an out of court conversation between a testifying police officer and an informant or other law enforcement officer implicated a defendant in narcotics activity"). Indeed, as introduced here, the CI-related testimony conveyed "critical substance about [the CI's statements] . . . implying [Mr. Jones's guilt] in the crime

charged"—namely, that Mr. Jones in fact possessed methamphetamine and in fact participated in a drug conspiracy. *See Kizzee* at 658.

2. The government cannot prove harmless error.

"Harmless error means that 'there is no reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Kizzee*, 877 F.3d at 661 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967) (alterations omitted). "This Court considers five factors when evaluating whether an error was harmless: (1) the importance of the witness' testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case." *Id.* at 661–62 (quoting *United States v. Duron-Caldera*, 737 F.3d 988, 996 (5th Cir. 2013)). Considering these factors as applied to the circumstances at issue, the government cannot meet its burden to "prove[ ] harmless error beyond a reasonable doubt." *See Kizzee* at 661.

First, the importance of the CI's testimony to the government's case cannot be overstated. The government referenced the CI and statements made by the CI at least a dozen times throughout the trial, including at least five times during the prosecutor's closing argument alone—a telltale sign of harmful error. *See Kizzee* at 662 ("The importance of testimony to the prosecution's case can be underscored if it is referenced in closing statements."); *United States v. Alvarado-Valdez*, 521 F.3d 337, 342–43 (5th Cir. 2008) ("Our task would be difficult were it not for the government's insistent reliance

on the testimony in its closing argument, in light of which we cannot say the error was harmless.").

Second, the CI's testimony was not cumulative. Again, not a single witness observed an exchange occur between Mr. Jones and the "unknown Hispanic male" on May 3, 2017. The CI's statements therefore comprised "the only evidence" that definitively indicated that a drug deal had occurred. *See Rodriguez-Martinez*, 480 F.3d at 308 (noting that the confidential informant's statement was "the only evidence that definitively identified [the defendant] as the drug source"). The same is true of the CI's statements that drug transactions had occurred on prior occasions where agents surveilled Mr. Jones but observed no narcotics and made no arrests or seizures.

Third, as to the material point of whether a drug transaction occurred involving Mr. Jones on any occasion, there is an absence of direct evidence corroborating the CI's testimony. Nevertheless, the government will argue—as did the government in *Kizzee*—that circumstantial evidence corroborates the CI's statements. *See Kizzee* at 662. In *Kizzee*, the government pointed to (1) admissible testimony that the defendant's house was "known for drug transactions" and that agents "regularly saw drug traffickers" there; (2) observations of the defendant behaving in a manner consistent with someone participating in a drug transaction; (3) the seizure of narcotics from an individual who had just left the defendant's residence; (4) cell phone logs linking the defendant to that individual; (5) the discovery of a large amount of cash on the defendant's person; and (6) the discovery of guns and ammunition in the defendant's residence, as well as surveillance cameras. *See id.* That circumstantial evidence was insufficient to meet the high hurdle required to show harmless error. In this case, any cir-

cumstantial evidence tending to corroborate the CI's testimony "is inconclusive at best, and the prejudice caused by the prosecutor's improper questioning is more likely to have contributed to" the convictions. *See id.*

Fourth, the CI was not subject to cross-examination at or before trial, and the credibility of the CI could not be assailed because this Court did not allow the CI file to be produced to the defense.

Fifth, given the government's weak evidentiary case overall (discussed in detail below at Part III of the Argument), the CI's statements comprised the most damning evidence the jury heard against Mr. Jones at trial.

Under these circumstances, the government cannot prove there is not at least "a reasonable possibility" that the statements of the CI "might" have contributed to the methamphetamine-related convictions. *See Kizzee* at 663. This Court should therefore vacate the judgment of conviction as to the methamphetamine-related counts (Counts 1 and 2) and remand for further proceedings.

B. The district court abused its discretion in failing to order the government to produce the confidential informant file to the defense.

Regardless whether a Confrontation Clause violation occurred, given the government's extensive reliance on the CI's statements at trial, disclosure of the identity of the CI "is essential to a fair determination of [this] cause." *Roviaro v. United States*, 353 U.S. 53, 61 (1957). "This Court uses a three factor test to determine whether the identity of an informant should be revealed: (1) the level of the informant's activity; (2) the helpfulness of the disclosure to the asserted defense; and (3) the Government's

interest in nondisclosure." *United States v. Ibarra*, 493 F.3d 526, 531 (5th Cir. 2007). All three prongs weigh in favor of disclosure here.

As to the first prong, given the absence of other evidence adduced at trial, the CI served as the lynchpin of the government's investigation and prosecution of Mr. Jones. The CI was, in reality, the only government witness to assert unequivocally that Mr. Jones participated in a drug transaction. That the government improperly elicited the testimony of the CI through other individuals does not lessen the central role of the CI as an active participant in both the investigation and alleged conspiracy.

As to the second prong, the defense had no opportunity to assess the credibility of the CI; no opportunity to inquire of the CI's criminal history; no opportunity to investigate how the CI obtained the information provided; no opportunity to determine the CI's connection to the alleged conspiracy; no opportunity to adduce whether the CI received compensation in exchange for information; and no opportunity to explore the CI's motivation for providing the information. These factors—while frequently present in cases involving informants—take on heightened importance in a case like this where the CI functioned practically as a critical witness for the government.

As to the third prong, the government had little interest in nondisclosure to begin with and any interest that did exist has dissipated. The government made clear at trial that the CI was "providing information about Eredy Cruz[-Ortiz]" only. ROA.1186. But at the time of trial, Mr. Cruz-Ortiz had been arrested and detained.[10]

[10] Although the government asserted that Mr. Cruz-Ortiz would be a government witness, he was not called as a witness at trial.

ROA.1045. Thus, based on the record before this Court, disclosure of the identity of the CI could not possibly "jeopardize . . . ongoing criminal investigations." *See Ibarra*, 493 F.3d at 532.

For these additional reasons, even if this Court concludes no Confrontation Clause violation occurred, the judgment of conviction should nonetheless be vacated as to the methamphetamine-related counts (Counts 1 and 2) and the case remanded with instructions to order the government to disclose the identity of the CI and for further proceedings.[11]

II. The District Court Erred in Admitting—as the Government's Exhibit Number One—Prejudicial Evidence of Mr. Jones's Unconnected Prior Conviction.

Mr. Jones complains of the wrongful admission of an unconnected prior conviction viewed in light of the tactical manner in which the government deployed that evidence once admitted. Mr. Jones objected to the prior conviction before trial, ROA.120, and renewed his objection during trial, ROA.921. Mr. Jones argued that the government sought to admit the prior conviction to bolster its otherwise weak case on possession through an impermissible propensity theory.

Mr. Jones's worst fears were realized at trial. The government designated the prior conviction as "Government's Exhibit No. 1," making no effort to hide the propensity-based core of its case: "Once a drug dealer, always a drug dealer." The prosecutor repeatedly referenced the prior conviction in a way that, by design, caused the

[11] To the extent the district court's error in refusing to disclose the identity of the CI is subject to harmless error review, such error was not harmless for the reasons stated above at Part I.A.2 of the Argument.

jury to conflate permissible and impermissible uses of that evidence. This Court's sister circuits have observed that this type of prosecutorial tactic results in the receipt of "propensity evidence in sheep's clothing . . . with insufficient regard for the unfair prejudice that surely would result from [its] admission." *United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009).

In practice, the government used the prior conviction to "so overpersuade [the jury] as to prejudge [Mr. Jones] with a bad general record and deny him a fair opportunity to defend against a particular charge," namely the possession elements of each of the four counts, for which the prior conviction evidence was not admissible. *See Old Chief v. United States*, 519 U.S. 172, 181 (1997). Given "the powerful prejudicial effect of [the] prior conviction and the lack of overwhelming evidence supporting the [g]overnment's case," the district court should not have admitted the prior conviction evidence. *United States v. Penn*, 616 F. App'x 524, 527 (3d Cir. 2015) (vacating judgment of conviction for possession even where "[g]overnment presented substantial evidence that [defendant] possessed the firearms" at issue).

A. In practice, the government deployed the prior conviction evidence to buttress its case on elements for which that evidence was not admissible—namely, possession of the firearm and methamphetamine.

As this Court has long recognized, "[c]lear prejudice may result when the jury is unable to separate the evidence and apply it to the proper offenses, or where the jury might use the evidence of one of the crimes to infer criminal disposition to commit the other crimes charged." *United States v. Fortenberry*, 914 F.2d 671, 675 (5th Cir. 1990). The government purported to offer the prior conviction evidence for the "limited purpose" of showing Mr. Jones's intent. But in reality, the government used the prior

conviction as the foundation on which it built its case on the possession elements—elements for which that evidence was not admissible.

Consider the following example of the government's targeted use of the prior conviction during direct examination of Detective Langham regarding Deputy Paniagua's arrest of Mr. Jones:

> [**Government**]: At that time, were you also aware of Mr. Jones'[s] criminal history and his conviction for conspiracy to possess with intent to distribute methamphetamine and possession of firearm by a felon?
>
> [**Defense**]: Objection.
>
> **The Court**: It is leading.
>
> [**Government**]: Were you aware of Mr. Jones'[s] criminal history at that time?
>
> [**Langham**]: Yes, sir.
>
> [**Government**]: Did [Mr. Jones's] criminal history play a part in your concern for Deputy Paniagua?
>
> [**Langham**]: Yes, sir.
>
> [**Government**]: Ideally, you would have preferred not to make the scene at all, as I said. Why then did you jeopardize the investigation?
>
> [**Langham**]: Officer safety, I believe, comes first and foremost over any sort of investigation.

ROA.982–83. This reference suggested strongly to the jury that the fact of the prior conviction made it more likely that Mr. Jones possessed a firearm in this case, and that the jury was permitted to reach such a conclusion—a mill-run offer of improper propensity evidence. The government doubled down on that offer by repeatedly eliciting testimony that "drug dealers" have a propensity to "carry guns." ROA.745, 1020–21.

That is but one of many examples. The government repeatedly referenced the prior conviction to make and support its case on the possession elements:

- The government referenced the prior conviction as a blanket final point in its Opening Statement without making any effort to limit its relevance to the specific element of intent. ROA.610 ("You will, of course, also hear evidence that Coy Jones is a convicted felon.").
- The government referenced and discussed at length the prior conviction in admitting it as the "Government's Exhibit No. 1." ROA.921–22.
- The government injected a reference to the possession elements while discussing the prior conviction in connection with the narcotics conspiracy in a way that suggested to the jury it was permissible to infer from the prior conviction that Mr. Jones possessed the firearm and methamphetamine in this case. ROA.1142–43 ("Obviously whether he possessed it and possessed it with intent to distribute is kind of the heart of this case. Conspiracy, we talked about the general instructions, but I will read to you that two or more persons reached an agreement, that the defendant knew of the unlawful purpose of the agreement. And, again, you can consider Government's Exhibit 1 for that purpose: Did he know he was entering an unlawful agreement?").
- The government referenced the prior conviction in discussing the felon-in-possession charge in a way that conflated the several elements of that charge and suggested to the jury it was permissible to infer from the prior conviction that Mr. Jones possessed the firearm in this case. ROA.1143 ("[Mr. Jones's] possession of a firearm is the heart of this case. There's no question he's a

convicted felon. Again, look at Government's Exhibit 1. He was convicted of two crimes in 2010." ROA.1143.

- The government referenced the prior conviction in addressing the "key question[ ]" of whether, "on 5-3-17, does Coy Jones throw a bag of dope and a gun out the window of his truck." ROA.1146. In virtually the same breath, the government encouraged the jury to "consider the similar acts, consider Government's Exhibit No. 1. Does Coy Jones get in that car to meet with Eredy Cruz for an innocent reason, or is it the obvious reason?" ROA.1147.

In short, references to the prior conviction pervaded the government's case—beginning, middle, and end—as the government deployed the prior conviction in a broad manner that went beyond its limited proffered purpose to show intent only and instead sought to paint Mr. Jones as a convicted felon with a propensity to commit drug crimes who acted in conformity with that propensity here. The prior conviction evidence as introduced strayed from the limited confines of Rule 404(b) to buttress the government's case on contested possession elements for which that evidence was not admissible.

B. The government bears the burden to demonstrate that evidence of a prior conviction is relevant to issues other than character and that prejudice does not substantially outweigh probative value.

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b). Rule 404(b) lays out the limited exceptions for the admission of evidence of prior misconduct, providing in pertinent part that such evidence "may be admissible for another purpose, such as proving motive,

opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." The government bears "the burden of demonstrating—in every case—that a prior conviction is relevant and admissible under 404(b)." *United States v. Wallace*, 759 F.3d 486, 494 (5th Cir. 2014). As this Court has warned, "[a] trial judge faced with the problem of admissibility of other crimes evidence should exercise caution and should require the government to explain why the evidence is relevant and necessary on a specific element that the government must prove." *United States v. Yeagin*, 927 F.2d 798, 803 (5th Cir. 1991).

This Court employs a two-pronged analysis to determine admissibility under Rule 404(b). "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403." *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978). Under the second *Beechum* prong, courts must examine several factors when determining whether the probative value of the evidence is outweighed by prejudice under Rule 403: (1) the government's need for the extrinsic evidence, (2) the similarity between the extrinsic and charged offenses, (3) the amount of time separating the two offenses, and (4) the court's limiting instructions. *United States v. Smith*, 804 F.3d 724, 736 (5th Cir. 2015) (citation omitted). Finally, even if all four factors weigh in the government's favor, this Court must still "evaluate the district court's decision under a commonsense assessment of all the circumstances surrounding the extrinsic offense." *United States v. Juarez*, 866 F.3d 622, 629 (5th Cir. 2017) (citation omitted).

If the government fails to demonstrate both relevance and admissibility, then the evidence must be excluded, "not . . . because it has no probative value, but because it sometimes may lead a jury to convict the accused on the ground of bad character deserving punishment regardless of guilt." *United States v. Carrillo,* 981 F.2d 772, 774 (5th Cir. 1993) (citation omitted).

C. The district court failed to conduct a substantial relevance analysis.

The government asserted below that the prior conviction evidence was necessary to demonstrate Mr. Jones's intent, which the government claims Mr. Jones placed in issue by pleading not guilty. The district court reflexively agreed and allowed the government to introduce the prior conviction for the limited purpose of proving Mr. Jones's "intent to engage in a drug conspiracy." *See* ROA.372. However, absent the precise criminal propensity inference Rule 404(b) is designed to forbid, "the fact of a defendant's past involvement in drug activity *does not in and of itself* provide a sufficient nexus to the charged conduct where the prior activity is not related in time, manner, place, or pattern of conduct." *United States v. Hall*, 858 F.3d 254, 274–75 (4th Cir. 2017) (citation omitted). Simply put, "the fact that a defendant has intended to possess and distribute drugs in the past does not logically compel the conclusion that he presently intends to possess and distribute drugs." *United States v. Bell*, 516 F.3d 432, 443–44 (6th Cir. 2008). The same principle applies to a prior firearm-possession conviction.

The government failed to demonstrate that Mr. Jones's prior conviction was "related in manner" and arose "from the same 'pattern of conduct' as the instant offense" and therefore did not "establish a sufficient link between those prior convic-

tions and the events giving rise to the charge[s] at issue." *See Hall* at 261, 272. The government failed to articulate the necessity of the prior conviction evidence for a proper purpose in this case or even a tie between that evidence and the "specific element[s]" actually at issue. *See Yeagin*, 927 F.2d at 803.

Instead, at the government's urging, the district court applied essentially a *per se* rule of relevance, reasoning that once Mr. Jones "put his intent at issue" by exercising his right to plead not guilty, the prior conviction was automatically relevant to "the issue of [Mr.] Jones's intent" to commit the crimes charged—regardless whether those allegations were connected or similar to the conduct underlying the prior conviction. *See* ROA.372; *cf. United States v. Cockrell*, 587 F.3d 674, 677 (5th Cir. 2009) (discussing both temporal proximity and factual similarity in concluding relevance prong satisfied by plea of not guilty). Other circuits have held that this type of reflexive inquiry "create[s] an exception that would virtually swallow the rule against admission of evidence of prior misconduct in general intent cases." *United States v. Hicks*, 635 F.3d 1063, 1071 (7th Cir. 2011) (citation omitted). The district court's rote application of this principle in practice swallowed the relevance inquiry altogether and left *Beechum*'s first prong twisting in the wind.

D. Given the scarcity of evidence supporting the possession elements, the government failed to show that the prejudicial effect of the prior conviction did not substantially outweigh its probative value.

Even assuming relevance, the government cannot meet its burden under *Beechum*'s second prong to demonstrate that any probative value of the prior conviction evidence is not substantially outweighed by its prejudicial effect. The government adduced no direct evidence of possession by Mr. Jones and therefore had a compara-

tively dire need for extrinsic evidence on the disputed possession elements. That reality increased significantly the likelihood of a severe prejudicial effect by infecting the jury's consideration of disputed possession elements to which the prior conviction evidence was not admissible. *See Fortenberry*, 914 F.2d at 675. In short, "[g]iven the lack of direct evidence and the relative weakness of the government's circumstantial case . . . an average juror would have found the government's case significantly less persuasive without the prior conviction[ ]." *See Hicks*, 635 F.3d at 1073–74.

Applying *Beechum* here: **First**, to the extent the prior conviction was probative at all, the government's need for that evidence to support intent was minimal, because Mr. Jones's theory of defense was not based on an argument that he was an ignorant participant in the alleged events. *See Juarez*, 866 F.3d at 627 (explaining that "[e]xtrinsic evidence has high probative value when intent is the key issue at trial") (citations omitted); *Beechum*, 582 F.2d at 914 ("[I]f the [g]overnment has a strong case on . . . intent . . . the extrinsic offense may add little and consequently will be excluded more readily.").

Second, the lack of similarity between the factual conduct underlying the prior conviction and that of the charged offenses further undermines the probative value of the prior conviction. *See Juarez*, 866 F.3d at 628 ("[P]robative value . . . correlates positively with . . . likeness to the offense charged" (citation omitted)). As an initial matter, the conduct underlying the prior conviction is temporally distant—seven to eight years removed—from the conduct at issue here. *See* ROA.1231.

Turning first to the prior conspiracy count, the conduct underlying that offense is factually unlike the conduct alleged here.[12] In December 2009, Mr. Jones was in a vehicle with another person who arranged with an undercover officer to trade a small amount of methamphetamine for a 9 millimeter pistol. 2010 PSR at ¶ 8. During a subsequent traffic stop, the other person "was observed throwing a plastic bag from the window of the vehicle." *Id.* ¶ 9. Mr. Jones advised that other person had also thrown a fanny pack containing drugs from the vehicle. *Id.* Investigators later recovered a loaded pistol in the glove box and a set of digital scales from the center console. *Id.* There was no allegation of a sprawling Mexican drug-trafficking conspiracy.

Here, by contrast, Mr. Jones was not in possession of a firearm or narcotics at the time of his arrest, and no firearms, ammunition, narcotics, or drug paraphernalia were present in Mr. Jones's truck. Here, it is alleged that Mr. Jones was *alone* in his vehicle, and that *he* threw methamphetamine and also an unloaded gun from the window. Here, the government alleges Mr. Jones is a co-conspirator in a large-scale Mexican drug-trafficking organization.

The conduct underlying the prior firearm possession count is also factually unlike the conduct alleged here. In June 2010, a sheriff's deputy pulled Mr. Jones over for "changing lanes without signaling intent and following other vehicles at an unsafe distance," and subsequently found a loaded handgun in the glove box and ammunition in multiple locations in the truck. *Id.* ¶ 14. Although the search also yielded two digital

[12] On May 1, 2018, Mr. Jones filed an Unopposed Motion to Supplement the Record on Appeal and attached a copy of the 2010 Presentence Investigation Report ("2010 PSR") to which he cites herein.

scales—presumably suspected to be narcotics related—no methamphetamine was observed or seized during that incident. *See id.*

Here, by contrast, Mr. Jones was arrested after evading arrest following an alleged drug transaction. Again, Mr. Jones was not in possession of a firearm at the time of his arrest, and no firearms or ammunition were present in Mr. Jones's truck. Here, it is alleged that Mr. Jones threw an unloaded gun from a window while driving.

Taken together, these material differences between the prior counts of conviction and the charges at issue undermine the probative value of the prior conviction as evidence in this case. *See Hall*, 858 F.3d at 272-725. That the government did not elicit any of the facts leading to Mr. Jones's prior conviction at trial shows that the government had no interest in actually offering that evidence to prove intent or knowledge, but rather sought to label Mr. Jones as a drug felon to poison him in front of the jury.

Third, the temporal remoteness of the seven-year-old conviction further "depreciates the probity of the extrinsic offense." *Beechum*, 582 F.2d at 915.

Fourth, although the court provided a limiting instruction, *see* ROA.1123–24, that instruction did not adequately protect against the "[c]lear prejudice" caused by the government's intentional conflation of permissible and impermissible arguments, which by design made the jury's impermissible use of the prior conviction evidence a foregone conclusion. *See Fortenberry*, 914 F.2d at 675. This Court's sister circuits have held that an otherwise sound limiting instruction is inadequate where the government's "tactics" lead to "[t]he ineluctable conclusion [that] the government [used the prior conviction] to buttress its case on the other counts." *United States v. Jones*, 16 F.3d 487, 492 (2d Cir. 1994). Given the government's tactical use of the prior conviction,

"it would be quixotic to expect the jurors to perform such mental acrobatics called for by the district judge." *Jones* at 493.

Finally, a "commonsense assessment of all the circumstances surrounding the extrinsic offense" leads to the inescapable conclusion that the prior conviction evidence should have been excluded as unduly prejudicial. *See Juarez*, 866 F.3d at 629 (5th Cir. 2017). In light of the weak evidence otherwise adduced by the government on possession, and the government's obvious strategic use of the prior conviction at trial, common sense dictates at least a reasonable possibility that the prior conviction contributed directly to the convictions. *See Bell*, 516 F.3d at 444 ("The only way to reach the conclusion that the person currently has the intent to possess and distribute based solely on evidence of unrelated prior convictions for drug distribution is by employing the very kind of reasoning—i.e., once a drug dealer, always a drug dealer—which 404(b) excludes.").

Hall is instructive. There, as here, the government had "no evidence directly linking [the] [d]efendant to the [firearm or contraband]." 858 F.3d at 259. The Fourth Circuit held that admission of the defendant's prior conviction, purportedly offered for proof of intent to commit facially identical crimes, was unduly prejudicial in light of the dearth of evidence supporting what in reality was the primary contested issue—possession. *Id.* at 270. As that court cautioned, "When other crimes evidence is of 'marginal probative value' and other evidence supporting a drug trafficking defendant's guilt is 'scarc[e] and equivocal,' there is 'an unacceptable risk that the jury w[ill] assume that [the defendant] ha[s] a propensity for [drug] trafficking and convict

on that basis alone.'" *Id.* (quoting *United States v. Aguilar-Aranceta*, 58 F.3d 796, 802 (1st Cir. 1995)).

Applying that sound logic here, given the comparative lack of evidence tying Mr. Jones to either the firearm or the methamphetamine, evidence of Mr. Jones's prior conviction was unduly prejudicial. Under this Court's "heightened" standard of review, the district court erred in admitting the prior conviction in light of the tactical manner in which it was deployed. *See Cockrell*, 587 F.3d at 678. Because evidence of the prior conviction pervaded the entire trial from beginning to end and contributed to each of the counts of conviction, such error was not harmless. *See Fortenberry*, 914 F.2d at 675.

For these reasons, this Court should vacate the judgment of conviction as to all counts and remand for further proceedings.

III. The Government Failed to Adduce Sufficient Evidence at Trial to Support any of the Four Counts of Conviction.

As the lower court correctly observed, "It's a circumstantial evidence case." ROA.1102–03. The government adduced absolutely no direct evidence of possession. Once stripped bare of all impermissible inferences drawn from the CI's statements or the fact of Mr. Jones's prior conviction, the body of circumstantial evidence adduced by the government does not suffice to support any of the counts of conviction. Even viewing all of the admissible circumstantial evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict, no rational juror could have found beyond a reasonable doubt that Mr. Jones possessed either the firearm or

the methamphetamine or that Mr. Jones knowingly participated in the alleged narcotics conspiracy.

A. The dearth of evidence that Mr. Jones possessed a firearm at any time precludes any rational juror from finding beyond a reasonable doubt that Mr. Jones possessed the firearm in question.

To meet its burden on the firearm-related charges (Counts 3 and 4), the government had to prove, *inter alia*, that Mr. Jones possessed a firearm. 18 U.S.C. § 922(g)(1) (Count 3); 18 U.S.C. § 924(c)(1)(A) (Count 4). Setting aside any inferences the jury may have drawn improperly from the CI's statements or the prior conviction, the government failed to meet either burden.

The government must put forward "some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the weapon." *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993). Here, the firearm-related convictions rest entirely on the bare fact that law enforcement located a gun in or beneath a cactus on the side of County Road 201 a quarter-mile away and on the opposite side of the road from a bag containing methamphetamine about two hours after Mr. Jones drove down that road. This case is exceptional in that the government failed to adduce *any* "circumstantial indicium of possession" (*e.g.*, fingerprints, DNA evidence, a storage case, shell casings, receipts, or the like) to support the possession element required for each firearm-related conviction. *See id.*

Not a single witness observed Mr. Jones possess a firearm on the day of his arrest or at any time during the charged conspiracy. *Cf. United States v. Rodriguez*, 68 F.3d 469 (5th Cir. 1995) (holding possession established where officer saw handgun in defendant's hand during struggle and defendant later "stated that the gun was not his,

although [officer] had not mentioned the weapon"). Not a single witness observed Mr. Jones throw any item, much less a firearm, from his truck on County Road 201; in fact, the government witnesses testified uniformly that they did not see Mr. Jones throw anything out of his truck. *Cf. United States v. Harris*, 694 F. App'x 326 (5th Cir. 2017) (holding possession established where "[a]gents observed [defendant] throw the firearm from the vehicle, and [defendant] told the agents that he threw the firearm because the agents scared him"); *United States v. Cantu*, 340 F. App'x 186, 189 (5th Cir. 2009) (holding possession established where officers observed defendant "carr[y] objects from his car and place[ ] them [in the exact location where] officers recovered the firearm and vest"). On this record, not a single witness observed any firearm whatsoever at any time prior to the moment when the officer happened upon the unloaded gun on the side of County Road 201.

There was no bullet or shell casing or any other firearm-related item recovered from Mr. Jones's truck. *cf. United States v. Morales*, 758 F.3d 1232, 1236 n.2 (10th Cir. 2014) (holding possession established where evidence showed, *inter alia*, "spent shell casing found in the vehicle [matched] the live casings found in the [loaded] firearm."). There was no fingerprint or DNA evidence connecting Mr. Jones to the firearm in question. *Cf. United States v. Jackson*, 389 F. App'x 357, 359 (5th Cir. 2010) ("The [g]overnment presented testimony that [defendant] was carrying a gun as he ran away from police officers; that he threw it under a bush; that officers recovered the gun from under the bush; and that his DNA was on the gun and the clip."). Finally, there was no evidence of any record of Mr. Jones ever purchasing a firearm. *Cf. United*

States v. Brown, 235 F. App'x 324, 325 (5th Cir. 2007) ("That [defendant] purchased the gun . . . evidences his ownership of the weapon.").

Mr. Jones's alleged attempt to evade arrest, to the extent relevant at all, "proves little," because he "might well have taken this action in an effort to evade detection" of the methamphetamine the government asserts he also possessed. *See Bailey*, 553 F.3d at 946. The same logic minimizes the import, if any, of the fact that the windows were rolled down in Mr. Jones's truck when he stopped. *Id.* Moreover, the weather was nice and the temperature was around 78 degrees at the time Mr. Jones drove down County Road 201. *See* ROA.1059.

Turning to the firearm itself, photographs introduced at trial demonstrate that, while looking for suspected methamphetamine, officers happened upon an unloaded gun lodged in or beneath a cactus on the side of County Road 201. The unloaded gun was dirty, dusty, and covered in cactus debris.[13] *Accord United States v. McKoy*, 396 F. App'x 991, 992 (5th Cir. 2010) (overturning conviction for possession even where gun was both loaded and discovered in "readily accessible and in close proximity to the drugs"); *United States v. Bailey*, 553 F.3d 940, 950 (6th Cir. 2009) (same); *cf. Morales*, 758 F.3d at 1235–36 (holding government established possession where evidence showed, *inter alia*, firearm "was free of dirt, dust, moisture, and debris when it was recovered"). Moreover, the cactus was positioned between the gun and the road, and the gun was found tucked under the cactus in such a way that officers had to break the cactus just to photograph and retrieve the gun, ROA.848, .847, & .1004, further undercutting the government's theory that Mr. Jones had recently thrown the gun from his truck.

[13] Photographs of the gun introduced at trial are located at ROA.1261–65, 1316, 1320, and 1526.

At bottom, the government's theory of firearm possession finds its footing in the dangerous and slippery principle that "drugs and guns are commonly found together and that drug dealers use guns to protect their business because of the inherent violence of the trade." *See, e.g.*, *United States v. Yanez Sosa*, 513 F.3d 194, 202 (5th Cir. 2008) (discussing principle in connection with the "in furtherance" requirement only). Yet this theory, which in some cases might address *why* one possesses a gun, steps past the predicate question of *whether* one possesses a gun. Even viewing all of the evidence in the light most favorable to the verdict, "the government provided no evidence that [Mr. Jones] exercised dominion or control over" the gun in question to support the requisite possession elements, and his firearm-related convictions must therefore be overturned. *See United States v. Hagman*, 740 F.3d 1044, 1050 (5th Cir. 2014).

This Court should reverse and remand for entry of a judgment of acquittal as to the firearm-related counts.

B. Removing impermissible inferences drawn from the confidential informant's statements or the prior conviction, insufficient evidence exists to support the methamphetamine-related convictions.

To meet its burden on the methamphetamine charges (Counts 1 and 2), the government had to prove, *inter alia*, that Mr. Jones possessed the methamphetamine. 21 U.S.C. § 841(a)(1) (Count 1); 21 U.S.C. § 846 (Count 2). As to the conspiracy charge, the government also had to prove "(1) the existence of an agreement between two or more persons to violate narcotics laws, (2) knowledge of the conspiracy and intent to join it, and (3) voluntary participation in the conspiracy." *United States v. Nieto*, 721 F.3d 357, 367 (5th Cir. 2013). Setting aside any inferences the jury may have

drawn improperly from the CI's statements or the prior conviction, the government failed to meet its burden on these charges.

1. The possession charge

Like the government's theory on firearm possession, its argument regarding the narcotics-possession charge was based primarily on the fact that a bag of methamphetamine was found on the side of a road that Mr. Jones had driven down approximately two to three hours earlier. However, "[m]ere proximity to the controlled substance, without dominion and control, is insufficient." *United States v. Brito*, 136 F.3d 397, 411 (5th Cir. 1998); *United States v. Tolliver*, 780 F.2d 1177, 1184 (5th Cir. 1986), *vacated on other grounds*, 479 U.S. 1074 (1987) ("Presence and association [are] insufficient to sustain a conviction for possession with intent to distribute."); *see Hagman*, 740 F.3d 1044.

Not a single witness observed an exchange between Mr. Jones and the "unknown Hispanic male" at the Valero. Not a single witness saw an exchange take place between Mr. Jones and the "unknown Hispanic male" when the two trucks were stopped on the side of County Road 213. And, as detailed above, not a single witness observed Mr. Jones throw anything from his truck on County Road 201. *Cf. United States v. Galvan-Garcia*, 872 F.2d 638, 640 (5th Cir. 1989) (holding possession established where "agents observed two bags, which were later discovered to contain marijuana, being thrown from a vehicle occupied solely by [defendant].").

Moreover, some of the evidence presented at trial regarding the methamphetamine tends to cut against the government's theory that the methamphetamine found on the side of County Road 201 belonged to Mr. Jones. Meaghan Blackburn, a gov-

ernment witness from the Texas Department of Public Safety Crime Lab, testified that Mr. Jones's fingerprints were not found on either of the bags containing the methamphetamine, and that Mr. Jones was excluded as the source of the two fingerprints on the HEB bag. ROA.874; *cf. United States v. Galindo*, 254 F. App'x 391, 395 (5th Cir. 2007) (noting the "significan[ce]" of the fact that "police found [defendant's] fingerprint on a bag of cocaine recovered from the house").

Given this lack of evidence, no reasonable juror could have found beyond a reasonable doubt that Mr. Jones possessed with intent to distribute the methamphetamine in the Ziploc bag found on the side of the road. This Court should, therefore, reverse Mr. Jones's conviction and remand for entry of a judgment of acquittal.

2. The conspiracy charge

The government's evidentiary case on the conspiracy charge was similarly insufficient, especially once considered clear of all impermissible inferences drawn from the statements of the CI and the prior conviction.

The government presented surveillance photographs of Mr. Jones meeting in a Target parking lot with an individual alleged to be Mr. Cruz-Ortiz, a known drug dealer, or with alleged associates of Mr. Cruz-Ortiz. While Mr. Jones's actions were "unquestionably suspicious and [formed] a valid basis for concern by the agents," the facts of those meetings alone, without more, cannot make up for "open gaps in the proof" in the government's conspiracy case against him. *See United States v. Skillern*, 947 F.2d 1268, 1274 (5th Cir. 1991) (reversing conspiracy conviction on sufficiency grounds even where defendant "associated with members of a drug conspiracy" and was present during a drug transaction); *see also United States v. Maltos*, 985 F.2d 743, 747

(5th Cir. 1992) ("Our cases . . . call for something more than [the defendant's] association with individuals engaged in the transport of [contraband] and [the defendant's] presence during the transport of . . . such contraband.").

The government conceded it never seized any narcotics or narcotics-related materials as a result of any surveillance involving Mr. Jones. No witness sold or purchased narcotics to or from Mr. Jones at any time. *Cf. United States v. Moorefield*, 627 F. App'x 301, 304 (5th Cir. 2015) ("Multiple witnesses testified to having personal knowledge of [the defendant] dealing meth."); *United States v. Ordonez*, 286 F. App'x 224, 229 (5th Cir. 2008) (holding conspiracy established where, *inter alia*, multiple witnesses testified that "they personally delivered many kilograms of cocaine to [the defendant] on more than one occasion"). As discussed above, no witness observed Mr. Jones in possession of narcotics at any time.

The government also suggested Mr. Jones was affiliated with Mr. Medrano-Garcia because both individuals were among 170 federal inmates incarcerated in the same jail facility during a thirty-five-day period in 2016, and that this fact somehow drew a connection between Mr. Jones and Mr. Cruz-Ortiz (who was not incarcerated there). However, there was no evidence that Mr. Jones ever spoke or interacted with Mr. Medrano-Garcia while in jail, and there was no evidence of any contact whatsoever between Mr. Medrano-Garcia and Mr. Cruz-Ortiz. *Cf. United States v. Rogers*, 708 F. App'x 178, 181 (5th Cir. 2017) (holding government established conspiracy where evidence showed "three-way phone calls showing" conspirators' orchestration of drug trafficking conspiracy).

To the extent Mr. Jones communicated with anyone by phone on the day of his arrest, the government conceded it has no evidence that Mr. Jones was communicating about anything illegal. *Cf. United States v. Ibarra*, 652 F. App'x 290, 295 (5th Cir. 2016) (holding government established conspiracy where evidence showed "coded text messages on [co-conspirator's] phone revealed [defendant's] picture and stated that [defendant] picked up acetone and drugs"). And the phone itself was erased while in police custody, so the government has no proof of the contents of any alleged text messages. *Cf. United States v. Vasquez,* 596 F. App'x 260, 262 (5th Cir. 2014) (holding conspiracy established where evidence showed, *inter alia*, phone calls and text messages implicating defendant in conspiracy).

At bottom, the government's evidence is insufficient, because "[m]ere presence or association alone . . . are not sufficient to prove participation in a conspiracy." *United States v. Turner*, 319 F.3d 716, 721 (5th Cir. 2003). The government failed to meet its burden to establish beyond a reasonable doubt essential elements of the conspiracy charge. This Court should, therefore, reverse Mr. Jones's conviction and remand for entry of a judgment of acquittal.

CONCLUSION AND PRAYER

Mr. Jones respectfully prays that this Court reverse the judgment of conviction as to all counts and remand for entry of a judgment of acquittal as to all counts or, in the alternative, vacate the judgment of conviction as to all counts.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 2, 2018, the following counsel is being served with a copy of this document via the Court's CM/ECF system, in accordance with Fed. R. App. P. 25 and 5th Cir. R. 25:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains **12,989** words, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type-style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font, and with 12-point font in the footnotes.

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