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

Consolidated With
Case No. 18-50088

United States of America,
Plaintiff – Appellee

v.

Coy Marshall Jones,
Defendant – Appellant

Appeal from the United States District Court
for the Western District of Texas
Case No. 1:10-CR-474-SS-1

REPLY BRIEF OF APPELLANT COY JONES

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I. The government cannot escape *Kizzee* by downplaying its backdoor introduction of the CI's inculpatory testimonial statements.

The government fails to respond to Mr. Jones's core confrontation claim. Mr. Jones could not have been clearer on this point: "[A]t trial the prosecution relied on the CI's statements to prove what it alleged happened, in fact, in the past"—after-the-fact statements from the CI that implied Mr. Jones possessed methamphetamine and participated in a narcotics conspiracy. 18-50086 Brief at 18-24. Under *Kizzee*, the conviction must be vacated. Just weeks ago, this Court reaffirmed that "courts must be vigilant in ensuring that . . . attempts to 'explain the officer's actions' with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth." *United States v. Sosa*, 17-40460, 2018 WL 3578436, at *5 (5th Cir. July 25, 2018) (quoting *United States v. Kizzee*, 877 F.3d 650, 659 (5th Cir. 2017)). This language in *Sosa* describes exactly what the government did here.

A. Before trial, the government misled Mr. Jones to think the government would elicit only the CI's forward-looking tip.

In pretrial briefing, Mr. Jones asked the court to exclude "any statements by the CI to law enforce officers." ROA.18-50086.90. At that time, Mr. Jones believed the CI was not "present for" or involved with the events of May 3, 2017, other than providing a tip to law enforcement ahead of time. *See id.* That belief was based on representations by the government in the limited discovery provided to Mr. Jones.[1]

[1] *See* ROA.18-50086.103-04 (no mention of after-the-fact statements by CI in Langham Affidavit), 162 (no mention in Langham Report), 170 (no mention in Paniagua Report), 172 (no mention in

We now know that Mr. Jones was misled. A week before trial, the court held an *ex parte* hearing regarding the CI.[2] Neither Mr. Jones nor his counsel were present. *Ex Parte* Transcript at 3. Detective Langham testified, contrary to Mr. Jones's understanding, that "[i]n addition to telling [agents] that the deal on May 3rd was going to happen at a certain location, at a certain time . . . the CI also [told agents] *after the deal had concluded that it, in fact, went through*." *Ex Parte* Transcript at 5. That testimony was elicited from leading questions from the prosecutor, showing that the government knew the material difference between statements made before the deal and after the deal. And, of course, the core of Mr. Jones's confrontation claim is that government witnesses later testified at trial that the CI told agents, after the fact, "that the deal had happened." ROA.18-50086.762.

Even before trial, the government knew it would seek to elicit testimony regarding the CI's critical after-the-fact statements. After the *ex parte* hearing, the lower court knew such testimony was possible. But Mr. Jones and his counsel did not know and had no reason to know.[3] Had defense counsel known, they would have sought a pretrial instruction that the CI's after-the-fact statements were off-limits. That was the purpose of Mr. Jones's motion to exclude.

Foiles Report), 177-78 (no mention in Langham Affidavit); *see also id.* at 188 (no mention in factual recital in court's order).

[2] On July 26, 2018, the Clerk granted the government's motion to supplement the record with the transcript from the *ex parte* hearing (the "*Ex Parte* Transcript"). As of Mr. Jones's August 10, 2018, Reply Brief deadline, the *Ex Parte* Transcript has not been processed into the electronic record on appeal. Mr. Jones will cite to the *Ex Parte* Transcript by referencing the page numbers occurring in the upper right-hand corner of each page.

[3] Mr. Jones saw the unsealed transcript from the *ex parte* proceeding for the first time on July 18, 2018—months after trial and after Mr. Jones filed all opening briefs in this appeal.

The government knew it misled Mr. Jones but made no effort to correct Mr. Jones's misunderstanding. Instead, again and again before trial, the government hid this expected testimony from Mr. Jones. In response to Mr. Jones's motion to exclude, the government represented that it did "not intend to call its informant as a material witness on the guilt or innocence of the defendant. *The informant in this case was not an essential participant in the offense charged in the indictment.*" ROA.18-50086.145. Still, Mr. Jones asked for more information:

> [T]he government does not explain whether it intends to call the CI as a witness . . . If the CI is not called as a witness, *there remains a concern that a law enforcement officer will testify about the CI's statements implicating Mr. Jones.* The government simply does not address this concern. The Fifth Circuit has made clear that law enforcement officers may not testify about statements made by others that inculpate a defendant.

ROA.18-50086.154. Mr. Jones's worst fears were realized at trial.

On October 19, 2018, the court held a hearing on pretrial issues. In questioning Paniagua about the traffic stop, the government carefully excised reference to the CI's after-the fact statement from the testimony it elicited:

> [**Government**]: At some point around 8:00, did [other agents] inform you that they had – *they believed they had witnessed* the culmination of a narcotics transaction.
>
> [**Paniagua**]: Yes.

ROA.18-50086.154. That testimony and the limited discovery provided by the government led Mr. Jones to misunderstand the scope of the CI's statements to law enforcement, as evidenced by the following exchange:

> [**Defense**]: [Langham] *believed* that -- because she claims that [she] had information from a confidential informant that Mr. Jones *was going to be* involved in a large methamphetamine transaction.
>
> . . .
>
> [**Defense**]: [I]f the government represents that they're not going to call the CI as a witness, which I think I've heard today, we think that there's a danger that Detective Langham, as a law enforcement officer, is going to testify that the CI provided information that Mr. Jones was distributing large amounts of methamphetamine, and that on May the 3rd, the reason why they set up at the Valero was because he *was going to be* engaged in a large transaction.
>
> **The Court**: . . . What they are going to say is that they had a *tip* from an informer that a transaction *might be occurring* at this place.

ROA.18-50086.440, 461. Mr. Jones thought the CI's involvement was limited to a forward-looking tip, and that agents "believed"—but did not know—a transaction had occurred. Again, the government failed to correct the misunderstanding it created. Why? Because the government knew it could not risk a pretrial instruction excluding the CI's after-the-fact statements.

On October 24, 2018, the court held another hearing on pretrial issues, during which counsel for Mr. Jones questioned Langham regarding the CI. ROA.18-50086. 469, 480-85. As counsel for Mr. Jones closed in on asking the critical question—"Why did you follow Mr. Jones and not the other guy?"—the prosecutor objected to ensure Langham did not reveal the CI's after-the-fact statements. Langham then limited her testimony to describing only the CI's forward-looking tip, and not the CI's after-the-fact statements, as demonstrated in this exchange:

> [**Defense**]: Detective Langham, you had an operational meeting on May 3rd, based on information provided by the confidential informant in this case, correct?

. . .

[**Langham**]: I told people in my office, yes sir.

[**Defense**]: And what did you tell them?

[**Langham**]: *We anticipated Mr. Jones to get a large amount of methamphetamine*, we were going to go out and conduct a surveillance.

[**Defense**]: And that was based on information that the confidential informant had provided you?

[**Langham**]: Yes, sir.

. . .

[**Defense**]: You led this surveillance operation at the Valero, correct?

[**Langham**]: Yes, sir.

[**Defense**]: And you didn't see an exchange of anything between Mr. Jones and the unidentified Hispanic male driving the Nissan, correct?

[**Langham**]: Not at the Valero, no, sir.

[**Defense**]: And after the two cars drove away from the Valero, you followed them, correct?

[**Langham**]: Yes, sir.

. . .

[**Defense**]: And when the two cars met, were they on the side of the road?

[**Langham**]: Yes, sir.

[**Defense**]: Were they side-by-side or?

[**Langham**]: One was behind the other . . . Coy Jones was parked behind the unknown Hispanic male.

[**Defense**]: Okay. *Did you see anything get exchanged between the two cars -- the drivers of the two cars?*

[**Langham**]: *No, sir.*

[**Defense**]: At some point, Mr. Jones drives away, correct?

[**Langham**]: Yes, sir.

[**Defense**]: And you instructed all your team members to follow Mr. Jones, correct?

[**Langham**]: Yes, sir.

[**Defense**]: You didn't instruct any of your team members to follow the Nissan, correct?

[**Langham**]: No, sir.

[**Defense**]: So multiple cars followed Mr. Jones?

[**Langham**]: Yes, sir.

[**Defense**]: And no one follows the Hispanic male in the Nissan?

[**Langham**]: Yes, sir.

[**Defense**]: *And why is that*?

[**Langham**]: Because—

> [**Prosecutor**]: *Your honor, I object, again, the relevance on the suppression issue in this case.*
>
> **The Court**: I'll overrule that objection if she can answer it.

[**Langham**]: We were aware from CI interview that Coy Jones *would be receiving* the methamphetamine, and our goal was to take that methamphetamine.

ROA.18-50086.480-85. Yet again, the government revealed only the CI's forward-looking tip. And, rather than correct Mr. Jones's misunderstanding, the prosecutor stepped in to affirmatively conceal the CI's after-the-fact statement. Why? Again, the

government knew it could not risk a pretrial instruction excluding the CI's after-the-fact statements.

The court overruled Mr. Jones's motion to exclude, but found the testimony to be limited to the forward-looking tip, exactly as Mr. Jones understood: "The information, I suspect, is simply *going to be* a drug transaction at that address. If the government is going to go further, the government needs to tell counsel." ROA.18-50086.520. Needless to say, the government intended to go—and went—much further, but it did not "tell defense counsel" at any time.

At trial, the CI's statements were to be limited to explaining that officers showed up at the Valero on May 3, 2017, because the CI had given a tip that a drug deal might occur there. Period. The government gave no indication that it intended to introduce the CI's after-the-fact statements that a drug deal had, in fact, occurred, or even that such statements had been uttered by the CI. But more than that, the government did not correct the material misunderstanding it created, despite numerous opportunities to do so.

B. Mr. Jones did not invite the CI's after-the-fact statements at trial by cross-examining agents to confirm they "believed"—but did not know—a drug deal occurred.

Having thus misled Mr. Jones, the government sowed the seeds for its "we-knew-the-deal-happened-because-the-CI-said-so" theory in its opening statement. Before defense counsel said a word at trial, the government primed the jury for the CI's testimonial, inculpatory statements:

> You'll also hear that the agents were able to develop an informant, and the informant into this organization was able to tell them where and

> when Eredy Cruz would be delivering methamphetamine; and based on that information, agents were able to conduct surveillance . . .
>
> . . . [A]cting on information from the informant that there's going to be a methamphetamine deal conducted at a particular gas station in Liberty Hill, Texas, agents set up surveillance on that gas station. They watched as Coy Jones met with another individual, the two immediately leave the gas station, they travel about a mile away to a secluded county road where they meet briefly and then, immediately part ways. *Of course, the information the agents have at this point is that Coy Jones is now in possession of a large amount of methamphetamine, so they follow Coy Jones.*

ROA.18-50086.605-06. The last sentence was a critical, foundational brick in the government's case: Based on information they had received, agents knew the deal happened, and that Mr. Jones had received a large amount of methamphetamine. In retrospect, the context implies the CI provided this information to agents. The government volunteered this statement uninvited. Defense counsel had no reason to believe the "information" came from the CI, because at that time defense counsel did not know the CI ever made an after-the-fact statement to agents.

Later, on direct examination of Clayborne, the prosecutor again alluded to the CI's after-the-fact statements, over Mr. Jones's objection. The government realized the question was improper and withdrew it. But Clayborne picked up the trail and answered anyway:

> [**Government**]: You didn't see any interaction or meeting 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.18-50086.730.

Defense counsel then crossed Clayborne to confirm what the government had, up to that point, represented to the defense—that Clayborne "believed," but did not "know" that a deal happened:

> [**Defense**]: And you didn't see any interaction between Mr. Jones and the silver truck, right?
>
> [**Clayborne**]: That's correct.
>
> [**Defense**]: But you testified that you *knew* Jones had received a large amount of methamphetamine.
>
> [**Clayborne**]: That's correct.
>
> [**Defense**]: But you didn't *know* that, right? You hadn't seen anything. you hadn't seen an exchange of methamphetamine or money.
>
> [**Clayborne**]: But I *knew* it was.
>
> [**Defense**]: You *believed*, but you didn't know it.
>
> [**Clayborne**]: I *knew* it. I mean, if you're asking me, I *knew* it.

ROA.18-50086.747.

Defense counsel's questions tracked the government's pretrial representations almost verbatim. *See* ROA.18-50086.154. By defense counsel's own contemporaneous explanation, counsel had no reason to ask about the CI's after-the-fact statements, because Mr. Jones had no knowledge of those statements. He relied on the government's representations that the CI's statement only "had to do with why [agents] were there in the first place." ROA.18-50086.765. Defense counsel "never had any reason to believe that [Clayborne] was continuing communication with the confidential informant regarding the operation." *Id.* Indeed, the defense never asked Clayborne—or any other government witness—*how* the government claimed to "know."

It was the government, not the defense, that asked that question on re-direct of Clayborne:

> [**Government**]: [Defense counsel] also asked you, let me characterize this, sort of confronted you when you said you knew a drug deal had gone down, but you had not seen anything. Do you recall that?
>
> [**Clayborne**]: That's correct.
>
> [**Government**]: *How did you know that a drug deal had, in fact, occurred?*
>
> [**Clayborne**]: So once we saw or the other units saw what looked like a drug deal, *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.*

ROA.18-50086.762. The government "characterize[d]" defense counsel's clarification question as a "confrontation" about the government's alleged "knowledge." That's when the government went all in and fully deployed its "we-knew-the-deal-happened-

because-the-CI-said-so" theory. As discussed at length in Mr. Jones's opening brief, that theory then pervaded the entire trial.[4]

Clayborne's redirect was the first time the government revealed the existence of the CI's after-the-fact statement. Defense counsel objected on Confrontation Clause grounds, and the court overruled that objection. ROA.18-50086.764-65. Under *Kizzee*, that was error. This was a classic set up. The government knew the front door was locked, so they tried to sneak in through the back.

C. The government cannot blame Mr. Jones for its backdoor set up, because waiver of confrontation rights must be "purposeful rather than inadvertent" under *United States v. Taylor*.

The government claims the CI's statements served the "limited" purpose of "setting the stage for the agents' subsequent actions," and that they went "marginally beyond" that purpose only when invited. Response at 25. As explained above, that is a gross understatement. There is nothing "marginal" about the difference between the forward-looking tip and the after-the-fact inculpatory statements. The government knew that all along, and that is why it concealed those statements before trial. Mr. Jones had no way to know that questions to clarify that agents "believed" but did not "know" would lead into the CI's after-the-fact statements. And this Court must "narrowly construe [defense] counsel's statements in applying the invited error doctrine." *United States v. Franklin*, 838 F.3d 564, 567 n.1 (5th Cir. 2016).

This case tracks the facts of *United States v. Taylor*, 508 F.2d 761, 764 (5th Cir. 1975), in which this Court reversed a conviction due to a Confrontation Clause viola-

[4] ROA.18-50086.723, 726, 730, 762, 962, 965, 969, 977–78, 1035–36, 1038, 1041, 1144–45, 1149, 1151, 1152–53, 1154.

tion. In *Taylor*, this Court also rejected an invited error argument. Before trial, the government disclosed the contents of some—but not all—of the statements of a non-testifying witness ("Hunter"). The government withheld the part of Hunter's statements confirming, after the fact, that he and the defendant hid the gun used in the crime under an abandoned house. At trial, government witnesses testified on re-direct about the nondisclosed inculpatory statements. That testimony gave rise to the confrontation claim.

Other trial testimony created an inconsistency about what kind of weapon was used in the crime. Defense counsel, unaware of Hunter's inculpatory statement, "was trying to develop the inconsistency," and asked the government witness on cross-examination, "[W]ho provided you with a description that the item you were looking for was a sawed-off rifle?" *Id.* The witness responded, "Hunter." On re-direct, the government elicited testimony from the witness that "Hunter told him that he and [the defendant] had hidden the clothes that they used and gun under an abandoned house." *Id.* at 763.

This Court held the testimony concerning Hunter's statements violated the defendant's confrontation rights. *Id.* at 764-65. Just like in this case, "the [g]overnment had never shown Hunter's statements to [the defense] attorney, so he had no way to know that asking about the sawed-off rifle would lead the witness into the [inculpatory] statement." *Id.* at 764. This Court also held that, because "application of the invited error rule [under these circumstances] would be tantamount to a waiver of the Sixth Amendment right to confrontation, a purposeful rather than inadvertent inquiry into the forbidden matter must be shown." *Id.* Applying that standard here, the gov-

ernment cannot show Mr. Jones "purposefully" inquired into the CI's after-the-fact statements where—because of the government's misrepresentations—he had no reason to know those statements had ever been uttered.[5]

Instead of addressing *Taylor*, the government cites a handful of opening-the-door cases and offers a conclusory statement without analysis that "testimony invited by Appellant did not violate Appellant's confrontation rights." Response at 15, 23. The government is wrong. A careful review of the record reveals this case is unlike cases where this Court has held a defendant opened the door to testimony regarding statements by non-testifying informants.

For example, in *United States v. Octave*, this Court, reviewing for plain error, held no Confrontation Clause violation occurred where a witness referred to conversations with a recently-deceased informant. 575 F. App'x 533, 538-39 (5th Cir. 2014). *Octave* is distinguishable in three important ways:

First, the other evidence in *Octave*—audio and visual recordings of several drug deals—overwhelmingly showed the defendants' guilt. *See id.* at 535-36. Here, the CI's after-the-fact statements are the only evidence purporting to show conclusively that Mr. Jones participated in a drug deal or possessed the methamphetamine.

Second, in *Octave* the government did not hide the ball. Before trial, the government "conceded that admission of [the deceased informant's] statements to law enforcement . . . would violate the defendants' right to confront [the deceased in-

[5] To the extent *Taylor* also turned on a pretrial agreement by the government not to use the statement at trial, the facts of this case counsel even more strongly in favor of reversal. In *Taylor*, although the defense did not know the statement's contents, it at least knew Hunter had made some other inculpatory statement. Here, the government concealed the CI's after-the-fact statements at all times and Mr. Jones had no reason to believe any other statement existed at all.

formant]." *Id.* at 538. The defense knew the informant made inculpatory statements to law enforcement before he died, and in pretrial briefing the government agreed that it would not "seek[] to introduce any statements made by [the deceased informant] to anyone other than the defendants."[6] Even with that information, defense counsel still pressed the government witness for "why he did not conduct fingerprint and DNA analysis on the drugs . . . to establish they came from the defendants" in an effort to impeach him. *Id.* at 538. Here, by contrast, the government concealed the CI's after-the-fact statements until the set up was complete. Mr. Jones never knew they existed.

Third, after defense counsel pressed the question in *Octave*, but before the witness answered on re-direct, the government objected to the question and argued defense counsel opened the door to testimony about the informant:

> [W]e didn't seek to introduce that on direct, but he's now been questioned on cross repeatedly about it . . . [Defense counsel are] trying to end run [our] adherence to a hearsay rule and impeach him as if he didn't know it . . . *[T]hey're manufacturing [this argument] based on our proper[ly] staying away from this.* They can't have it both ways.[7]

After that objection, the defense immediately ended cross-examination. On re-direct, when the government asked "why" the witness had not tested the drugs, he responded: "[F]irst, I didn't expect [the informant] to be dead and not be able to be here and testify. Second . . . I was sure of where the drugs came from based in part on my conversations [with the informant]."[8] The defense did not object to that question or

[6] *See* Government's November 9, 2012 Response to Motion in Limine at 1-2, Doc. 57, *United States v. Kavis J. Octave*, Case No. 2:12-cr-00205 (E.D. La.).
[7] *See* Trial Transcript at 231-32, Doc. 116, *United States v. Kavis J. Octave*, Case No. 2:12-cr-00205 (E.D. La.).
[8] *Id.* at 298.

that testimony. Here, the government never sought a ruling or even raised its opening-the-door theory before it elicited the CI's after-the-fact statements.[9] Unlike in *Octave*, Mr. Jones did not end run the government's proper avoidance of the after-the-fact statements. This case is the inverse. The government is trying to end run *Crawford*. And Mr. Jones objected to the government's tactics.[10]

In *United States v. Jimenez*—a *Bruton* case that does not mention *Crawford*—this Court held defense counsel opened the door for statements by a non-testifying witness by "repeatedly" asking a government witness during cross-examination "to explain the basis for his suspicions." 509 F.3d 682, 691 & n.3 (5th Cir. 2007). Yet again, the government disclosed the statements pretrial and agreed "not to offer any of [the statements] into evidence which incriminated any of the other defendants,"[11] before the defense "repeatedly" asked for exactly those statements. Moreover, other evidence of the defendant's guilt was "substantial"—for example, he was arrested in possession of "292 pounds of marijuana in the trunk of his vehicle." *Id.* at 691, 687.[12]

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[9] *Cf. Taylor*, 508 F.2d at 765 ("Government counsel should have sought a ruling from the court outside the hearing of the jury and should not have plunged the trial into possible [irretrievable] error.").

[10] In another plain error case cited by the government, this Court held a defendant "waived her confrontation objection" by stipulating to the evidence at issue. *United States v. Ceballos*, 789 F.3d 607, 617 (5th Cir. 2015). Clearly, *Ceballos* has no application here. *See, e.g.*, *id.* at 615 (noting that "counsel may have had strategic reasons to concede the admission of this particular evidence" and that defendant "did cross-examine each . . . proponent of the stipulated evidence").

[11] *See* Brief of Plaintiff-Appellee at 92, *United States v. Jimenez*, Case No. 04-40355 (5th Cir.) (filed June 20, 2007) (citing "20 R. 10-11").

[12] In *United States v. Whittington*, a case not mentioned in the government's Response, this Court held the defendant's confrontation claim was precluded because his counsel invited a reference to informants' statements while cross-examining a government witness. 269 F. App'x 388, 409 (5th Cir. 2008). There, defense counsel accused the witness of "hav[ing] no evidence whatsoever" in an effort to impeach the witness. The witness responded, "Just from the information we had from the initial informants." *Id.* *Whittington* is distinguishable in several ways. First, Mr. Jones did not elicit

At bottom, if this Court sides with the government and holds Mr. Jones opened the door to the CI's after-the-fact statements, this case will serve as a prosecutorial blueprint for how to end run *Crawford* with respect to eliciting the out-of-court testimonial statements of informants through government witnesses. Step one: isolate the constitutionally infirm, inculpatory part of the informant's statements. Step two: before trial, disclose to the defense some of the informant's statements, but conceal the important, inculpatory one. Step three: at trial, induce the defense to explore a government witness's knowledge of the contents of the informant's statements. Step four: elicit the inculpatory statements from the witness on re-direct.

That would be the upshot of affirming Mr. Jones's conviction based on invited error. This Court should decline the government's invitation to prescribe that rule. Instead, it should follow *Taylor* and reverse the convictions.[13]

D. The government fails to prove harmless error beyond a reasonable doubt under *Kizzee.*

The CI's after-the-fact testimony—and the natural implication that Mr. Jones was in possession of the drugs—was critical to the prosecution's case. There was no other testimony that Mr. Jones conclusively possessed methamphetamine on May 3rd.

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testimony about the CI's after-the-fact statements on cross. *Cf. United States v. Gonzales,* 606 F.2d 70, 76 (5th Cir. 1979) ("This testimony occurred in response to defense attorney's questioning during cross-examination."). Second, the reference to the informants in *Whittington* ("the information we had") was indirect and unspecific. Here, the critical testimony was specific ("a drug deal happened") and directly implicated Mr. Jones. Third, questions posed by counsel here merely used the government's own words to confirm that agents "believed," but did not "know" that a deal happened.

[13] In the alternative, if this Court believes Mr. Jones invited error, it still must reverse the convictions, because "the error was so patent as to have seriously jeopardized the rights of" Mr. Jones. *United States v. Lemaire*, 712 F.2d 944, 949 (5th Cir. 1983); *see also United States v. Lerma*, 877 F.3d 628, 632 (5th Cir. 2017) (holding defendant did not invite error, but noting invited error should be reviewed for "manifest injustice").

In fact, no witness saw Mr. Jones with drugs (or a gun). The government's case against Mr. Jones was otherwise weak. There was no "conclusive hard proof that a drug deal happened" on any other occasion during which law enforcement observed Mr. Jones. ROA.18-50086.1041.

The government claims *Kizzee* is distinguishable because here, the "more limited information" elicited did not identify Mr. Jones and therefore, there was no "clear and logical reference" that Jones was guilty of the crimes charged. Response at 25. That argument is not supported by the record. Agents testified that a drug deal was expected to take place, that they received information that "Coy Jones had received a large amount of methamphetamine," and that the CI then told them "that the deal happened." *See, e.g.*, ROA.18-50086.730, 762. The CI's statements directly implicated Mr. Jones, when not a single other witness tied Mr. Jones to the drugs. *Kizzee* is on all fours with this case.

E. Even absent a Confrontation Clause violation, the district court should have ordered disclosure of the CI's identity.

If the CI was going to be the government's star witness, he should have been present in the courtroom and testifying under oath. That did not happen. The trial court abused its discretion in not disclosing the CI's identity to Mr. Jones.

The disclosure of the CI's identity—and the ability to cross-examine the CI—would have been instrumental to Mr. Jones's defense. The *Ex Parte* Transcript shows that the CI could have been cross-examined about his own criminal history, or the fact that he received immigration and monetary benefits in exchange for providing information to law enforcement. *Ex Parte* Transcript at 4.

More importantly, the CI could have been cross-examined on his statement that a drug deal happened on May 3rd. Although the government claims the CI "had a minimal role in the criminal activity," Response at 32, somehow the CI was able to provide information "that the deal on May 3rd was going to happen at a certain location, at a certain time" and "after the deal had concluded that it, in fact, went through[.]" *Ex Parte* Transcript at 5. How is that possible? What is the connection between the CI and Cruz-Ortiz or Roman Lopez? What was the CI's role? Mr. Jones will never know and neither did the jury.

Ultimately, in this case, the government had it both ways. It relied on hearsay statements from the CI at trial that directly implicated Mr. Jones in a drug transaction; and yet, the CI remained in the shadows and did not testify. Mr. Jones never had the opportunity to cross-examine the government's star witness. Even if this Court finds that no Confrontation Clause violation occurred, the judgment of conviction should be vacated as to the methamphetamine counts and the case remanded with instructions to disclose the identity of the CI.

II. The government used Mr. Jones's prior conviction for an impermissible purpose and prejudiced the jury.

Again, the government misses the point. The government used Mr. Jones's prior 2010 conviction for more than just to establish that he was a convicted felon who, if found in possession of a firearm, could be guilty of the felon-in-possession statute, 18 U.S.C. § 922(g). It argued that *because Mr. Jones was a convicted felon, he more likely possessed the firearm in the first place.* The government concedes there was no direct evidence connecting Mr. Jones to the firearm—no eyewitness testimony that Mr.

Jones possessed a firearm at any time, and no DNA or fingerprint evidence linking Mr. Jones to the firearm found on the side of the road. *See* Response at 40. Without other evidence to support the firearm possession charges, the government fell back on the prior conviction to bolster its case.

The government impermissibly used the prior conviction to suggest to the jury that Mr. Jones in fact possessed a firearm because he was a convicted drug dealer. The government repeatedly focused on the theme that "drug dealers" have a propensity to "carry guns." ROA.18-50086.745, 1020-21. In closing, the government claimed Mr. Jones's firearm possession was "the heart of this case" and suggested that because Mr. Jones was a "convicted felon," he was more likely to possess the firearm in question. ROA.18-50086.1143. In other words, because Mr. Jones was a drug dealer—a "bad man"—he should be convicted of possessing the firearm found on the side of the road. *See United States v. Avarello*, 592 F.2d 1339, 1346 (5th Cir. 1979) ("The danger inherent in evidence of prior conviction is that juries may convict a defendant because he is a 'bad man' rather than because evidence of the crime of which he is charged has proved him guilty."). This was classic—and impermissible—propensity evidence.

The government also used Mr. Jones's prior conviction to prejudice the jury on the drug counts. The government, perhaps recognizing the inherent differences between the conduct to which Mr. Jones pled guilty in the 2010 conviction and the conduct for which he was charged at trial, introduced Mr. Jones's prior conviction but did not elicit any testimony regarding the conduct underlying the 2010 conviction. But

still, the government used the prior conviction—Government Exhibit 1—as the cornerstone of its prosecution on the drug counts.

The district court erred in admitting the prior conviction. It cannot be that all prior narcotics convictions are *per se* admissible in a drug conspiracy case, because the government "continues to maintain 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). But *per se* admissibility is the rule advocated by the government in light of the tactical way it used the prior conviction here.

Other courts have found it problematic when the government does exactly what it did in this case. It introduced Mr. Jones's prior conviction but no specific facts or circumstances showing the factual nexus required for admissibility under Rule 404(b) to show intent. *See United States v. Hall*, 858 F.3d 254, 274-75 (4th Cir. 2017) (holding prior conviction for marijuana possession was not admissible to prove intent to distribute marijuana absent any connection between the prior offense and the charged offense); *see also United States v. Macon*, 2:16-CR-00121-DCN, 2018 WL 1036212, at *3 (D.S.C. Feb. 23, 2018) (denying motion *in limine* to exclude prior conviction but noting that the court was troubled by the government's admission of prior convictions without presenting argument or evidence with regard to the "factual similarities between Macon's prior convictions and the circumstances surrounding the instant case" and citing *Hall*). This Court should follow *Hall* and hold Mr. Jones's prior conviction was not admissible in light of the way that the government used the conviction at trial.

Not only did the government fail to show that evidence of Mr. Jones's prior conviction was relevant to issues other than character, the government used his prior conviction in a prejudicial fashion. This Court should reverse Mr. Jones' convictions for this independent reason.

III. The government cannot answer significant evidentiary gaps.

The government concedes its case "did not include any" direct evidence that Mr. Jones possessed either the methamphetamine or the firearm. Response at 40.

As to the firearm, the point remains: "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." *See* 18-50086 Brief at 41-44. And the government failed to adduce *any* evidence indicating possession—no fingerprints, no DNA evidence, no storage case, no shell casings, and no receipts. As discussed above, the thrust of the government's argument is the fallacy that "guns and drugs go together." Response at 44-45. The evidence remains wanting. *See United States v. Hagman*, 740 F.3d 1044, 1050 (5th Cir. 2014).

As to the methamphetamine, the government makes noise about Julio Rogel-Diaz and Imran Rehman, two other drug dealers.[14] It is undisputed that Mr. Jones never interacted with or met these individuals. Neither individual has been charged with a conspiracy involving Mr. Jones. *See* 18-50086 Brief at 9-10. And the government concedes it has no evidence that Mr. Jones communicated about anything illegal on the phone. *Id.* at 12. Again, we will never know the contents of the phone, be-

[14] The government also says Mr. Jones "entered none of the stores at the [Target] location." Response at 42. The record belies that statement. ROA.18-50086.1238 (photograph of Mr. Jones entering Target store).

cause they were erased after being viewed by Detective Langham while the phone was in police custody. *Id.* Without eyewitness testimony or any other direct evidence to establish possession, the government's case on methamphetamine boils down to association with suspected drug traffickers, Mr. Jones's prior conviction, proximity to drugs, and the CI's constitutionally infirm after-the-fact statements. Removing impermissible inferences drawn from improper sources, that evidence is insufficient. *See United States v. Turner*, 319 F.3d 716, 721 (5th Cir. 2003) ("Mere presence or association alone . . . are not sufficient to prove participation in a conspiracy."); *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.").

Finally, the government's attempted use of "the same evidence" to support both the methamphetamine and firearm charges, *see* Response at 43, shows the firearm convictions cannot be untangled from the methamphetamine convictions. Should this court reverse the methamphetamine convictions based on Mr. Jones's confrontation claim, it should also reverse the firearm convictions. *Accord United States v. Carpenter*, 963 F.2d 736, 740 (5th Cir. 1992) (describing the rule "derived from the Supreme Court's decision in [*Maine v. Moulton*, 474 U.S. 159 (1985)]" in favor of vacating "all" convictions where Sixth Amendment right to counsel is violated as to one conviction and other convictions are "inextricably intertwined" or "extremely closely related").

IV. Conviction and revocation fall together.

Because the underlying conviction must be reversed, and the record contains no fact to support revocation other than the conviction, this Court should also reverse the revocation.

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. Mr. Jones also respectfully prays that this Court reverse the revocation of supervised release as to all counts or, in the alternative, vacate the revocation as to all counts.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 10, 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 **6,205** 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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