No. 15-2371

United States Court of Appeals
for the Seventh Circuit

United States of America,
Plaintiff–Appellee,

v.

Miles Musgraves,
Defendant–Appellant.

Appeal from the United States District Court
For the Southern District of Illinois, East St. Louis Division
Case No. 3:13-cr-30276-MJR
The Honorable Michael J. Reagan

Reply Brief of Appellant

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Argument

I. Musgraves maintained a simple buyer-seller relationship with Stevens.

The government tries mightily to mask the fact that it did not produce at trial the evidence that would satisfy this Court's five-factor, totality-based test for whether an alleged drug conspiracy—rather than a mere buyer-seller relationship—exists. Yet its efforts come up short. Conceding that three of the five factors are wholly absent from the case, (Gov't Br. 22–25),[1] the government engages in speculation as to the other two, shoehorning the very few pieces of evidence it does have into factors where they simply do not fit. Finally, the government spends more than half of its evidentiary analysis arguing a factor that this Court has long since discarded: the presence of mutual trust.

A. There was no evidence of fronting.

The first of the two factors that the government actually argues—the existence of credit transactions or "fronting"—is not satisfied by the government's evidence. Although evidence of credit arrangements can at times show that those involved "share the common objective of reselling the drugs since resale is the means of closing out the credit transaction," *United*

[1] The government does not argue that there was an agreement to look for customers or that there were payments on commission. It does conclusorily mention that the two "advised each other on how to conduct sales within the joint venture" within its paragraph on "mutual trust," (Gov't Br. 23), but its failure to discuss or develop this argument means that it is waived, *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (arguments waived on appeal if they are "underdeveloped, conclusory or unsupported by law").

States v. Long, 748 F.3d 322, 326 (7th Cir. 2014), not every credit sale "support[s] an inference that there was an agreement to distribute," *United States v. Villasenor*, 664 F.3d 673, 680 (7th Cir. 2011). For example, "a supplier extending credit to an individual purchasing small quantities of drugs for personal consumption" does not create a conspiracy. *Id.* What is more, evidence of one credit transaction cannot support a conspiracy conviction, especially when that evidence is "vague and incomplete." *United States v. Pulgar*, 789 F.3d 807, 814 (7th Cir. 2015) (noting that when fronting was "the exception—not the rule" of the transactional relationship between the buyer and the seller no conspiracy existed). Rather, the types of credit transactions that are indicative of a conspiracy are those that by their frequency or nature define the course of interaction between parties or those that involve large quantities of drugs. *See id*. at 813–14. And, of course, as Musgraves previously noted, (Appellant Br. 20), when the seller has obtained something of value from the buyer in a quid pro quo transaction, the buyer does not need to resell the drugs to satisfy a debt and therefore no common economic objective exists. *United States v. Colon*, 549 F.3d 565, 569 (7th Cir. 2008). Thus, proof of fronting is essential to distinguish a conspiracy from a buyer-seller relationship, but it is independently sufficient to sustain a conviction. *Long*, 748 F.3d at 326. Indeed, this Court has routinely overturned conspiracy convictions with more evidence of fronting than was present here. *See, e.g.*, *Pulgar*, 789 F.3d at 816; *Colon*, 549 F.3d at 572.

The government relies on a single alleged exchange to argue that it provided sufficient evidence of fronting to establish a conspiracy. (Gov't Br. 22) ("Musgraves fronted cocaine to Stevens as evidenced by Stevens' statement that he owed money to Musgraves for cocaine and Musgraves keeping Stevens' gun as collateral." (citing 3/17/15 Trial Tr. 85:8–23)). Yet the trade on which the government relies is nothing more than a quid pro quo transaction in which Musgraves provided two or three grams of cocaine—a user quantity—for a handgun.

The trial testimony on which the government relies is confusing. But one thing is clear: notwithstanding the government's leading questions, Stevens went to pains to point out that his leaving the AK-47 assault rifle at Musgraves's house was not as payment for previously obtained drugs. (3/17/15 Trial Tr. 85–88) (government asking "Okay. How much did you owe your brother on the cocaine for the AK-47?" and Stevens answering, "**Well, I need to back up here. It is getting mixed up.** The AK-47, I had already paid [Bock] for it. I didn't need to get drugs, but the guy [Bock] had another gun [the handgun] and . . . that's when I got some drugs for him. That AK-47, I had already paid for it." (emphasis added)).

Significantly, the government did not establish that Stevens owed money to Musgraves generally, or that Stevens had previously taken cocaine from Musgraves and now owed him money for it. In fact, the prosecutor's later questioning of Stevens reflects a clarified understanding that there were

two independent, completed quid pro quo transactions. (3/17/15 Trial Tr. 89) ("So you mentioned a minute ago that **after that deal** where Bock traded his guns for the cocaine . . . ." (emphasis added)). Finally, further undercutting the government's position is that it presented evidence of just a single incident, which was for a user amount of cocaine, not a distribution amount. (3/17/15 Trial Tr. 90) (Stevens testifying that he smoked the cocaine he obtained from Musgraves); *see Pulgar*, 789 F.3d at 814 (single transaction insufficient to prove conspiracy); *Villasenor*, 664 F.3d at 680 (user quantity insufficient to prove conspiracy); *United States v. Johnson*, 592 F.3d 749, 755 n.5 (7th Cir. 2010) (same). Thus, even if this Court were to accept the government's characterization of Stevens's confused testimony as evidence of fronting, the government has still failed to establish any evidence that Musgraves was extending credit beyond a one-time deal for one individual who was buying a small, personal-consumption quantity of the drug. Taken together, these facts undercut any finding of a conspiracy.

B. There was no evidence of an intent to warn of future threats during the conspiratorial period.

The second and final of the five factors that the government addresses—an intent to warn of future threats—likewise does not advance its case in favor of finding a drug conspiracy. As a threshold matter, the primary incident on which the government relies—that Stevens shooed off the informant Tisdale—occurred months before the alleged conspiracy began, in

February 2013. (3/16/15 Trial Tr. 29); (R.41 at 1–2). The Tisdale incident occurred September 21, 2012, nearly five months earlier. (3/16/15 Trial Tr. 75.) Similarly, although the government also mentions jailhouse communications from Stevens to Musgraves, (Gov't Br. 25), these all occurred after the charged conspiracy had ended, in July 2013, (R.41 at 1–2). In any event, these isolated incidents were more about Stevens's self-interest than some tacit agreement with Musgraves, and thus are insufficient to establish a conspiracy. *See Johnson*, 592 F.3d at 757 (finding a "singular warning is insufficient to establish the existence of a conspiracy," particularly when there is evidence that the behavior was motivated by self-preservation). When Stevens turned away Tisdale he was trying to avoid interaction with law enforcement, as he suspected Tisdale of cooperating with police and wearing a wire. (3/17/15 Trial Tr. 73.) And Stevens's entreaties to Musgraves from jail following his July 2013 arrest were not made to warn Musgraves of threats, but rather to assure Musgraves that he had not snitched on him to the police. (3/17/15 Trial Tr. 67–68.) Whether true or not, those statements were in Stevens's self-interest; they served to quell Musgraves's suspicions of snitching so that Stevens could then engage as an informant with police, or to try to maintain or mend his relationship with his brother. (3/17/15 Trial Tr. 67–68.)

C. The "mutual trust" relationship argued by the government is not probative of a conspiracy because a level of trust is inherent in any buyer-seller relationship, a fact particularly true of family members.

Although in older cases this Court has considered mutual trust as an independent factor supporting the existence of a conspiracy, *see, e.g.*, *United States v. Thomas*, 284 F.3d 746, 752 (7th Cir. 2001); *United States v. Clay*, 37 F.3d 338, 342 (7th Cir. 1994), this Court's 2010 *Johnson* decision retreated from it, recognizing that mutual trust is inherent in any buyer-seller relationships, 592 F.3d at 757. More recent cases have advanced *Johnson*'s position, noting that mutual trust was a factor that "did not actually distinguish conspiracies from buyer-seller relationships." *United States v. Brown*, 726 F.3d 993, 998–99 (7th Cir. 2013). That is, mutual trust might be present within a conspiratorial relationship, but it is equally likely to be present within a buyer-seller relationship.

Even if this Court were to weigh mutual trust as a factor, the government points to just two facts to show mutual trust between the two and they are too weak to establish a conspiracy: (1) that Musgraves allowed his brother to store the assault rifle at his house; and (2) that Stevens would enter his brother's house to purchase the drugs. (Gov't Br. 24.) These unremarkable acts do not show an agreement to distribute drugs, and the fact that they are brothers further undercuts any such inference. *See United States v. de Soto*, 885 F.2d 354, 367 (7th Cir. 1989) (cautioning that courts

must exercise care when a conspiracy is alleged among family members so as not to confuse knowledge of with participation in a conspiracy).

Finally, the government's repeated invocation of Musgraves's use of the colloquial phrase "**my man**" to demonstrate a conspiratorial relationship, (Gov't Br. 5, 25) (emphasis by government), is borderline frivolous.[2] *See, e.g.*, *United States v. Noble*, 536 Fed. App'x 654, 656 (7th Cir. 2013) ("Almost as frivolous is the weight the government assigns to innocuous facts. At the extreme the government asserts that Noble was surely conspiring with Miller since he called Miller 'cuz.'"). The government needed to do more than shade innocuous facts to meet its burden of proving a drug conspiracy.

II. The government offers no evidence placing Musgraves with the gun or the cocaine any time near the date the government charged Musgraves with possession and distribution.

The government's use of a framing theory as a wholesale substitute for evidence required the jury to lapse into speculation to find Musgraves guilty beyond a reasonable doubt of drug distribution and being a felon in possession. *See United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013) ("The government may not prove its case . . . with 'conjecture camouflaged as evidence.'"). The government failed to prove Musgraves's possession of the

[2] Equally frivolous is its suggestion that the buyer-seller instruction given at trial eliminates an appellate challenge to the sufficiency of the evidence. (Gov't Br. 25; Gov't App. C.) This Court has repeatedly overturned conspiracy convictions even when the jury was alerted to the buyer-seller alternative. *See, e.g.*, *Johnson*, 592 F.3d at 758; *Colon*, 549 F.3d at 571; *United States v. Rivera*, 273 F.3d 751 (7th Cir. 2001) (where the jury instruction itself was erroneous).

gun or the drugs at any time remotely close to the November 17, 2013, date it chose to charge in the indictment, and his convictions should be vacated.

A. No evidence connects Musgraves to the cocaine found on Jesse Smith's car visor.

The government makes scant reference to Musgraves's insufficiency challenge to the drug-distribution count. When it does mention the drugs, though, they are conveniently conflated with the felon-in-possession discussion. (Gov't Br. 29–30.) And for good reason: the government at trial offered *no* evidence that Musgraves even possessed, let alone walked out to Jesse Smith's car to distribute the cocaine found on the visor. *Cf.* (3/19/15 Trial Tr. 64) (government explaining in closing: "There were no witnesses to the defendant committing this act, sneaking out early in the morning while Jesse Smith is drunk out in his car . . . ."). No physical evidence connected Musgraves to the cocaine on the visor; the police never bothered to fingerprint the bag or submit it for DNA testing. (3/18/15 Trial Tr. 37.) Furthermore, no witnesses testified to seeing Musgraves sneaking out to the Cadillac to plant the cocaine and drugs, as the government alleged. Even Smith did not claim anyone entered his car.

As a backstop the government points to motive, suggesting that Musgraves felt pressured to give McCray information because "[t]ime was running out to get consideration on his charge[.]" (Gov't Br. 30.) But even its motive theory is undermined by the evidence. Musgraves's continued compliance with McCray's requests for information in the two months

following the ultimatum guts the government's claim that Musgraves was under such duress that he would resort to framing Smith. (3/17/15 Trial Tr. 205–12.) Furthermore, it is implausible that Musgraves would risk additional charges—for possession of the gun and the drugs, and charges related to framing—by planting this contraband, during a time when he was working with police.

The government suggests the placement of the drugs in the visor establishes its framing theory because the visor was "an easily accessible location to Musgraves without disturbing Smith."[3] (Gov't Br. 31.) Yet, the government simultaneously alleged Musgraves planted the gun from the backseat—a decidedly less accessible spot. *See* (3/18/15 Trial Tr. 13–14.) Placing the cocaine on the visor and the gun under the seat, which was the government's theory, would have required both the car's front and back doors be opened, thus increasing the likelihood that the individual would have disturbed Smith. Second, the government wholly ignores the cocaine police found in Smith's pocket, which it inexplicably did not charge Musgraves with distributing (or Smith with possessing). And if the drugs in Smith's pocket were Smith's, then it is likely the other drugs in the car were his, too. Indeed,

[3] Smith's inability to tell police how the drugs got there cannot reasonably be construed as evidence of framing. After all, Smith was passed out drunk when the police found him, so he was unaware of many things the morning police found him. *See* (3/18/2015 Trial Tr. 44) ("I thought I went home, but I passed out in my car out front."); (3/18/2015 Trial Tr. 51–52) (Smith saying he did not remember whether he "crawled in" the back seat or the front seat of his vehicle because he was drunk); (3/18/2015 Trial Tr. 44) (Smith stating that he woke up in the police station, and that police had to carry him into the station).

at the time of the search of Smith's car on November 17, 2013, officers had a sealed arrest warrant for Smith for unlawful delivery of a controlled substance. (3/18/15 Trial Tr. 21.) In the absence of any evidence of distribution, and despite ample evidence contradicting the government's theory, no reasonable juror could find Musgraves guilty beyond a reasonable doubt of distributing cocaine. This Court should vacate his conviction on Count 5.

B. Musgraves's felon-in-possession conviction could only rest on proof of actual possession around November 17, 2013, which the government did not prove.

Musgraves's felon in possession conviction suffers from the same fatal evidentiary flaw as the government's drug-distribution charge and likewise relies on the government's sheer conjecture that Musgraves framed Smith. *See* (Gov't Br. 27–30.)

The government points to seven facts from the record to support its actual possession theory, but only one[4] even remotely touches on the element of firearm possession: Stevens's claim that he left the handgun with Musgraves, trading it for cocaine. But even that single piece of evidence is

[4] The government individually parses out as proof of possession a string of atmospheric facts that, when examined, say nothing about whether Musgraves possessed the gun: (1) one of Stevens's customers, Donald Bock, said he wanted to trade a handgun for cocaine; (2) testimony claiming that Bock drove Stevens with the weapon to Musgraves's home; (3) Stevens's entering Musgraves's home with the weapon, and returning without it; (4) that Bock reported his handgun stolen; (5) another drug user, Gordon, saw *Stevens* with a rifle of Bock's at some point; and (6) Alton Police discovered ammunition in Musgraves's home in its July 12, 2013 search. *See* (Gov't Br. 28.) The ammunition recovered, however, did not fit the kind of gun Musgraves was charged with possessing. (R.41 at 2.)

undermined by the other facts in the government's case, which the jury was required to consider. *See* (R.106 at 16) (pattern instruction § 3.09 requiring jurors to "consider all of the evidence").

As a threshold matter, it is worth noting again that that the government charged Musgraves with possessing the handgun on or around November 17, 2013—the date police seized and first searched Smith's car. So even if the jury believed Stevens's alleged gun-for-cocaine exchange in early 2013 actually occurred, that fact does not establish beyond a reasonable doubt Musgraves's possession some ten or eleven months later.

The government mischaracterizes this Court's decision in *United States v. Lane* to circumvent its obligation to prove the crime that it chose to charge in the indictment. 267 F.3d 715 (7th Cir. 2001). Contrary to the government's suggestion, *Lane* **does not** stand for the proposition that the element of possession can be established without regard to timeframe. *See* (Gov't Br. 29.) The defendant in *Lane* did not claim the alleged possession was too temporally remote to sustain the charge contained in the indictment. Rather, the defendant argued that his momentary touching of the firearm (either holding the gun while inspecting it for purchase, or placing it in a box and then carrying the box to a car), did not amount to possession. *Lane*, 267 F.3d at 716–18. Although the government claims that the prosecution in *Lane* "successfully hinged its case on direct evidence in the form of witness testimony to prove actual possession of a firearm a month or more before an

arrest was even conducted," the date of *arrest* is irrelevant. (Gov't Br. 29.) Rather, the operative date is the one charged in the indictment. *Lane* is silent about that fact and the indictment is no longer available on PACER, but one can only presume that the indictment charged the actual date of possession. The evidence presented at trial was tailored to that fact, affirmatively placing a gun in the defendant's hands on that date: March 18, 2000. *Lane*, 267 F.3d at 716 (noting that "[t]he government presented Bowen's testimony that Lane returned the gun to its box, picked it up and carried it outside himself"). Unlike *Lane*, the government presented no evidence of Musgraves's possession at the time charged in the indictment. The government has offered no other authority aside from *Lane* to support its contention that an alleged possession, ten to twelve months before the possession charged in the indictment, satisfies its burden of proof on this element.

Not only is the government short on authority, its own evidence undermines a finding that Musgraves possessed the gun anytime near November 17, 2013. First, Stevens testified that Musgraves wanted nothing to do with the gun and planned to get rid of it immediately. (3/17/15 Trial Tr. 88) (Stevens saying that Musgraves "didn't want to keep [the gun]" and that he was "going to get them out of there"). The jury had to find Stevens credible in order to convict because Stevens was the only source of evidence suggesting Musgraves ever had possession. Therefore, the jury would have credited Stevens's report that Musgraves expressed an intent to rid himself of

the gun back in early 2013, when the alleged trade of cocaine for the gun occurred. Indeed, the intervening search of Musgraves's home suggests that he followed through. Alton Police did not find any guns in Musgraves's home in its July 12, 2013 search, and the government never explained how Musgraves would then have possessed that weapon some four months later.

Finally, no evidence shows that Musgraves was so pressured by McCray that he would have resorted to framing Smith. No witnesses even suggested Musgraves felt pressure from McCray's self-professed ultimatum. But the record does show that Musgraves continued to provide information to McCray in the two months following this purported "ultimatum," making Musgraves look far from desperate. In short, no reasonable jury could find guilt beyond a reasonable doubt in a case where the government's case rests on one stale fact which is actively undermined by other conflicting government evidence.

C. The government's alternate theory of constructive possession is similarly unsupported.

Despite offering no proof that Musgraves had actual possession of a gun around November 17, 2013, the government next advances an alternate theory: one of constructive possession. (Gov't Br. 30.) Citing no additional facts to support this alternate implausible argument, it instead relies on case law that by the government's own admission does not apply.

First, under the government's "planting" theory, Musgraves had to have actual possession of the gun in order to plant it in Smith's car and to

then constructively possess it there. *See* (3/19/2015 Trial Tr. 67) (telling the jury that the government's case showed that "the defendant snuck out there that morning and framed Jesse Smith, put that gun underneath the seat"). Because, as demonstrated above, the government had no proof of actual possession, this Court should likewise reject a constructive possession theory that hinges on that same threshold fact.

But even if this Court entertains the theory, the government has offered no facts to satisfy this Court's test for constructive possession. The government acknowledges as much, relying on *United States v. Griffin*, 684 F.3d 691, 698–99 (7th Cir. 2012), as the law for "joint occupancy cases." *See* (Gov't Br. 30.) The gun (and the cocaine) were found in Smith's car, a place that Musgraves did not occupy, let alone "jointly" occupy with Smith, as this Court's test under *Griffin* and subsequent cases requires. *Griffin*, 684 F.3d at 698–99; *see also, e.g.*, *United States v. Reed*, 744 F.3d 519, 526–27 (7th Cir. 2014) (constructive possession of heroin found in defendant's girlfriend's home, near his clothing, shoes, and other items). And, as noted in the opening brief, the government provided no proof of a substantial connection between the defendant and the contraband, nor between the defendant and the place in which the contraband was found. *See* (Appellant Br. 27–29.) This Court should vacate Musgraves's conviction on Count 4.

III. Musgraves's November 2013 statements were made pursuant to the oral proffer agreement and should have been suppressed.

The government stops short of actually arguing that there was no valid oral proffer agreement. Rather, the government sidesteps this central question and chooses instead to poke holes around the periphery with a collection of arguments that at the end of the day cannot overcome what the parties below and the district court recognized: Musgraves and the government formed an agreement whereby in exchange for information about crimes in Alton, the government would refrain from pursuing him criminally and would not use the information he provided against him. (A.15, 59, 61, 67–68; R.60 at 2, 5.)

A. The government invokes incorrect standards of review.

First, the government inaccurately argues that the existence of an oral agreement is a "factual determination based on the perceived credibility of witnesses at the suppression hearing," and thus is reviewed for clear error. (Gov't Br. 33.) The district court, however, did not rely on credibility findings because there were none to make—every witness told the same story. *See* (A.14–22.) There were no cross-purposes or inconsistencies among the witnesses. *See* (A.54–91.) Everyone generally agreed that: the Alton police were extremely interested in Musgraves's assistance and cooperation; the officers were "absolutely adamant" in proceeding immediately with a proffer on July 12, 2013 (A.56–57); AUSA Boyce was contacted on his cell phone,

while traveling that day, to reach an agreement (A.57–58); and the parties did reach an agreement that day (A.57–59). Importantly, the district court, too, found that the parties entered into a valid oral proffer agreement on July 12, 2013. (A.15) (stating that Boyce would prepare a letter "confirming their oral agreement" and referring to it as "[t]he oral agreement"). The government seemingly does not dispute this.

What is in dispute, however, is whether the "agreement extended to the statements Musgrave[s] made on November 17, 2013." (Gov't Br. 33.) This Court reviews the district court's ruling on a motion to suppress statements and the validity of proffer agreements de novo. *See, e.g.*, *United States v. Greve*, 490 F.3d 566, 571 (7th Cir. 2007); *United States v. Bennett*, 708 F.3d 879, 885 (7th Cir. 2013).

The government also incorrectly invokes a plain-error standard, claiming that Musgraves's discussion of oral agreements and agency principles was a "new argument" never raised below. (Gov't Br. 36.) To the contrary, in his motion to suppress and bar proffer statements, (R.60), Musgraves explicitly references standard contract and agency principles in discussing the active role Alton Police played in the proffer negotiations and subsequent conversations:

- "That any such statements made by [Musgraves] were made to the designated agents of the prosecuting attorney, being officers from the Alton Police Department." (R.60 at 3–4.)
- "This case appears unique in terms of how proffer agreements are entered into between defendants and law enforcement." (R.60 at 4.)

- "In this particular case, the Alton Police wanted to begin its interrogation process on the evening of July 12, 2013, and as such, contacted AUSA Boyce . . . ." (R.60 at 5.)

- "Defendant agreed to the general terms of immunity as conveyed to him [by the Alton Police] on that date . . . ." (R.60 at 5.)

  "[After July 12, 2013], members of the Alton Police Department continued their contacts and discussions with [Musgraves] under the initial offer of conditional immunity . . . ." (R.60 at 5.)

Given this, the district judge was "plainly able to discern" the grounds upon which Musgraves based his arguments. *See United States v. Kirkland*, 567 F.3d 316, 321 (7th Cir. 2009). The defendant presented the district court with this argument, and the district court opted not to entertain it when considering the effect of the November 2013 statements. (R.91 at 13–15) (district court discussing applicability of *Miranda* and Federal Rule of Evidence 410). Plain-error review is not appropriate.

B. The government ignores the statements Musgraves actually challenges in this appeal.

The government alleges that the discussions on July 12, 2013, "*may* not have" resulted in a valid proffer agreement and that the statements Musgraves made that day might not be covered. (Gov't Br. 35) (emphasis added). But Musgraves did not challenge the July 2013 statements. Rather, he argues that the valid, oral proffer agreement entered into on July 12, 2013, extended through and included his November 17, 2013, statements. But the government glosses over this distinction.

The effect of the government's choice to focus exclusively on July 12, 2013, is that it fails to meaningfully address events during the relevant time period between July and November 2013. (Gov't Br. 35.) It ignores the undisputed understanding between the parties that the exchange of information would take several months given Musgraves's recent arrest and his need to rebuild trust on the streets; thus the police gave him until the end of the year to produce information. (A.59–60.) It likewise ignores the regular communication that then took place between McCray and Musgraves during that time period, (A.154), as well as the several instances of Musgraves providing McCray with information related to guns in September and October 2013—the *same exact* type of information Musgraves provided to McCray on November 17, 2013, (A.161, 165). Nor did the government explain the "completely credible," (A.19), testimony of McCray that he himself "believed there was still a cooperative agreement" and that Musgraves was cooperating to get "consideration on his case," (A.67–68). Instead the government focuses on what it can explain—that no "formal written agreement was memorialized." (Gov't Br. 35.) The valid oral agreement is binding just the same.

Turning to the relevant time frame—November 2013—the oral proffer agreement continued in effect through that time because the officers, acting at the direction and as agents of the prosecutor, repeatedly requested information and assistance from Musgraves under that agreement. The

government does not contest that contract and agency principles apply in the context of an oral proffer agreement, and that those principles therefore apply here. Instead, the government labels the argument "absurd" because Musgraves cited to a footnote in the Eighth Circuit's *Millard* decision. (Gov't Br. 36–37.) Footnote or not, the government does not grapple with the substance of *Millard*, which is on all fours with Musgraves's situation. Applying Federal Rule of Criminal Procedure 11 to bar a defendant's statements to a federal agent, the Eighth Circuit looked beyond the agent's title to his actions and the underlying purpose of the rule: to promote plea bargaining—an essential component of justice and a properly functioning criminal justice system. *United States v. Millard*, 139 F.3d 1200, 1206 (8th Cir. 1998). Specifically, in *Millard*, the federal agent told the defendant that he was interested in the defendant's cooperation and that he had talked to the AUSA. *Id.* at 1205 n.4. During the course of his conversation with the defendant, the federal agent telephoned the AUSA to discuss what deal could be offered to the defendant. *Id.*

What happened in *Millard* is precisely what happened to Musgraves. Alton police officers were interested in Musgraves's cooperation, and were "absolutely adamant" that they proceed with a proffer agreement immediately. (A.56–58; 2/6/15 Hr'g Tr. 16–18.) The officers were the only government officials Musgraves had contact with, and just like *Millard*, even telephoned the AUSA—who was traveling that day—to secure the proffer

agreement. (A.57–58.) The government is correct that Musgraves's attorney spoke with AUSA Boyce, (Gov't Br. 37), but the critical point remains unchanged: the officers were the direct contact and the face of the prosecuting authority for Musgraves. From July 12 to November 17, 2013, Musgraves only communicated with and made statements to Alton police officers. Although this Court has thus far declined to extend Rule 11's protections to police officers, it has not squarely rejected the proposition, and it has not yet encountered the facts that would require it. Under the right facts, like the ones present here and in *Millard*, when a law enforcement officer makes affirmative representations or purports to act as an agent for the prosecuting attorney, the defendant's statements should be deemed inadmissible.

Finally, turning to the November 17, 2013, statements that Musgraves actually challenged in this appeal, the government creates a straw man only to knock it down. Nowhere in his opening brief does Musgraves rely on *Miranda* to suppress the November 17, 2013, proffer statements, so the government's arguments are misplaced. *See* (Gov't Br. 38.) The government failed to address, and thus waived, any response to Musgraves's argument that the valid oral proffer agreement remained in operation through the November 17, 2013, statements. *See Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 709 (7th Cir. 2015) ("As we have

repeatedly held, '[t]he absence of any supporting authority or development of an argument constitutes waiver on appeal.'" (citation omitted)).

C. Musgraves reasonably believed that his statements were immune because of officer conduct.

A defendant's reasonable perception that he is providing testimony under a grant of immunity renders those statements involuntary. *United States v. Cahill*, 920 F.2d 421, 427 (7th Cir. 1990). The government is mistaken when it asserts that Musgraves's expectations were even less reasonable than Cahill's. (Gov't Br. 38–39.) In *Cahill*, the defendant was told to "forget about receiving immunity" and signed a proffer letter acknowledging that no grant of immunity existed, and the court there found that he harbored no reasonable perception that his statements were immune from prosecution. *Id.* at 426. But unlike *Cahill*, Musgraves never signed an agreement that removed immunity. And unlike the officers in *Cahill*, the Alton police actively sought Musgraves's cooperation and then actively engaged his assistance in the months following the July 12, 2013, interview. The officers did nothing to disavow Musgraves's belief that his statements would not be used against him, and McCray even testified that he believed Musgraves was still providing assistance in November 2013 pursuant to a cooperative agreement. (A.67.) If Musgraves's statements were voluntary, there would be no reason for McCray to issue an ultimatum to force Musgraves to make those statements. *See* (A.162; Appellant Br. 40.) An officer's continued and repeated requests for information following an oral

proffer agreement is the precise type of deceptive and coercive conduct that renders a statement involuntary. *See Cahill*, 920 F.2d at 427. Musgraves's belief was reasonable under the totality of the circumstances; the November 17, 2013, statements were not freely given and should have been suppressed.

IV. No probable cause existed for the search warrant because officers omitted all requisite credibility and reliability information from the supporting affidavits.

Under this Court's precedent, the complete omission of any credibility or reliability information in the supporting affidavits is nearly always fatal to a warrant's probable cause determination. *See United States v. Glover*, 755 F.3d 811, 816–17 (7th Cir. 2014). The government, however, overlooks *Glover*'s threshold requirement, choosing instead to launch into an analysis of the five factors that comprise the next step of the inquiry. Second, the government compounds its error by misstating what the officers must demonstrate to invoke the good-faith exception.

A. The government ignores *Glover*'s threshold requirement and instead substitutes an unsupported holistic approach.

The wholesale failure to present "known, highly relevant, and damaging information" about an informant's credibility severely impairs the neutral role of the issuing judge and undermines any probable cause determination. *Glover*, 755 F.3d at 817. Though this Court typically affords "great deference" to the issuing judge's conclusions, *United States v. McIntire*, 516 F.3d 576, 578 (7th Cir. 2008), that standard does not help the

government here. This Court "cannot defer to the under-informed finding of probable cause." *Glover*, 755 F.3d at 818.

The government attempts to overcome this critical deficiency by citing a pre-*Glover*, unpublished opinion for the proposition that even absent the requisite information, "reliability can be inferred from the totality of the circumstances." (Gov't Br. 42) (citing *United States v. Lowe*, 389 Fed. App'x 561, 563 (7th Cir. 2010)). This argument fails for two reasons. First, *Glover* teaches that an affidavit lacking any credibility or reliability information is *presumed* to lack probable cause, which can only be overcome when "information about credibility is not available" or when there is a strong showing of "other factors such as extensive corroboration." *Glover*, 755 F.3d at 818. Here, credibility information was not only available to the officers, but was also known. Under *Glover,* their failure to include such information may not be excused.

Second, an insufficient warrant may only be salvaged with a "*strong* showing on the primary factors," *id.* (emphasis added), a standard the government cannot meet. Even if it were a close call under the factor analysis, "any available credibility information is likely to be material to the magistrate's decision." *Id*.

Sweeping under the rug both *Glover's* threshold credibility requirement and the strong showing of the factors required in its absence, the government advocates for a watered-down totality-of-the-circumstances

analysis and calls for this Court to view the faulty affidavits "holistic[ally]." (Gov't Br. 43.) But in so doing, the government glosses over the numerous inconsistencies in the Boner Affidavit and ignores the many flaws in the Brantley Affidavit, all of which Appellant catalogued in the opening brief. (Appellant Br. 43–45.) The government's reliance on this Court's decision in *Koerth* does not help its cause. There, and similarly here, "the officers did not see fit to present [the confidential informant] to testify in person before the warrant-issuing judge" and, further, took no steps to corroborate the statements contained in the affidavit. *United States v. Koerth*, 312 F.3d 862, 867–68 (7th Cir. 2002). Confidential informant Tisdale never appeared in court. And although the other John Doe affiant, Boner, did appear, the judge merely ensured that Boner swore to his statements. (2/6/15 Hr'g Tr. 73.) This Court in *Koerth* "refuse[d] to water down the probable cause standard" and held the warrant invalid "[d]ue to the lack of the necessary quantum of reliable information." *Id.*

Finally, though it tries, the government cannot meaningfully distinguish *Glover*. The circumstances in *Glover* were not "exceptional," (Gov't Br. 43), and this Court's articulation of the controlling legal framework did not turn on the facts of that case. Even if the facts mattered, the government misrepresents the record in trying to distinguish this case from *Glover*. The government asserts that Boner is reliable because—unlike *Glover*—"he did not have a criminal record at the time of his affidavit, he was

not part of a gang, [and] he did not use aliases to deceive police." (Gov't Br. 43.) As for Boner's lack of a criminal record, the government neglects to mention that at the time of the affidavit, Boner was a juvenile. And regardless, McCray did not even run a criminal history check. (A.77.) Further, the record is silent as to whether Boner was in a gang or used an alias; thus the government's claim that he was not involved in these things simply is not true. Finally, and critically, here the government relies on facts before the district court, not before the issuing judge. Given the government's own assertion that "no weight is assigned to the district court's decision but 'great deference' is given to the issuing judge," (Gov't Br. 40), it should not have relied on facts never before the issuing judge to rehabilitate faulty affidavits that precluded a finding of probable cause.

B. Officers who insist on following an illegal practice simply because it has always been done do not act in good faith.

The good faith exception does not apply when an officer misleads a warrant-issuing judge with reckless disregard for the truth. *United States v. Leon*, 468 U.S. 897, 923 (1984). This Court has firmly held that "credibility omissions themselves . . . provide sufficient circumstantial evidence to support a reasonable and thus permissible inference of reckless disregard for the truth." *Glover*, 755 F.3d at 820.

Here, the officers omitted all credibility and reliability information from both the Boner and Brantley Affidavits, as well as all known adverse

information. *See* (Appellant Br. 46–47.) The government's response, that Musgraves wants a "full adversarial cross examination," (Gov't Br. 46), not only engages in sheer hyperbole, it misses the point entirely: that officers are tasked with knowing the law and following clear precedent. This Court established in *United States v. Bell*, 585 F.3d 1045 (7th Cir. 2009), and confirmed in *Glover*, that an affidavit must contain credibility and reliability information so that a detached and neutral judge can properly assess probable cause.

The argument that it "has always been [Brantley's] practice" to withhold information about affiants from a warrant-issuing judge and that none of his previously obtained search warrants have ever been invalidated does not salvage the officer's failures. (Gov't Br. 47.) The absence of reversals for lack of probable cause may not turn on the accuracy of their procedures; it could just as easily be the product of defendants not challenging them. But more importantly, an officer's unconstitutional acts are not rectified simply because he has always acted contrary to the law. The good faith exception cannot be used to mask unconstitutional acts.

V. Musgraves received an improper sentence based on inaccurate and speculative information.

In one breath the government admits that "it is not clear" and the records "offer no clear explanation" why Musgraves's 2006 Illinois conviction is listed as a Class X felony but he only served 25 months' imprisonment. (Gov't Br. 50.) The government fully acknowledges that it would "not have

been [a] legal [sentence] under Illinois law if had been convicted as originally charged." (Gov't Br. 50.) Yet the district court used this conviction to sentence Musgraves as a Career Offender—resulting in a seven-fold increase in Musgraves's sentence. (A.45–46.)

In the next breath the government endeavors to explain the lower court's speculation by offering more speculation. According to the government, "[o]ne of two things must have occurred." (Gov't Br. 50–51.) But that is not true. Any number of things could have occurred. Just as the government speculates that one possibility is that the charge may have been "reduced, without written amendment to the charging document, to . . . a Class 2 felony," (Gov't Br. 51), it is just as plausible that Musgraves pleaded to a misdemeanor drug offense. That is the key issue. Musgraves has a due process right to be sentenced based solely upon accurate information. *See United States v. Coonce*, 961 F.2d 1268, 1275 (7th Cir. 1992). Speculating about the accuracy of other speculation does not comport with due process.

No more persuasive is the argument that "there is nothing about the sentence that could be construed as objectively unreasonable." (Gov't Br. 53.) If the district court only relied on accurate information, the correct guidelines calculation would have been 37 to 46 months' imprisonment. (A.51–52.) Yet, anchored by the initial Career Offender enhancement, the judge stated an "appropriate" non-Career Offender sentence would nonetheless be seven times the guideline range, or 240 months' imprisonment, which can be

nothing other than an unreasonable upward enhancement, especially given the district court's reliance on the government's dubious Jesse Smith framing theory. Regardless, any alternative justifications offered by the district court amount to nothing more than an advisory sentence—unreviewable by this Court.

Conclusion

For the foregoing reasons, Appellant Miles Musgraves, respectfully requests that this Court vacate his convictions on Counts 2, 4, and 5, reverse and remand for a new trial on all counts, or, at a minimum, vacate his sentence and remand for resentencing.

Dated: February 10, 2016

Respectfully submitted,

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Certificate of Compliance with
Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, Miles Musgraves, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on February 10, 2016, which will send notice of the filing to counsel of record in the case.

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