[ORAL ARGUMENT NOT YET SCHEDULED]
No. 22-3043

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM CALLOWAY,
Appellant.

Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Mr. Calloway hereby submits the following certificate as to parties, rulings, and related cases.

I. Parties and Amici

The parties below and in this Court are the appellant, William Calloway, and the appellee, the United States of America. There are no intervenors or amici, either in the district court or this Court.

II. Rulings Under Review

The decision of the district court, the Honorable Royce C. Lamberth, is not reported. Its ruling on the admissibility of the Rule 404(b) evidence is reproduced at JA110. Its rulings restricting cross-examination of the Government's witness are interspersed throughout the trial transcript and are cited within the body of the brief.

III. Related Cases

This case has not previously been before this Court, and counsel is not aware of any related cases.

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GLOSSARY OF ACRONYMS

D.C. OIG:	D.C. Office of the Inspector General
DFS:	D.C. Department of Forensic Sciences
DNA:	Deoxyribonucleic Acid
MPD:	Metropolitan Police Department

STATEMENT OF JURISDICTION

This Court has jurisdiction over Mr. William Calloway's direct criminal appeal pursuant to 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 as Mr. Calloway was charged and convicted under 18 U.S.C § 922(g)(1). JA167. The final judgment was filed on June 24, 2022, and Mr. Calloway filed a timely notice of appeal on June 27, 2022. JA166.

STATEMENT OF ISSUES

I. Whether the district court abused its discretion in denying Mr. Calloway's Sixth Amendment right to confront the Government's witness about her testimony, elicited on direct examination, that the D.C. Department of Forensic Sciences investigation did not affect her testimony or performance.

II. Whether the district court abused its discretion when it admitted Fed. R. Evid. 404(b) evidence of Mr. Calloway's previous firearms conviction in an 18 U.S.C. § 922(g)(1) prosecution in which the Government proceeded solely on an actual possession theory.

STATUTES AND REGULATIONS

The pertinent statutes and regulations appear in an addendum at the end of the brief.

STATEMENT OF THE CASE

Following a December 2021 jury trial, Mr. Calloway was found guilty of unlawful possession of a firearm after being convicted of a crime punishable by imprisonment for a term exceeding one year. JA167. Mr. Calloway's appeal raises two claims. First, although the Government presented DNA evidence to the jury as allegedly unassailable proof of Mr. Calloway's guilt, the district court blocked his efforts to confront the witness who collected the DNA evidence. Second, the district court admitted evidence of Mr. Calloway's previous firearms conviction despite its irrelevance. The facts relevant to Mr. Calloway's conviction are set forth below.

A. Pretrial Proceedings

In the two years leading up to trial, the D.C. Department of Forensic Sciences ("DFS") was under investigation for mishandling evidence. In 2020, the Government became aware that, between 2016 and 2017, DFS personnel in the firearms examination unit falsely testified in D.C. Superior Court that ballistics evidence from two unrelated shootings came from a single firearm. JA127–30. Both the

Government and the D.C. Office of the Inspector General ("D.C. OIG") opened investigations into the firearms examination unit. JA120; JA134.

In March 2021, a D.C. OIG investigation revealed "new allegations of examination errors" in the DFS's latent fingerprint unit. JA136. Additionally, a report issued by independent auditors found widespread "problems associated with DFS management" and concluded that management practices "cast doubts on the work product of the entire DFS laboratory." JA133. As a result of the report, the American National Standard Institute National Accreditation Board suspended the DFS's accreditation. JA133.

Planning to call DFS witnesses at trial to testify about evidence collection and processing, the Government filed a motion in limine to limit defense counsel from asking its DFS witnesses about the ongoing investigations and allegations of misconduct at the agency. *See generally* JA43–55. At a pretrial hearing on that motion, defense counsel asked the district court to reserve ruling on the scope of cross-examination until trial because it was "hard to anticipate cross" before hearing witness testimony. JA112. The district court granted defense counsel's request,

and the parties agreed to approach the bench if an issue arose at trial. JA112.

The Government also filed a Fed. R. Evid. 404(b) motion to introduce Mr. Calloway's 2016 D.C. Superior Court convictions for carrying a pistol without a license and unlawful possession of a firearm by a person convicted of a crime punishable by imprisonment for a term exceeding one year. JA22. It contended that these convictions were relevant to proving Mr. Calloway's intent, knowledge, and absence of mistake with respect to the firearm he allegedly "possessed and discarded when approached by an MPD officer" on October 4, 2018. JA22. Defense counsel countered that Mr. Calloway's prior convictions did not fall within "any of the enumerated purposes" of Fed. R. Evid. 404(b) and were "overly prejudicial" under Fed. R. Evid. 403. JA37.

At the pretrial hearing, the district court asked the Government if it was "trying to show constructive possession here as well as actual?" JA107. The Government acknowledged that actual possession was "the sounder theory of the case" but argued that "[i]f there's [sic] facts in the evidence to support" a constructive possession theory, "then that's enough for 404(b) to be admitted." JA107. Defense counsel stated that

it was not going to "open the door" to constructive possession by arguing that possession was unknowing or accidental, so Mr. Calloway's prior convictions were irrelevant to any contested issues. JA108–09. The district court held that the 404(b) evidence was admissible. JA110.

B. Government Trial Testimony

The Government presented the events leading up to its recovery of the gun primarily through Officer Sean Jamison's testimony. JA207. At approximately 1:15 a.m. on October 4, 2018, ShotSpotter, an acoustic gunshot detection system located throughout the District of Columbia, detected sounds of gunshots in Oxon Run Park (the "Park"). JA210–11; JA216. While on patrol duty, Officer Jamison received a dispatch call informing him of the ShotSpotter notification, and he proceeded to the Park. JA210–11.

Officer Jamison arrived at the Park approximately five minutes later and observed four people on a path adjacent to a baseball field. JA223–25. He watched one person, whom he later identified as Mr. Calloway, disappear into a nearby wooded area adjacent to a creek. JA224. Mr. Calloway was out of Officer Jamison's line of sight for no more than five seconds. JA224. Officer Jamison confirmed that he "never

saw" Mr. Calloway "in possession of a firearm." JA617. Officer Jamison testified that Mr. Calloway entered a black Lexus with two other people and drove away. JA227.

Sergeant Michael Bowman then arrived on the scene, JA604, and relayed the black Lexus's description to Officer Christopher Clark, who stopped the black Lexus about three blocks away. JA242; JA610. Officer Jamison joined Officer Clark to assist with the traffic stop. JA610. All occupants of the black Lexus consented to a search, and nothing was recovered from the vehicle or its occupants. JA612–13; JA617. Mr. Calloway voluntarily identified himself and provided his date of birth. JA617. The three vehicle occupants, including Mr. Calloway, were permitted to leave. JA250.

Officer Jamison testified that he returned to the Park[1] and saw seven shell casings on the path where he had previously seen the four people. JA575; JA578–79; JA621. With the assistance of a K-9 unit, a Smith & Wesson 0.45 caliber handgun was found across the creek

[1] Sergeant Bowman had remained at the Park to canvass while the other officers conducted the traffic stop. JA575–76.

adjacent to the wooded area where Officer Jamison had seen Mr. Calloway walking. JA577–78.

The Government then called two DFS witnesses. Catryna Palmer, a former DFS employee who worked at the DFS from 2014 until August 2021, testified about processing the evidence collected in this case. JA664. She worked in the crime scene sciences unit at the DFS from 2014 to 2018, and then was employed in the "evidence processing unit," a subunit of the latent fingerprint unit. JA665.

The Government asked Ms. Palmer if she knew that the "DFS had lost its accreditation," and if she was aware of "any investigation" into "specific individuals" at the DFS. JA665–66. Ms. Palmer confirmed that she knew the DFS had lost its accreditation and was aware of the ongoing investigation but said that she did not know of any investigation into particular individuals. JA666. When asked by the Government whether the DFS investigation affected her testimony or performance in this case, she answered "[n]o." JA666. In response to the Government's question about whether she knew if the crime scene sciences unit was ever accredited, she replied that "it was not accredited," and to her knowledge, it did not have to be accredited "at this time." JA666. The Government

also asked Ms. Palmer if the "evidence processing unit within the [latent fingerprint unit]" where she worked when processing the evidence in this case was accredited. JA666. Ms. Palmer replied that in 2018, "it was a newly formed unit" and did not have to be accredited. JA666.

Ms. Palmer then testified that about one week after the firearm and magazine were collected from the Park, she swabbed them both for "potential DNA recovery," took photos as a quality control measure, and after finishing, placed the swabs in labeled boxes and sealed them in envelopes. JA670; JA674–76; JA681; JA688. Ms. Palmer testified that she did not "get alerted to" where the swabs were sent afterward. JA688. She also processed the firearm and magazine for latent fingerprints but did not find any. JA681–82.

On cross-examination, defense counsel asked Ms. Palmer if "the fact that [DFS's] accreditation was being evaluated" was "being discussed by the people who worked at DFS?" JA327. The district court sustained the Government's objection. JA327. Defense counsel then asked Ms. Palmer if she knew "why DFS lost its accreditation?" JA327. Again, the district court sustained the Government's objection. JA327.

After asking to approach, defense counsel stated that "the nature of issues at DFS are fair" for cross-examination, as "the government opened the door to this when they asked the question of whether or not DFS had lost its accreditation." JA327–28. Without explanation, the district court again sustained the Government's objection. JA328.

On redirect, the Government asked Ms. Palmer if the evidence processing unit she served in while analyzing this case was accredited. JA333; JA665. Ms. Palmer responded that "[a]t that time we were a brand new unit. We had just gotten started up so we were not accredited." JA333. Defense counsel's re-cross asked Ms. Palmer to confirm that her unit of the DFS was "not accredited and never sought accreditation." JA337. The district court interrupted, stating "[n]o, that is not what [the Government] said. Try that again." JA337. Although counsel attempted to reframe the question, the district court instructed him to "sit down," reasoning that counsel was "not covering things on redirect." JA337.

The Government's next DFS witness, Edward Shymansky, Jr., a crime scene analyst in the crime scene sciences unit, testified that he arrived at the Park at about 3:30 a.m. on October 4, 2018. JA339; JA343.

MPD officers directed him to the evidence that the MPD officers and the K-9 unit had found, and he proceeded to collect the evidence and transport it back to the DFS office. JA343; JA350. The Government asked Mr. Shymanksy if he was aware that "certain DFS subunits" had lost their accreditation; Mr. Shymanksy replied that he knew of the investigation that led to the accreditation loss through "news articles and by word of mouth." JA341. He stated that "to [his] knowledge," the crime scene sciences unit did not get accredited. JA341.

The Government then called Michelle Bonnette, a forensic DNA analyst who was employed from 2017 to 2021 at Signature Science, an independent and accredited laboratory. JA363. While employed at Signature Science, Ms. Bonnette took evidence "through the DNA process to generate profiles," which could be compared to known DNA samples. JA367.

Upon receiving Ms. Palmer's swabs of the firearm and magazine from the DFS in 2019, Ms. Bonnette issued a "deconvolution report," which listed "all of the possible genotypes that could comprise that mixture." JA386; JA393. Ms. Bonnette explained that she "never looked" at the physical firearm and magazine in this case; the findings of her

report were based on the swabs that she received from the DFS. JA393. She interpreted the DNA profile from Ms. Palmer's swab of the firearm "as a mixture of two individuals, with at least one male contributor." JA393. The DNA of one individual contributed "about 97 percent of that mixture," and the other individual contributed "about 3 percent." JA393. Ms. Bonnette interpreted the swab of the magazine "as a mixture of four individuals, with at least one male contributor." JA398. Ms. Bonnette's analysis showed that the first individual contributed "approximately 54 percent of the sample," the second individual contributed "40 percent," the third individual contributed "4 percent," and the fourth individual contributed "3 percent." JA399. She explained that "with four individuals contributing, there's easily hundreds of thousands of allele combinations plausible to explain that mixture." JA399.

A year later, DFS forensic scientist Melissa Gervasoni, who did not testify, "collected a DNA sample" from Mr. Calloway "by administering a buccal swab" on Mr. Calloway's cheek. JA436. Signature Science received the buccal swab on July 1, 2020. JA373. Ms. Bonnette testified that a "different analyst" performed the "cutting and sampling of" the buccal swab, and she did not examine it. JA421–22. She only compared

the report that someone had derived from the buccal swab received from the DFS with the findings in her 2019 report. JA422.

In Ms. Bonnette's opinion, the buccal swab report "aligned with the 97 percent" DNA contributor on the firearm and the "54 percent" DNA contributor on the magazine. JA396; JA400. Ms. Bonnette testified that the "likelihood ratio" of obtaining the DNA mixture on the firearm was "590 sextillion times more likely if the DNA originated from William Calloway and an unknown, unrelated individual, rather than if the DNA originated from two unknown, unrelated individuals." JA397. She also testified that obtaining the mixture profile on the magazine is "approximately 717 billion times more likely if the DNA originated from William Calloway and three unknown, unrelated individuals, than if the DNA originated from four unknown, unrelated individuals." JA400.

C. Stipulations and Fed. R. Evid. 404(b) Evidence

The parties stipulated that the firearm was manufactured outside the District of Columbia and transported in interstate commerce. JA438. And they stipulated that "prior to October 4, 2018," Mr. Calloway "had been convicted of a crime punishable by imprisonment for a term exceeding one year," and he knew of that conviction. JA438–39.

Over Mr. Calloway's objection, the jury also heard the Government's Rule 404(b) evidence that Mr. Calloway had possessed a different firearm in 2016 and was convicted of one count of possessing that firearm after being "convicted of a crime for which the penalty was greater than one year" and one count of "carrying a pistol without a license." JA439–40. The Government read its proffer about this evidence to the jury and also introduced Mr. Calloway's signed statement of facts. JA31. The district court informed the jury that it could consider Mr. Calloway's previous "firearms offense" convictions for the "limited purpose" of deciding whether the Government proved that Mr. Calloway "intended to possess a firearm," and that "his actions in this case were knowing and on purpose, not by mistake or accident." JA440. The district court also instructed the jury that it could consider this evidence in deciding whether the Government proved that Mr. Calloway was aware "that he had a conviction for [a crime] punishable by term of imprisonment, exceeding one year at the time that he possessed the firearm." JA441.

D. Defense Witness Testimony

After the Government rested, defense counsel called Kevin Bryant,

an acquaintance of Mr. Calloway who was present at the Park.[2] JA442. On October 3, 2018, Mr. Bryant picked up Mr. Calloway and another person and went to the Park. JA445. He testified that he had purchased a firearm "earlier that day" and that he fired the gun in the early hours of October 4, 2018 to see if it worked properly. JA446–47. Mr. Bryant also stated that when he saw the police lights on Mississippi Avenue, he "tossed the gun" across the creek. JA447.

E. Closing Arguments and Sentencing

During closing arguments, the Government emphasized that the DNA evidence was the "most devastating" of all the evidence in this case. JA733. And it again reminded the jury that Ms. Bonnette had testified that it was "59[0] sextillion times more likely [that] Mr. Calloway's DNA is on that gun, than if it wasn't." JA733.

The jury found Mr. Calloway guilty of the single § 922(g)(1) count. JA785. Although Mr. Calloway had been on release pending trial, in part because he has Myeloid Leukemia, a form of blood cancer that affects stem cells within his bone marrow, the district court revoked his release.

[2] The district court appointed counsel for Mr. Bryant before he testified. JA429–31.

JA148–49; JA787–88. On June 24, 2022, the district court sentenced Mr. Calloway to 63 months incarceration and 36 months supervised release. JA168–69.

F. Ongoing Discovery

After this appeal was filed, the Government provided discovery about Ms. Bonnette, the former Signature Science forensic analyst who analyzed the DNA in this case. In September 2022—nine months after Mr. Calloway's trial—Ms. Bonnette refused to testify for the Government in another case, stating that "for nearly two years" she had been "out of the field" and was "not up to speed on the latest developments, recommendations or case law and precedent as it pertains to probabilistic genotyping." JA712. She said that she no longer has a forensic license. JA712.

G. Procedural History

Mr. Calloway timely filed his notice of appeal on June 27, 2022. JA166. This Court appointed undersigned counsel to represent Mr. Calloway on appeal. JA166.

SUMMARY OF THE ARGUMENT

The district court's stringent limits on cross-examination violated Mr. Calloway's Sixth Amendment Confrontation Clause right. The Government elicited self-serving testimony from Catryna Palmer—the DFS witness who processed the DNA evidence—that the DFS investigation had no impact on her testimony or work on this case. But the district court abruptly curtailed cross-examination on this issue. This entirely prevented Mr. Calloway from exploring the ways in which the DFS investigation and loss of accreditation might have affected Ms. Palmer's testimony. And the district court abused its Rule 403 discretion in concluding that the infinitesimal risk of confusing or misleading the jury and delaying the trial *substantially* outweighed the probative value of Mr. Calloway's right to create doubt in support of his defense.

The district court also erroneously admitted evidence of Mr. Calloway's prior convictions. Because this case involved only actual—not constructive—possession, evidence of Mr. Calloway's prior convictions were not relevant to demonstrate his knowledge, intent, or absence of mistake with respect to the firearm he allegedly possessed on October 4, 2018. *See United States v. Linares*, 367 F.3d 941, 946–48 (D.C. Cir. 2004).

And even if the prior acts evidence was admissible to support a constructive possession theory—which it was not—its admission still constituted an abuse of discretion, as the unduly prejudicial nature of this evidence substantially outweighed its minimal probative value under Fed. R. Evid. 403. *See* Fed. R. Evid. 403. The proffered prior acts evidence substantially harmed Mr. Calloway. It invited the jury to conclude that because Mr. Calloway had been convicted in two separate cases, he is the type of person to have committed this crime—exactly the type of propensity evidence Rule 404(b) forbids. *See* Fed. R. Evid. 404(b).

Both the district court's constitutional and non-constitutional errors were harmful. Under the Confrontation Clause, the district court's abuse of discretion was not harmless because denying cross-examination contributed to Mr. Calloway's conviction: the jury did not have a chance to consider the defects in the DFS witness' testimony. The district court's non-constitutional evidentiary errors under Rules 403 and 404(b) also substantially affected the outcome of the proceedings. Cumulatively, the district court's errors warrant reversal.

ARGUMENT

This Court reviews the district court's limitations on cross-examination and its evidentiary rulings under Rules 404(b) and 403 for abuse of discretion. *See United States v. Tucker*, 12 F.4th 804, 822 (D.C. Cir. 2021); *United States v. McGill*, 815 F.3d 846, 880 (D.C. Cir. 2016). Mr. Calloway's conviction should be reversed because the district court abused its discretion by denying his Confrontation Clause right to cross-examine a crucial witness and by admitting irrelevant evidence of prior convictions.

I. THE DISTRICT COURT ERRED IN DENYING MR. CALLOWAY THE RIGHT TO CROSS-EXAMINE A KEY WITNESS.

Because the Government's case relied heavily on DNA evidence connecting Mr. Calloway to the firearm, it needed to persuade the jury that Ms. Palmer collected the DNA evidence before an independent forensic laboratory analyzed it. On direct examination, it elicited testimony that Ms. Palmer knew about the ongoing investigation into the DFS and that the investigation had no effect on her work or testimony in this case. JA341; JA665–66. But when Mr. Calloway tried to ask about the ways in which the DFS investigation might have affected Ms. Palmer's performance or testimony, the district court prohibited that

cross-examination without explanation. JA327. That violated Mr. Calloway's Confrontation Clause rights. And the district court's Rule 403 justification for restricting cross-examination was also erroneous because there were only miniscule risks to permitting cross-examination.

A. Mr. Calloway Had a Confrontation Clause Right to Cross-Examine a DFS Witness About a Critical Issue Raised on Direct Examination.

On direct examination, the Government asked Ms. Palmer about the DFS's loss of accreditation and elicited testimony that the investigation and loss of accreditation impacted neither her testimony nor her performance in this case. JA341; JA665–66. But the district court abused its discretion by repeatedly sustaining the Government's objections to Mr. Calloway's cross-examination of Ms. Palmer on this issue. JA327; JA329–30. And Ms. Palmer's testimony was critical to the Government's case. After all, Ms. Bonnette's testimony that Mr. Calloway's DNA matched the sample that Ms. Palmer collected from the gun was meaningless without Ms. Palmer's testimony about that sample. JA421–22.

This Court has long recognized that the district court may not restrict a defendant's right to cross-examine witnesses on a matter

brought out before the jury on direct until that right has been "substantially and fairly exercised." *United States v. Pugh*, 436 F.2d 222, 226 (D.C. Cir. 1970); *see United States v. Dorman*, 860 F.3d 675, 685 (D.C. Cir. 2017); *United States v. Stock*, 948 F.2d 1299, 1302 (D.C. Cir. 1991) (noting "there should be great latitude for cross-examination on issues raised in direct testimony"). Defendants also have a right to a "threshold level of cross-examination" that permits them to "elicit enough information to allow a discriminating appraisal of a witness's motives and bias." *Tucker*, 12 F.4th at 822 (citing *United States v. Hall*, 945 F.3d 507, 513 (D.C. Cir. 2019)).

Even though the Government's direct examination opened the door to the DFS investigation and loss of accreditation, Mr. Calloway was denied an opportunity to ask questions about those very issues. JA327; JA329–30. The Government began Ms. Palmer's direct with questions about her work in this case, her awareness of the DFS investigation, and whether it affected her performance, rendering the subject relevant and material on cross-examination. JA664–66. Ms. Palmer testified that she was a member of the evidence processing unit, a subunit of the latent fingerprint unit. JA664–65. She explained that she swabbed the firearm

and magazine recovered from the crime scene for "potential DNA," and processed these items for "latent prints." JA664–65.

When the Government asked Ms. Palmer, "[A]re you aware that . . . DFS had lost its accreditation[,]" she answered in the affirmative. JA665–66. And in response to the Government's questions about whether the DFS's loss of accreditation affected either her "performance" or her "testimony" in Mr. Calloway's case, Ms. Palmer gave the response she had been led to: "No, sir." JA666. Because the Government elicited this testimony from Ms. Palmer, Mr. Calloway had the right to explore the subject on cross-examination.

He should have been able to question whether the DFS's loss of accreditation reasonably impacted Ms. Palmer's performance or testimony in his case. In its motion in limine, the Government acknowledged that "[i]f the defense can establish that one of the DFS witnesses is aware of the investigation, [it] agrees that a limited line of questioning regarding potential testimonial bias would be appropriate." JA49. The Government nonetheless objected, and the district court blocked cross-examination on those issues. JA49. This Court has recognized that the district court must "give a defendant a 'realistic

opportunity to ferret out a potential source of bias.'" *United States v. Davis*, 127 F.3d 68, 70 (D.C. Cir. 1997) (citing *United States v. Derr*, 990 F.2d 1330, 1334 (D.C. Cir. 1993)). Mr. Calloway was not afforded that right. Instead, when defense counsel asked Ms. Palmer whether she knew "why DFS lost its accreditation," the Government immediately objected. JA327. Defense counsel argued that the Government opened the door to this line of cross by asking about it on direct. JA328–29. The district court sustained the objection without explanation. JA329.

The district court could have mitigated that initial error by permitting questions on re-cross-examination of Ms. Palmer, but it instead simply cut off Mr. Calloway's re-cross, telling counsel to "sit down." JA337; *cf. Tucker*, 12 F.4th at 822 (noting with approval the district court's approach permitting some, although not all, cross). On redirect, the Government asked Ms. Palmer if the evidence processing unit she served in while analyzing the evidence in this case was accredited. JA333; JA665. Ms. Palmer responded that it was "not accredited." JA333. But on re-cross-examination, when defense counsel tried to confirm that Ms. Palmer's unit of the DFS was "not accredited and never sought accreditation," the district court interrupted, stating

"[n]o, that is not what [the Government] said . . . [t]ry that again." JA337. And before defense counsel could finish reframing the question, the district court cut off defense counsel again, ruling that the attempted question was "not covered in recross anyway" and instructed him to "sit down." JA337. Although defense counsel pleaded to ask one more question, the district court denied further cross. JA337.

But the DFS's loss of accreditation—and the investigation that led to it—provided fertile grounds for cross-examination about the impact of the multiple DFS investigations on Ms. Palmer's testimony and her evidence processing in this case. Cross-examination about the nature and extent of the investigation may have caused Ms. Palmer to respond differently about whether the investigation into the DFS affected her testimony, and may have revealed her motivation in testifying. In particular, given that the audit report revealed "allegations of examination errors" in Ms. Palmer's unit—the latent fingerprint unit, JA136—cross-examination of Ms. Palmer regarding what she knew of those investigations might have raised doubts about her earlier testimony that it had no effect on her. *See Davis*, 127 F.3d at 70–71 (explaining that "a reasonable jury might have received a significantly

different impression of the witness' credibility had defense counsel been permitted to pursue his proposed line of cross-examination") (internal quotation marks omitted).

B. The District Court Erred in Its Fed. R. Evid. 403 Balancing.

Even if the minimal cross-examination the district court permitted was sufficient under the Confrontation Clause—which it was not—the district court abused its discretion in limiting this cross on Rule 403 grounds. The Government argued that permitting Mr. Calloway to cross-examine Ms. Palmer about allegations of misconduct at the DFS would risk confusing or misleading the jury. JA49. Not so. Mr. Calloway proposed only limited cross. JA328. Not only was the risk of confusion or delay marginal at best, but it also did not come close to substantially outweighing Mr. Calloway's constitutionally protected interest in cross-examining the witness and the jury's interest in hearing relevant evidence that may have changed the outcome of the case. *See Henderson v. George Washington Univ.*, 449 F.3d 127, 133 (D.C. Cir. 2006) ("Rule 403 tilts, as do the rules as a whole, toward the admission of evidence in close cases."). As such, the district court abused its discretion in precluding this cross-examination.

The district court understated the probative value of this critical line of cross-examination. Its limitations on cross-examination at the very least *implicated* Mr. Calloway's Confrontation Clause right, making this cross-examination exceptionally relevant. The Rule 403 balancing should have considered this probative value. This is particularly true because Ms. Palmer was a critical Government witness. Her testimony about collecting DNA swabs that allegedly matched Mr. Calloway's DNA was paramount to the Government's case. JA397; JA665–66. Without her testimony, the Government could not have argued that the DNA recovered from the gun matched Mr. Calloway's DNA.

The district court also overstated the risk of harm to the Government. Cross-examination about accreditation would not have risked confusing the jury because defense counsel only intended to ask questions about subject matter elicited by the Government on direct. JA328. To be sure, cross-examination calling into question Ms. Palmer's performance or testimony in this case might have hurt the Government's case. But that is not *unfair* prejudice. The district court also overstated the risk of harm because Mr. Calloway's cross-examination would not have unduly delayed the trial. Defense counsel said that his cross-

examination of Ms. Palmer would have been limited to a few questions. JA328.

Given the central importance of this cross-examination, the Government needed to identify an extraordinary risk in order to substantially outweigh that probative value. It did not. Witness testimony about the DNA evidence was the key element the Government used to convict Mr. Calloway. Without testimony about the DNA, the Government did not have sufficient evidence to convict Mr. Calloway. Because of the issues at the DFS, Mr. Calloway should have had the chance "to ferret out" their impact on Ms. Palmer. *Davis*, 127 F.3d at 70. By preventing defense counsel's cross, the district court rendered the trial fundamentally unfair.

II. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF MR. CALLOWAY'S PRIOR CONVICTIONS UNDER FED. R. EVID. 404(B) AND 403.

"[A] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Linares*, 367 F.3d 941, 945 (D.C. Cir. 2004) (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977)) (internal quotation marks omitted). The jury was tasked with deciding a single issue in this case:

whether the Government proved that Mr. Calloway possessed the firearm beyond a reasonable doubt. The jury need not—and should not—have heard evidence regarding Mr. Calloway's prior convictions to fulfill its fact-finding mission.

Trial courts have latitude in deciding evidentiary questions. *See United States v. Cassell*, 292 F.3d 788, 792 (D.C. Cir. 2002). But such latitude must fall within the confines of the Federal Rules of Evidence. The district court abused its discretion in admitting Mr. Calloway's prior convictions, as the prior acts evidence can neither withstand Rule 404(b) scrutiny nor pass muster under Rule 403's balancing test. *See* Fed. R. Evid. 403 and 404(b). The introduction of this prejudicial evidence substantially affected the jury's verdict, and Mr. Calloway must be granted a new trial.

A. Mr. Calloway's Prior Convictions Were Inadmissible Under Fed. R. Evid. 404(b).

The district court erred in allowing the Government to introduce evidence of Mr. Calloway's prior convictions under Rule 404(b) to establish his "intent, knowledge, and absence of mistake with respect to the firearm he [allegedly] possessed and discarded" on October 4, 2018. JA22. A district court's Rule 404(b) decisions are reviewed for abuse of

discretion, *see United States v. McGill*, 815 F.3d 846, 880 (D.C. Cir. 2016) (citing *United States v. Johnson*, 519 F.3d 478, 483 (D.C. Cir. 2008)), and "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

This Court has long recognized that in cases with evidence of only actual—rather than constructive—gun possession, prior acts evidence is generally inadmissible under Rule 404(b) to demonstrate intent, knowledge, or absence of mistake. *Linares*, 367 F.3d at 946–48. Actual possession describes a person's "direct physical control" over an object, while constructive possession refers to circumstances when a person who does not have direct physical custody still has "the power and intent to exercise control over the object." *Henderson v. United States*, 575 U.S. 622, 626 (2015). The Government has "no obligation to prove intent" under 18 U.S.C § 922(g)(1), and intent therefore cannot serve as a lawful basis for the admission of prior acts evidence. *Linares,* 367 F.3d at 948. Where, as here, "no reasonable jury" could conclude that the defendant possessed a firearm either "unknowingly or mistakenly," the Government has no need to import evidence of a prior conviction to forge a connection between the defendant and the firearm recovered. *Id*. at 950.

The evidence presented by the Government can support only an actual possession theory. At trial, the Government's case-in-chief opened with evidence of gunshots heard in the early hours of October 4, 2018. JA211. To the extent that this evidence provided any indication about possession of the firearm, it demonstrates actual possession. Discharging a firearm requires actual possession as it can only be accomplished through "direct physical control." *Henderson*, 575 U.S. at 626.

The Government continued by introducing Officer Jamison's testimony, which further underscored its actual possession theory. Officer Jamison testified that he saw Mr. Calloway disappear into a nearby wooded area out of Officer Jamison's line of sight for no more than five seconds. JA224. In its motion in limine, the Government argued that Mr. Calloway allegedly entered the wooded area to "toss the firearm across the creek." JA27. One cannot discard a firearm that one is not physically possessing.

The Government's expert, Ms. Bonnette, testified that the DNA evidence recovered from the firearm and its magazine provided "very strong support" that Mr. Calloway's DNA was included, JA398; *see* JA400–01, further indicating that the Government's sole theory of the

case was actual possession. *See United States v. Jackson*, 389 Fed. App'x. 357, 359 (5th Cir. 2010) (citing *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998)) (evidence that the defendant's "DNA was on the gun and the clip" established that he had "knowing, physical control over a firearm"). All of the evidence introduced by the Government—the ShotSpotter notification, Officer Jamison's testimony, and the DNA evidence—supported a theory of actual, not constructive, possession.

Even at the motions hearing, the Government agreed that a constructive possession theory was plausible only after prompting by the district court. JA197. But a constructive-possession veneer is not sufficient to mask the underlying reality of the Government's case. It failed to introduce any evidence that demonstrated that Mr. Calloway had the necessary "dominion and control" over the firearm at a time when he was not allegedly in physical possession of it. *Dorman*, 860 F.3d at 679 (internal quotation marks omitted); *see also United States v. Jones*, 484 F.3d 783, 789 (5th Cir. 2007) (noting that where the Government introduces "evidence of actual possession only, the jury could find either actual possession or no possession, but never *constructive* possession.") (emphasis in original).

To be sure, this Court has permitted Rule 404(b) evidence of a prior gun possession where the trial evidence supports *both* actual possession and constructive possession. *See United States v. Garner*, 396 F.3d 438, 442–43 (D.C. Cir. 2005). In *Garner*, an officer saw the defendant remove a firearm from his waistband and place it under the passenger seat where he was sitting. *Id.* at 439. Although the officer's testimony supported a theory of actual possession, a jury could have discredited the officer's observations and still have convicted Garner on a constructive possession theory. *Id.* at 442–43. Critical to that conclusion, however, was that the firearm was recovered under Garner's seat where he was in a position to exercise dominion and control over it. *Id.* at 443; *see also Jones*, 484 F.3d at 790 (describing *Garner* as a "classic case" of constructive possession) (internal quotation marks omitted). There was simply no evidence of constructive possession here.

This Court found an abuse of discretion in *Linares* because Rule 404(b) "barred" the admission of prior acts evidence in exclusively actual possession cases. 367 F.3d at 952. This Court should similarly find an abuse of discretion here. *See Koon*, 518 U.S. at 100 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); *United States v. Aguiar*,

894 F.3d 351, 361 (D.C. Cir. 2018); *Lucas v. Duncan*, 574 F.3d 772, 775 (D.C. Cir. 2009).

B. The Highly Prejudicial Nature of this Evidence Required Its Exclusion Under Fed. R. Evid. 403.

Even if the Rule 404(b) evidence was admissible to support a constructive possession theory—which it was not—it still could not survive Rule 403 review. Mr. Calloway stipulated that he "had been convicted of a crime punishable by imprisonment for a term exceeding one year." JA438–39. The Government nonetheless introduced evidence not only that Mr. Calloway previously possessed a firearm without a license, but also that when he did so, he had already been convicted of a crime punishable by imprisonment for more than one year. JA438–40. There simply was no need for the jury to learn that he had previously been convicted in not just one but two cases. Although trial courts retain discretion on Rule 403 balancing, "there are limits on [that] discretion." *Miller v. Poretsky*, 595 F.2d 780, 793 (D.C. Cir. 1978) (Robinson, J. concurring). Those limits were surpassed here because the prejudicial prior acts evidence substantially outweighed its minimal probative value.

The probative value of the prior acts evidence was marginal at best, as it was only relevant to a constructive possession theory that had

limited evidentiary support. *Linares* expressly forecloses any argument that knowledge, intent, or absence of mistake are relevant in exclusively actual possession cases. 367 F.3d 946–48. Mr. Calloway's prior convictions therefore could only have been admissible to demonstrate that when he allegedly constructively possessed this firearm, he did so knowingly.

The unduly prejudicial nature of the prior acts evidence substantially outweighed its minimal probative value. The danger of prejudice in this case was "manifest," as the Government introduced evidence of Mr. Calloway's prior gun possession—a conviction that was "virtually identical" to the charges in the current indictment—over defense counsel's objection. *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995); *see* JA439. The admission of Mr. Calloway's prior gun possession also presented an unfettered risk that the jury would consider this evidence in deciding whether the Government proved that Mr. Calloway actually—not constructively—possessed the gun. The jury instructions presented at the conclusion of trial did not explain that Mr. Calloway's prior gun possession was only allowed to be considered for a constructive possession theory. JA777–78. Inadequate jury instructions

cannot accomplish their fundamental goal of mitigating prejudice. *See* Fed. R. Evid. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the . . . *lack of effectiveness* of a limiting instruction.") (emphasis added). The unduly prejudicial nature of this prior acts evidence substantially outweighed its marginal probative value.

III. THE DISTRICT COURT'S ERRORS WERE NOT HARMLESS.

The Government cannot carry its burden of proving harmless error in this case. Each of the district court's errors alone warrants reversal. A violation of Mr. Calloway's Confrontation Clause right requires reversal unless the Government can prove harmless error beyond a reasonable doubt. And Mr. Calloway is entitled to reversal on the non-constitutional errors unless the Government establishes that the totality of the district court's errors are harmless. *See, e.g.*, *Egan v. United States*, 287 F. 958, 971 (D.C. Cir. 1923). It cannot do either.

A. The District Court's Confrontation Clause Error Was Not Harmless Beyond a Reasonable Doubt.

A constitutional error is harmful unless the Government establishes "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S.

18, 24 (1967). In determining whether the Government has met its burden, a reviewing court "invariably considers" whether: "(1) the case is not close, (2) the issue not central, or (3) effective steps were taken to mitigate the effects of the error." *United States v. Sheehan*, 512 F.3d 621, 632–33 (D.C. Cir. 2008) ("When . . . a defendant is prevented from offering crucial evidence in her own defense, it can hardly be concluded that the trial errors are harmless."). Each weighs against a finding of harmless error.

The Government's case rested almost entirely on DNA evidence. If there had been any reasonable doubt about the validity of that DNA collection or analysis, Mr. Calloway would have been acquitted. Because the district court prevented Mr. Calloway from developing Ms. Palmer's testimony and there was not otherwise overwhelming evidence against Mr. Calloway, it is difficult to say this case is not close. *Sheehan*, 512 F.3d at 632. Ms. Palmer's testimony was also central to this case because she collected the DNA swab from the gun, and Ms. Bonnette's DNA testimony depended on the reliability of that swab. Finally, no steps were taken to mitigate the effects of the district court's error. As such, the Confrontation Clause error was not harmless beyond a reasonable doubt.

B. The Totality of the District Court's Non-Constitutional Errors Was Not Harmless.

The Government cannot carry its burden of proving that prejudice towards Mr. Calloway did not result from the evidentiary errors in this case. *See United States v. Olano*, 507 U.S. 725, 734 (1993). Standing alone, each of the district court's errors—precluding defense counsel from cross-examining Ms. Palmer under Rule 403 and admitting prejudicial Rule 404(b) evidence—substantially affected the outcome of the proceedings. *See, e.g.*, *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *United States v. Whitmore*, 359 F.3d 609, 621–22 (D.C. Cir. 2004). But even if each error does not individually amount to harmful error, this Court has recognized that errors may combine to "exert a cumulative effect" that deprives a defendant of the right to a fair trial. *United States v. Jones*, 482 F.2d 747, 749 n.2 (D.C. Cir. 1973); *see Egan*, 287 F. at 971. Viewed in the aggregate, the totality of the district court's errors demand reversal for a new trial.

The district court erred in precluding defense counsel from cross-examining Ms. Palmer under Rule 403. The primary evidence the Government introduced against Mr. Calloway—Ms. Bonnette's DNA testimony—relied *entirely* on the jury crediting Ms. Palmer's testimony

about collection of the DNA swabs beyond a reasonable doubt.[3] Indeed, Ms. Bonnette emphasized in her testimony that her DNA analysis relied on the agency—and namely, Ms. Palmer—following its own "standard operating procedures." JA417. But the attempt to cross-examine about this issue was met by the district court telling defense counsel to "sit down." JA337. And because the district court precluded permissible cross-examination of Ms. Palmer, this Court should not rely on that evidence.

Aside from the DNA evidence, the weight and nature of the evidence against Mr. Calloway is slight. This is particularly so because Ms. Bonnette, the independent forensic analyst who conducted the DNA analysis in this case, appears to have called her own expert credentials into doubt less than nine months after the conclusion of Mr. Calloway's trial. JA712. In September 2022, she refused to testify for the

[3] In closing arguments, the Government stated that Ms. Bonnette had testified that it was "59[0] sextillion times more likely [that] Mr. Calloway's DNA is on that gun, than if it wasn't." JA733. But this is neither what Ms. Bonnette stated nor an accurate likelihood ratio. A likelihood ratio "evaluates *two different scenarios*" and indicates which of the two is "more likely, based on the evidence." JA390. It does not present one scenario alone.

Government in another case, stating that she has been "out of the field" for "nearly two years," and is "not up to speed on the latest developments, recommendations or case law and precedent as it pertains to probabilistic genotyping." JA712.

Even if the erroneous 403 balancing alone is not enough to warrant reversal, the admission of the Rule 404(b) evidence materially prejudiced Mr. Calloway. It invited the jury to conclude that because Mr. Calloway committed crimes on two previous occasions, he is the type of person to commit the crime currently charged. And the prejudice from this propensity evidence was left uncured since the district court failed to adequately instruct the jury that it could consider the prior acts evidence only for its purported proper purpose. JA777–78. The prejudicial prior acts evidence—without adequate jury instructions—certainly influenced the jury's verdict. *See Linares*, 367 F.3d at 45–46 (noting that "empirical investigations" have "confirmed" that juries "treat prior convictions as highly probative"). And that possibility alone should compel a finding of harmful error.

Harmless error cannot serve as a "panacea" for errors committed at trial. *United States v. Clay*, 667 F.3d 689, 696–97 (6th Cir. 2012). The

district court's cumulative constitutional and non-constitutional errors deprived Mr. Calloway of his right to a fair trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Calloway's conviction and remand the case for a new trial.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,438 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on January 25, 2023, I electronically filed the foregoing Appellant's Opening Brief via this Court's CM/ECF system, which will send notice of such filing to counsel of record in the above-captioned case.

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ADDENDUM
STATUTES AND REGULATIONS

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CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES

18 U.S.C § 922(g)(1)

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other

conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

REGULATIONS

FED. R. EVID. 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FED. R. EVID. 404(b)

(b) Other Crimes, Wrongs, or Acts.

> (1) Prohibited Uses. Evidence of any other crime, wrong, or 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.
>
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
>
> (3) Notice in a Criminal Case. In a criminal case, the prosecutor must:
>
> > (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
> >
> > (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
> >
> > (C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.