ORAL ARGUMENT SCHEDULED FOR MAY 12, 2023
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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REPLY BRIEF OF APPELLANT

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GLOSSARY

DFS – D.C. Department of Forensic Sciences
DNA – Deoxyribonucleic Acid

STATUTES AND REGULATIONS

All applicable statutes and regulations are in the Addendum to Mr. Calloway's Opening Brief.

SUMMARY OF THE ARGUMENT

The Government's brief attempts to minimize the role of Ms. Palmer, the DFS witness who produced the DNA evidence swab that led to Mr. Calloway's conviction. But it struggles to explain why it introduced the issue of the DFS's loss of accreditation during Ms. Palmer's direct examination. And it has little to say on a critical fact: Ms. Palmer's testimony was central to this trial because evidence of DNA analysis at an independent laboratory depended on the jury believing her testimony about the swab. Cross-examination of Ms. Palmer was exceptionally relevant—especially given her answers on direct—because it would have allowed the jury to appraise her potential bias and motive to lie. To be sure, it is impossible to speculate what Ms. Palmer would have said in response to Mr. Calloway's questions. But the key point is that the Confrontation Clause entitled him to ask.

Further, the district court abused its discretion in admitting prior acts evidence under Fed. R. Evid. 404(b). Although the Government now attempts to rationalize why constructive possession could have been plausible, it never put forth evidence suggesting that Mr. Calloway had

dominion and control of the firearm at a time when he was not allegedly in actual possession of it. *See Henderson v. United States*, 575 U.S. 622, 626 (2015).

Finally, the Government's sparse arguments about the effect of the constitutional error are simply insufficient to prove that error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). And it never responds to Mr. Calloway's argument that any errors must be assessed cumulatively. Viewed in totality, the district court's errors were harmful. Had Mr. Calloway been accorded his right to cross-examine Ms. Palmer, the resulting testimony may have called into doubt all of the DNA analysis undertaken at the independent laboratory. This error must be considered alongside the admission of the prejudicial prior acts evidence, which was left uncured by deficient jury instructions. Because the Government has not carried its burden of demonstrating harmless error, this Court should reverse and remand for a new trial.

ARGUMENT

I. THE GOVERNMENT'S ARGUMENTS EVADE MR. CALLOWAY'S CONFRONTATION CLAUSE CLAIM AND MISAPPLY RULE 403.

The Government's failure to acknowledge the importance of Ms. Palmer's testimony dooms its Confrontation Clause argument. Its entire case hinged on Ms. Bonnette's DNA analysis, which relied on Ms. Palmer's testimony. JA417. And contrary to the Government's arguments, the cross-examination that the district court blocked was relevant to Ms. Palmer's motive to lie. The Government's Rule 403 arguments about undue delay and jury confusion fare no better because the relevance of Ms. Palmer's testimonial bias outweighed any risk of unfair prejudice.

A. The District Court Unconstitutionally Limited Mr. Calloway's Cross-Examination About Issues Raised on Direct.

The Government agrees, as it must, that Mr. Calloway had a Confrontation Clause right to "a threshold level of cross-examination" to "elicit enough information to allow a discriminating appraisal of a witness's motives and bias." Gov. Br. 26 (internal quotations omitted). But it never grapples with the fact that its decision to ask Ms. Palmer on

direct examination about the DFS investigation guaranteed Mr. Calloway "great latitude for cross-examination" on that subject. Opening Br. 21–22 (quoting *United States v. Dorman*, 860 F.3d 675, 685 (D.C. Cir. 2017)). It instead asserts that Mr. Calloway's cross-examination was either improper or irrelevant because his questions tried to taint Ms. Palmer with the DFS's malfeasance. Gov. Br. 30–32, 34. Not so. Mr. Calloway's questions regarding Ms. Palmer's knowledge about the DFS's loss of accreditation—and the reasons for it—went directly to a constitutionally protected line of cross-examination: whether Ms. Palmer had a motive to lie in this case.

Throughout its brief, the Government repeatedly argues that the questions Mr. Calloway asked were not relevant to Ms. Palmer's motive to lie. Gov. Br. 30, 35, 40. But as the Government recognized before trial, Mr. Calloway's questions about Ms. Palmer's knowledge of the DFS investigation were relevant to "potential testimonial bias." JA49. And defense counsel's question to Ms. Palmer about whether the DFS's loss of accreditation was being discussed within the DFS goes directly to her

knowledge of the investigation, a subject the Government raised in its direct examination. *See* JA327, 666.

The Government mistakenly argues that defense counsel improperly tried to "elicit hearsay testimony from Palmer about misconduct by others at DFS." Gov. Br. 34. But Mr. Calloway asked only whether the loss of accreditation was a subject of conversation at the DFS. JA327. In other words, he asked only whether Ms. Palmer had heard things about the investigation and the loss of accreditation that might have affected her testimony in this case. Because these questions focused on any such knowledge and its impact on Ms. Palmer's testimony, defense counsel did not "wrongly suggest[] to the jury that misconduct by other individuals at DFS could be imputed" to Ms. Palmer. Gov. Br. 28.

Ms. Palmer's later responses during cross-examination emphasize the relevance of this line of inquiry. She said that she first heard that the "DFS's accreditation might be at risk" when the subject "hit the news," JA327, and she responded affirmatively to defense counsel's question asking if "all of [her] knowledge about the accreditation issue came only from the news." JA330. The district court then sustained an

objection to defense counsel's subsequent question asking whether "no one in DFS was discussing" the investigation. JA330. But Ms. Palmer's answers gave Mr. Calloway the right to explore whether people at the DFS were discussing this and how those discussions might have given Ms. Palmer an incentive to shade her testimony in this case. Had Ms. Palmer answered that she discussed the investigation with her colleagues, that would have impeached her testimony that she learned everything from the news. *See* JA330; *United States v. Stock*, 948 F.2d 1299, 1301 (D.C. Cir. 1991) (recognizing that cross-examination should not be restricted when a subject matter might be "inconsistent" with prior testimony, especially when a jury may be able to detect the difference). Mr. Calloway also could have explored how those discussions might have affected her testimony.

Had Ms. Palmer continued to insist that she heard about the investigations consuming her workplace only from the news, that insistence might have cast doubt on her credibility. It strains credulity that Ms. Palmer never discussed the DFS's loss of accreditation with her colleagues while working at the Department during its most tumultuous

period—when its accreditation was first suspended and then ultimately withdrawn because it had "engaged in misrepresentations and fraudulent behavior," Gov. Br. 17–18; its top official had resigned from her post; and the DFS had "disband[ed] its firearms examination unit," Gov. Br. 17–18. Either way, the answer to this question might have given the jury "a significantly different impression of [her] credibility." *United States v. Tucker*, 12 F.4th 804, 822 (D.C. Cir. 2021) (citing *United States v. Miller*, 738 F.3d 361, 375 (D.C. Cir. 2013)).

Mr. Calloway's question about why the DFS lost its accreditation was also relevant. The jury heard that there was an investigation into the DFS, but without understanding the reasons for that investigation, it could not evaluate the critical question of Ms. Palmer's credibility. On direct examination, she testified that she knew about the loss of accreditation, and it had no effect on her testimony. JA666. Because the district court prevented Mr. Calloway from briefly cross-examining Ms. Palmer about her knowledge of the reasons the DFS lost its accreditation, the jury had no ground to question her assertion. But Ms. Palmer's knowledge of those reasons—that the DFS had sloppy management

practices and errors in other units—might well have revealed a motive to lie. Specifically, it may have suggested to the jury that Ms. Palmer's primary interest in testifying that the loss of accreditation did not affect her was to protect her own reputation, rather than to forthrightly tell the truth.

What Ms. Palmer knew about why the DFS lost its accreditation also would have underscored her candor—or lack thereof—when testifying about hearing of this issue only from the news. JA330. If Mr. Calloway had been allowed to cross-examine her about both the reasons for loss of accreditation and whether people at the DFS were discussing it, the jury may well have concluded that she was not being truthful when she testified that she only heard of the investigation from the news. Determinations about credibility are quintessentially jury issues, but the jury was deprived of the opportunity to assess the ways in which Ms. Palmer may have shaded or falsified her testimony. *See United States v. Littlejohn*, 489 F.3d 1335, 1338 (D.C. Cir. 2007) (noting that this Court "giv[es] full play to the right of the jury to determine credibility")

(internal quotations omitted). And an adverse credibility determination may have caused the jury to question all of her testimony.

The Government argues that because Ms. Palmer collected the evidence in this case before the DFS investigation started, the investigation cannot have affected her work. Gov. Br. 30. But the status of the investigation when she collected the evidence is irrelevant to her motive to lie at trial. Undeterred, the Government asserts that because Ms. Palmer "no longer worked for DFS" when testifying at trial, her "motivation to curry favor" with the Government "was especially attenuated." Gov. Br. 30. But Ms. Palmer, who had just started a new job in the same forensic field a week before trial, JA663–64, still had a motive to shade her testimony.

Finally, the Government repeatedly faults Mr. Calloway for the "speculative" nature of his claim regarding what Ms. Palmer might have said. JA31. But this only proves Mr. Calloway's argument: the stark reality is that we do not and cannot know with certainty what Ms. Palmer would have revealed because the district court cut off Mr. Calloway's cross-examination into Ms. Palmer's motives and bias. This Court has

long recognized that Mr. Calloway deserved a chance to ask. *See, e.g.*, *United States v. Pugh*, 436 F.2d 222, 224–25 (D.C. Cir. 1970); *Dorman*, 860 F.3d at 685–86; *Stock*, 948 F.2d at 1302.

B. The Government Ignores that Rule 403 Favors Admission of Relevant Evidence.

The Government's Rule 403 arguments—that cross could not "elicit a probative answer" and introduced a "substantial risk of 'unfair prejudice' and 'confusing the issues,'" Gov. Br. 30, 33—are speculative and misunderstand the Rule 403 balancing test. After all, a trial court's consideration of witness testimonial evidence weighs "in favor of admission." *United States v. Whitmore*, 359 F.3d 609, 619 (D.C. Cir. 2004) (citing *United States v. Cassell*, 292 F.3d 788, 795 (D.C. Cir. 2002)).

Even if cross-examination may have revealed limited information about allegations of the DFS's misconduct, the risk of any prejudice was neither *unfair* nor substantial. Cross-examination assessing Ms. Palmer's knowledge of the DFS's loss of accreditation, or false statements about what she knew, might have caused the jury to doubt Ms. Palmer's testimony. But exposing those issues is the precise point of cross-examination. *See Tucker*, 12 F.4th at 822 (recognizing that cross is

permissible to allow the jury a fair opportunity for "a discriminating appraisal of a witness's motives and bias") (citing *United States v. Hall*, 945 F.3d 507, 513 (D.C. Cir. 2019)). The Government has not shown that any risk of unfair prejudice from cross-examination about Ms. Palmer's motives *substantially* outweighed the probative value.

The other risks asserted by the Government were likewise miniscule. There was no risk of undue delay because as defense counsel explained, he intended to limit his cross to a few questions. JA328. Such defined questioning would not have caused a "mini-trial" of Ms. Palmer, as the Government suggests. Gov. Br. 33–34. And any risk of "distract[ing] or confus[ing]" the jury, Gov. Br. 30–31, could have been mitigated on redirect. *See Dorman*, 860 F.3d at 686 (noting that "[a]mbiguities can be corrected on redirect"). The district court also could have given a "curative instruction" to guard against any risk of confusion. *Henderson v. George Washington Univ.*, 449 F.3d 127, 134 (D.C. Cir. 2006). Particularly since this cross-examination went to the central issue of Ms. Palmer's motive to lie and posed minimal risks, the Rule 403

balancing favored allowing this line of questions. *See Whitmore*, 359 F.3d at 619.

II. THE ADMISSION OF MR. CALLOWAY'S PRIOR CONVICTIONS UNDER FED. R. EVID. 404(B) AND 403 WAS AN ABUSE OF DISCRETION.

The Government's scatter-shot attempts to demonstrate that Mr. Calloway had "dominion and control" over the firearm are unsupported by the evidence. *United States v. Williams*, 952 F.2d 418, 420 (D.C. Cir. 1991). Because the Government cannot succeed on either its Fed. R. Evid. 404(b) argument or its alternative Fed. R. Evid. 403 claim, this Court should reverse and remand for a new trial.

A. The Government's Constructive Possession Arguments Are Unpersuasive.

The district court abused its discretion in admitting Rule 404(b) evidence to support constructive possession. Although the Government spills much ink arguing that the evidence supported constructive possession because "[n]o witness placed the gun in Calloway's hand," Gov. Br. 44, the law of actual possession requires neither visual confirmation of the contraband nor "direct evidence" of it. Gov. Br. 50. It only requires evidence—direct or circumstantial—of a person's "physical

custody" over an object. *Henderson*, 575 U.S. at 626. The lack of direct evidence in this case has no bearing on whether constructive possession is plausible. And, notably, the Government never specifies when Mr. Calloway could have been in constructive possession of the firearm at a time when he was not allegedly in actual possession of it. *See id.* (holding that "[c]onstructive possession is established when a person, though *lacking such physical custody*, still has the power and intent to exercise control over the object") (emphasis added). Indeed, the Government has no answer to that question because the evidence it introduced supports actual possession.

The Government errs in arguing that Mr. Calloway "wrongly assum[ed] that evidence can only establish actual or constructive possession disjunctively. . . ." Gov. Br. 51. True, evidence *can* support both actual and constructive possession, but the evidence in *this case* cannot. The Government contends that the firearm was found "in proximity" to Mr. Calloway, who allegedly acted evasively, and this demonstrates that he could have "exercise[d] dominion and control over [it]." Gov. Br. 45 (citing *Williams*, 952 F.2d at 420). But the Government

cites no case where this Court has extended constructive possession to a situation where, as here, contraband is found in the public domain far removed from the person who purportedly had dominion or control over it. *See United States v. Holland*, 445 F.2d 701, 703 (D.C. Cir. 1971) (holding that "[w]e must remember that constructive possession means being in a position to exercise dominion or control over a thing").

Because Mr. Calloway could not have exercised dominion and control over the firearm recovered near a stream in a public park, his allegedly-evasive conduct is irrelevant.[1] *See United States v. Alexander*, 331 F.3d 116, 128 n.2 (D.C. Cir. 2003) (holding that "evidence of evasive action . . . is hardly determinative" in constructive possession cases); *see also United States v. Bryant*, 523 F.3d 349, 357 (D.C. Cir. 2008) (recognizing that "the plus factors cannot be substituted for the ultimate question" of whether a defendant exercised dominion and control).

[1] The Government offers only the thinnest evidence that Mr. Calloway acted evasively. Officer Jamison saw Mr. Calloway briefly walk into the woods and then enter a vehicle. *See* JA224. These actions do not constitute typical evasive conduct. *Cf. Littlejohn*, 489 F.3d at 1339 (holding that defendant's conduct was evasive where he "ran" upon seeing police).

The Government never responds squarely to Mr. Calloway's assertion that the evidence in this case only supports actual possession. *See* Opening Br. 32. Instead, it muddles the issue by analogizing to fragmented portions of distinguishable cases. The Government relies on *Williams*, *see* Gov. Br. 45, a decision holding that the evidence was sufficient to show that Williams constructively possessed drugs found in another person's apartment. 952 F.2d at 420. To demonstrate the requisite dominion and control over the contraband, the Court pointed to Williams' attempt to escape the apartment, evidence of his fingerprint on an ammunition box "tossed out the window" that was found near firearms also thrown from the apartment, and a phone bill and bank card in his name recovered from the bedroom. *Id.*; *see also United States v. DeLeon*, 641 F.2d 330, 336 (5th Cir. 1981) (recognizing that at least four pieces of evidence, in totality, contributed to constructive possession finding). The Government presented no analogous indicia of control in Mr. Calloway's case. And this Court's suggestion that Williams' fingerprint on the ammunition box provided evidence that he constructively possessed the

firearms made sense because there was no evidence that he actually possessed the firearms. *See Williams*, 952 F.2d at 420.

The Government's reliance on *United States v. Gaines* is similarly misplaced. There, a constructive possession theory was plausible only because the police found the firearm near Gaines' feet under a car where Gaines could still exercise dominion and control over it. *See Gaines*, 859 F.3d 1128, 1133–34 (8th Cir. 2017). The Government has not—and cannot—point to a time when Mr. Calloway was without physical possession of the firearm but was still within arm's reach of it.

Nor can the Government succeed in arguing that the presence of DNA on the firearm establishes constructive possession. *See* Gov. Br. 46. Indeed, the Government's presentation of the DNA evidence reaffirms that its sole theory of the case was actual possession. At trial, it asked its DNA expert, Ms. Bonnette, to confirm that it is "unlikely that this is some type of transfer case." JA420. Ms. Bonnette made clear that "a full DNA profile" like that recovered here is less likely when an item is only "transiently touched." JA402. She also noted that "generally handling an item for a longer period of time" will "deposit more DNA" than an item

"touched very briefly." JA420. In short, the Government emphasized through this testimony that Mr. Calloway was the one holding the gun—*i.e.*, actually possessing it—rather than constructively possessing it. *See Henderson*, 575 U.S. at 626.

Perhaps the starkest illustration of the Government's misunderstanding of constructive possession comes from its claim that Mr. Bryant's testimony that Mr. Calloway "'never knew' about the gun" put "constructive possession . . . in play." Gov. Br. 48–49. That argument is a red herring. Unlike in *United States v. Garner*, 396 F.3d 438, 445 (D.C. Cir. 2005), Mr. Calloway never argued that he possessed the firearm unknowingly, accidentally, or that he was in "the wrong place at the wrong time." Instead, he categorically denied possessing it altogether. *See* JA745; JA757. Mr. Bryant's testimony reinforced the jury's choice between finding that Mr. Calloway either actually possessed the firearm or that he never possessed it. It did not, however, put constructive possession—and by extension, knowledge—at issue. *See United States v. Pardo*, 636 F.2d 535, 549 (D.C. Cir. 1980) (recognizing

that "mere association with another" cannot establish constructive possession, "even when the other is known to possess [contraband]").

The Government's claim that the Rule 404(b) evidence was necessary to prove Mr. Calloway's knowledge in light of Mr. Bryant's testimony also defies logic. It introduced the prior acts evidence *before* Mr. Bryant testified. *Compare* JA439–41 (introduction of prior acts evidence) *with* JA442 (start of Mr. Bryant's testimony). It is therefore impossible to credit the Government's assertion that Mr. Bryant's testimony rendered the prior acts evidence necessary—the horse had already left the barn.

The Government strays from the core issues when it contends that Mr. Calloway argues for the first time on appeal "that the evidence can support only an actual possession theory." Gov. Br. 47. It claims that Mr. Calloway "moved for judgment of acquittal on the element of possession generally" and "did not object to the final jury instructions." Gov. Br. 47. This argument overlooks that Mr. Calloway repeatedly raised the only necessary objection: his Rule 404(b) objection to the introduction of his "prior gun conviction" to "show knowledge." JA434.

He need not have objected again to the constructive possession issue at trial because the district court had ruled on this issue at the motions hearing. *See* Fed. R. Evid. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal").

B. The Prejudicial Impact of the Prior Acts Evidence Substantially Outweighed Its Minimal Probative Value.

Recognizing that it needs to win on both its Rule 404(b) and 403 arguments, the Government argues that there was no Rule 403 error here. But the unfair prejudice in this case—left uncured by deficient jury instructions—substantially outweighed the minimal probative value of the prior acts evidence.

The Government sidesteps Mr. Calloway's claim that there was substantial prejudice here because the jury need not have learned that he had previously been convicted not just once but twice. Opening Br. 34. While the Government somewhat confusingly labels this argument a "non sequitur," its silence on the prejudicial impact of the overly-broad prior acts evidence is deafening. Gov. Br. 53. And it similarly has no

response to Mr. Calloway's argument that because the prior acts evidence was "virtually identical" to the current charge, the danger of prejudice was "manifest." Opening Br. 35.

The Government argues that the prior acts evidence was admitted "secondarily to show that [Mr. Calloway] knew he had a qualifying prior conviction under § 922(g)(1)." Gov. Br. 54. To be sure, a "defendant may not stipulate or admit his way out of the full evidentiary force of the case." *Old Chief v. United States*, 519 U.S. 172, 186 (1997). But *Old Chief* recognizes that when a defendant has stipulated to the prior-conviction element, it is an "abuse of discretion" under Rule 403 to "admit the record" of the underlying conviction. *Id.* at 191–92. The core of *Old Chief*'s reasoning was that the prosecution's need for "evidentiary depth to tell a continuous story has [] virtually no application" when the defendant's legal status is at issue. *Id.* at 190.

The same logic holds true here. Because Mr. Calloway stipulated to his knowledge of disqualification, *see* JA438–39, the Government had no need to "admit the record" of his underlying conviction to prove that knowledge. *Old Chief*, 519 U.S. at 191. As in *Old Chief*, "evidentiary

depth" was not necessary to prove Mr. Calloway's knowledge of his legal status, rendering this a Rule 403 abuse of discretion. *Id.* at 190.

The Government is also mistaken that Mr. Calloway was required to "object to the limiting instruction" and that his claim is now "subject to plain-error review." Gov. Br. 54. Mr. Calloway's argument is not that the ineffective jury instructions were a basis for reversal. It is that the prejudice in this case substantially outweighed the minimal probative value of the prior acts evidence, and the district court's instructions did not mitigate that prejudice. *See* Opening Br. 35–36. Because Mr. Calloway preserved the Rule 403 issue, the specific nuances of the argument need not have been preserved. JA34–37; *see United States v. Murry*, 31 F.4th 1274, 1287 (10th Cir. 2022) ("Preserving an issue in the district court is simple. A party need only to alert the court to the issue and seek a ruling.") (internal quotations omitted).

Finally, the Government maintains that "the 404(b) evidence had substantive probative value." Gov. Br. 53. Not so. Constructive possession was a fallback position from the Government's "sounder theory" of actual possession. JA107. Indeed, the Government concedes

that "the jury could draw [] inferences" from its evidence and "find that Calloway had actual possession of the gun." Gov. Br. 50. Because the prior acts evidence was only relevant to a constructive possession theory that had limited evidentiary support, its probative value was minimal.

III. THE GOVERNMENT HAS NOT DEMONSTRATED HARMLESS ERROR.

The Confrontation Clause violation—limiting cross-examination of a key Government witness's motive to lie—cannot be harmless beyond a reasonable doubt. And viewed cumulatively, the district court's non-constitutional errors substantially affected the outcome of the proceedings.

A. The Confrontation Clause Error Was Not Harmless Beyond a Reasonable Doubt.

Because the district court's limitation of cross-examination was fatal to Mr. Calloway's defense, the Government cannot meet its burden of proving harmless error beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Limiting cross-examination about Ms. Palmer's knowledge of the DFS investigation prevented Mr. Calloway from providing the jury facts from which it "could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. 308, 318 (1974).

Specifically, the jury could not consider what Ms. Palmer knew about the DFS investigation, how that information might have affected her testimony, and whether she was being truthful about what she knew. Ms. Palmer's responses on these topics may well have caused the jury to doubt her testimony or impeached her credibility.

To be sure, it is *possible* that cross-examination would not have discredited Ms. Palmer in the eyes of the jury. But the Government cannot and has not met its burden of proving beyond a reasonable doubt that her credibility could not have been called into question. Nor can the Government say with certainty that Ms. Palmer's unrevealed knowledge about why the DFS lost its accreditation did not affect her testimony.

The Government focuses on the DNA evidence, arguing that it conclusively demonstrates Mr. Calloway's guilt because "there was no evidence suggesting any mechanism by which Calloway's DNA could have transferred onto these items at DFS." Gov. Br. 41. But the Government's evidentiary presentation of the DNA at trial relied on the jury believing Ms. Palmer's testimony. She was the witness who collected the swab that Ms. Bonnette—the DNA expert—analyzed. Ms. Palmer

was therefore a critical Government witness. And it is not Mr. Calloway's burden to demonstrate his innocence. It is the Government's burden to establish that the constitutional error did not taint the jury's verdict.

The Government's only response is that because it also introduced Ms. Palmer's report, the jury could still have convicted Mr. Calloway on the basis of that report. Gov. Br. 30. But this mistakes the salient issue. This Court must consider not whether the evidence *absent* the error was sufficient but instead whether the Government has shown beyond a reasonable doubt that "the error at issue did not have an effect on the verdict." *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998). Ms. Palmer's testimony was crucial to the case the Government presented at trial, and Mr. Calloway's chance to reveal flaws in her credibility was a critical factor in combating the physical evidence. The Government has not met its burden.

B. The Totality of the Non-Constitutional Errors Was Harmful.

The Government's brief ignores two of the most important arguments that Mr. Calloway raised about harmless error. This Court assesses harmless error under a cumulative standard. *See* Opening Br.

38. And it is the Government that must demonstrate harmlessness. *See id.* Viewed in totality, the non-constitutional errors in this case—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.

The district court's preclusion of cross-examination on Rule 403 grounds was harmful. Mirroring its trial strategy, the Government relies heavily on its DNA expert's testimony that Mr. Calloway's "DNA matched the major contributor to DNA mixtures found on both the gun and the magazine." Gov. Br. 56. This reliance underscores Ms. Palmer's central role in this case and, by extension, why Mr. Calloway's cross-examination of her was imperative. Had Mr. Calloway been accorded his right to illustrate Ms. Palmer's potential motive to lie in this case, it could have called into doubt *all* of the testimony about the DNA.

And the harmful effect of precluding cross-examination must be considered alongside the district court's erroneous admission of detailed evidence of Mr. Calloway's prior convictions. The Government barely contests that the prior acts evidence had a prejudicial effect on the jury;

it instead emphasizes that the Rule 404(b) evidence was not mentioned in closing arguments. Gov. Br. 57. But the district court sent this evidence back to the jury room with instructions that the jurors could "examine any or all of [the exhibits]" as they considered the verdict. JA779–80. Introducing the Rule 404(b) evidence and the exhibits at trial allowed prejudice to pervade the minds of the jury. *See United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 898 (D.C. Cir. 2010) ("Evidence need not be reinforced and reiterated again and again for it to be prejudicial enough to warrant a new trial.").

And contrary to the Government's assertion, Gov. Br. 53–54, the prejudice could not be cured because the jury instructions omitted mention that the prior acts evidence was relevant only for constructive possession and not for any other purpose. *See* JA777–78. The Government's minimal efforts to refute the prejudice of the prior acts evidence, *see supra* at 19, cannot satisfy its burden of demonstrating harmless error.

To be sure, this Court found harmless error in *United States v. Linares*, 367 F.3d 941, 944 (D.C. Cir. 2004), but the errors in Mr.

Calloway's case are readily distinguishable for two reasons. Most critically, the only error in *Linares* was admission of prior acts evidence. *See id.* at 953. Viewed in totality, the two errors here substantially affected the outcome of proceedings. And further, *Linares*'s Rule 404(b) error only introduced evidence of a prior gun possession, which is significantly less prejudicial than the Rule 404(b) evidence in Mr. Calloway's case, where the jury learned that Mr. Calloway a prior gun possession and convictions in two prior cases. *See id.* at 952; *see also United States v. Miller*, 673 F.3d 688, 701–02 (7th Cir. 2012) (finding harmful error because incorrectly-admitted Rule 404(b) evidence is "very prejudicial," even where the Government's case was "certainly strong").

Together, the district court's denial of cross-examination of a critical Government witness, coupled with the introduction of wholly-irrelevant prior acts evidence, substantially affected the outcome of proceedings.

CONCLUSION

The district court deprived Mr. Calloway of core safeguards, including the right to confront witnesses against him and to be judged solely on non-propensity evidence. In light of these harmful errors, this Court should reverse and remand.

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 5090 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 April 12, 2023, I electronically filed the foregoing Appellant's Reply 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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