ORAL ARGUMENT SCHEDULED FOR MAY 12, 2023

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3043

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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Cr. No. 20-00053 (RCL)

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee hereby states as follows:

Parties and Amici

The parties to this appeal are appellant, William Calloway, and appellee, the United States of America.

Rulings Under Review

A jury convicted Calloway of unlawful possession of a firearm (prior felony conviction), 18 U.S.C. § 922(g)(1). Calloway claims that the district court abused its discretion at trial by (1) limiting cross-examination of a fact witness formerly employed by the District of Columbia Department of Forensic Sciences about the lab's recent loss of accreditation, and (2) permitting the government to introduce evidence of Calloway's prior gun conviction as probative of Calloway's knowledge and intent under Federal Rule of Evidence 404(b).

Related Cases

The government is unaware of any related cases.

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), the government states that all pertinent statutes and regulations are contained in the Addendum to the Brief for Appellant.

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ISSUES PRESENTED

I. Whether the district court abused its discretion in limiting cross-examination of a former DFS employee about that agency's loss of accreditation, where the witness testified about routine evidence collection that occurred prior to the accreditation loss, had nothing to do with the misconduct investigations that led to it, and was gainfully employed elsewhere when she testified at trial.

II. Whether the district court abused its discretion in admitting evidence of Calloway's prior gun conviction under Federal Rules of Evidence 404(b) and 403, where the evidence supported and the district court instructed the jury on constructive possession in addition to actual possession.

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COUNTERSTATEMENT OF THE CASE

On February 27, 2020, appellant William Calloway was charged by indictment with unlawful possession of a firearm (prior felony conviction), in violation of 18 U.S.C. § 922(g)(1) (Joint Appendix (JA) 3). On July 7, 2021, the government filed a motion in limine to admit evidence of Calloway's prior gun conviction to prove knowledge, intent, and absence of mistake under Federal Rule of Evidence 404(b) (JA 18). Calloway filed an opposition to the government's Rule 404(b) motion on

September 22, 2021 (JA 32). On October 5, 2021, the government filed a motion in limine to limit cross-examination of witnesses employed by the District of Columbia Department of Forensic Sciences (DFS) about an ongoing investigation into misconduct by DFS management, as well as DFS's loss of accreditation in April 2021 (JA 40). Calloway did not file a written response to that motion. At a motions hearing on December 13, 2021, the district court granted the government's Rule 404(b) motion and, at Calloway's request, reserved decision on the DFS motion (JA 110, 112). During cross-examination of the first DFS witness at trial, however, the court sustained the government's objections to Calloway's questions about DFS's loss of accreditation that exceeded the bounds requested in the government's motion in limine (JA 327).

On December 20, 2021, following a three-day trial, a jury found Calloway guilty (JA 785). On June 24, 2022, the district court sentenced Calloway to 63 months of imprisonment, to be followed by three years of supervised release (JA 167-69). Calloway timely appealed (JA 166).

The Trial

The Government's Evidence

At approximately 1:16 a.m. on October 4, 2018, ShotSpotter detected the sound of gunshots coming from Oxon Run Park's baseball diamond, located at the intersection of Mississippi Avenue and Wheeler Road, SE (JA 209, 215-16, 438).[1] Within five minutes, Metropolitan Police Department (MPD) Officer Sean Jamison arrived at the diamond and observed Calloway and three other people (JA 223-25). Calloway, who was wearing a white t-shirt and grey sweatpants, spotted Officer Jamison, then walked out of sight into a wooded area leading to a small creek (JA 224-25). Calloway's three companions did not follow him (JA 226). Calloway quickly reemerged from the wooded area and walked toward two parked cars, joined by the others (JA 226-27). Officer Jamison twice told Calloway to stop, but Calloway got into a black Lexus (JA 227).

Officers stopped Calloway's car several minutes later (JA 227, 236, 250-51). Calloway and the other occupants consented to a search of the

[1] "ShotSpotter is a surveillance network of GPS-enabled acoustic sensors that uses sophisticated microphones to record gunshots in a specific area." *United States v. Jones*, 1 F.4th 50, 51 (D.C. Cir. 2021).

car and themselves; because police did not find any contraband, Calloway and his companions were allowed to leave (JA 250-51).

The officers returned to the park and found seven .45 millimeter cartridge casings lying on the ground where Officer Jamison had seen Calloway's group standing (JA 437, 578). MPD dispatched a K-9 team led by Officer Abraham Lazarus, which searched the wooded area Calloway had entered (JA 577). The dog found a Smith & Wesson "M&P" .45 millimeter semiautomatic pistol lying on the ground on the other side of the creek from the baseball diamond (JA 641-47).

Edward Shymansky, a DFS crime scene analyst, collected the gun and cartridge casings (JA 344). Although there were "some leaves" on the gun, it did not appear to have been lying on the ground "for any great length of time" (JA 350). The gun and its magazine were empty (JA 355). On October 12, 2018, Catryna Palmer, a DFS forensic evidence analyst—who, at the time she testified, was no longer employed by the agency—swabbed the gun and magazine for DNA and processed them for fingerprints (JA 671). Palmer did not find any fingerprints (JA 682). Palmer took wet and dry swabs of the gun's grip, trigger, trigger guard, magazine release, slide levers, slide/frame grooves, and front/rear sights,

and the magazine's lip and base (JA 684-85; Supplemental Appendix (SA) 1). She packaged and sealed the swabs, which were submitted to Signature Science, a private, accredited forensics laboratory in Austin, Texas (JA 366, 371-73).

Signature Science DNA analyst Michelle Bonnette derived a DNA profile from the guns swabs that she interpreted using STRMix software as a mixture of two people with at least one male contributor, featuring a "very strong major contributor" (97%) and a "secondary trace contributor" (3%) (JA 393-94).[2] Bonnette interpreted the profile from the magazine swabs as a "more complicated" mixture of four individuals with at least one male contributor, featuring 54%, 40%, 4%, and 3% contributors to the mixture (JA 398-99). On August 20, 2020, Bonnette

[2] STRMix is a "statistical tool that [forensic laboratories] utilize to help [ ] compute very complicated calculations" involving multi-person DNA profiles (JA 386-87). "The idea is to combine the tools of DNA science, statistics, and computer programming to mitigate the risks from subjective assessments of multi-purpose DNA samples. The software in the end helps to measure the probability that a mixture of DNA includes a given individual's DNA." *United States v. Gissanter*, 990 F.3d 457, 461 (6th Cir. 2021). STRMix "is the most tested and most peer reviewed probabilistic genotyping software available," "has garnered wide use in forensic laboratories across the country," and "is the market leader in probabilistic genotyping software." *Id.* at 465-66 (internal quotation marks omitted).

compared Calloway's DNA profile to the mixture profiles from the gun and magazine (JA 395-96, 400-01; GX 26). As to the gun, Calloway's profile "aligned with the 97 percent contributor," and Bonnette calculated a "likelihood ratio" of 590 sextillion—i.e., that obtaining the specific mixture "is approximately 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" (JA 395-97).[3] As to the magazine, Calloway's profile "aligned most closely with" the 54% contributor, and Bonnette calculated a likelihood ratio of 717 billion (JA 400-01). Both likelihood ratios provide "very strong support" for Calloway's inclusion in the mixtures (JA 398, 401).

The parties stipulated that on March 21, 2020, a DFS forensic scientist following appropriate forensic protocols collected Calloway's DNA sample by buccal swab; a firearms and toolmark examiner with sufficient education, training, and experience determined that the seven cartridge casings were consistent with being fired from the .45 millimeter

[3] A sextillion is the number one followed by 21 zeroes.

Smith & Wesson firearm; the gun had a sufficient interstate nexus; ShotSpotter detected sounds of gunshots in Oxon Run Park on October 4, 2018, between 1:16 am and 1:18 am; and Calloway had previously been convicted of a crime punishable by imprisonment for more than a year, and knew it (JA 436-39).

The government also presented Rule 404(b) evidence that Calloway was convicted in D.C. Superior Court in January 2017 of unlawful possession of a firearm (prior felony conviction) and carrying a pistol without a license (JA 439). The district court instructed the jury that "you may consider this evidence for the limited purpose of deciding whether the government has proved beyond a reasonable doubt that the defendant intended to possess a firearm; and that his actions in this case were knowing and on purpose, not by mistake or accident" (JA 440). The court warned the jury not to "use the evidence for any other purpose. You may not use that evidence to conclude that the defendant has a bad character or criminal propensity." (JA 441.)[4]

[4] The jury was permitted to consider the evidence for one additional, "limited purpose": to determine whether Calloway "was aware of the fact" that he had a prior felony conviction (JA 441).

The Defense Evidence

Kevin Bryant, a friend of Calloway's, testified that he, Calloway, and two women drove to Oxon Run Park together on the night of October 3-4, 2018 (JA 444-45). Bryant claimed that he bought a gun that day "from someone off the street," and, unbeknownst to Calloway, had it in the trunk of his Lexus (JA 446). Bryant testified that he took the gun into the park to "protect" his group; soon, however, Bryant and one of the women fired all of the gun's bullets into the air to "test[]" it (JA 446-47). When police lights appeared, Bryant claimed that he "tossed the gun" towards a "lake" or "river" (JA 447, 458). Bryant was convicted of receiving stolen property in 2011 and served 18 months in prison (JA 449).

On cross-examination, Bryant stated that he could not remember where he bought the gun, or who sold it to him; "[i]t was somebody I know that knows somebody" (JA 454-55). He claimed that Calloway "never knew" Bryant had the gun and "never seen nothing," although Calloway heard the shots (JA 457-58). Nor did Calloway ever touch the gun, according to Bryant, although the pair "may [have] touched hands," and Bryant's "palm was sweaty when [he] touched the gun" (JA 469-70).

Bryant denied knowing the name of the woman with whom he shot the gun, although they had "built a bond" and called each other "Sis" and "Bro" (JA 459-60). Bryant also insisted that neither he nor Calloway had entered the wooded area by the creek; rather, Bryant claimed that he threw the gun "to the other side of the lake" from a path in the open (JA 470-71). Bryant claimed not to know that Calloway had previously been convicted of a felony, or even to have been aware that Calloway had been charged in this case (JA 462, 467-68).

Bryant admitted, however, that "a couple days" before he testified, Calloway contacted him and "said, Running out of time, Bro. . . . I need you Bro." (JA 467.) Bryant, who understood that Calloway was asking him to take responsibility for the gun, agreed to "take my charge" (JA 469).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it prevented Calloway from eliciting secondhand information about why DFS lost its accreditation during cross-examination of Catryna Palmer, a former DFS employee who was not involved in any of the misconduct that precipitated the forensic laboratory's accreditation loss. DFS lost accreditation in

2021 after investigations revealed that agency management sought to cover up errors made by firearms examiners and mislead the government. But Palmer had nothing to do with any of this. Her job was routine evidence processing, she swabbed Calloway's gun and magazine for DNA in October 2018, well before the investigations and accreditation loss, and there was no evidence to suggest that she had performed her limited function improperly. Moreover, by the time Palmer testified at trial, she had already left DFS and found gainful employment elsewhere, so any theory of testimonial bias based on the misconduct of others at DFS was especially attenuated. Additional cross-examination about DFS's accreditation loss would not have been probative of any legitimate contested issue in the case, and would have carried a substantial risk of unfair prejudice by wrongly suggesting to the jury that the misconduct of others at DFS could be imputed to Palmer.

The district court did not abuse its discretion in admitting evidence of Calloway's prior gun conviction under Federal Rules of Evidence 404(b) and 403, to show knowledge, intent, and lack of mistake or accident. Evidence of a prior conviction for unlawful possession of a firearm is admissible under Rule 404(b) where a defendant is charged with

constructively possessing an illegal gun. Here, there was ample evidence that Calloway constructively possessed the gun found in Oxon Run Park, and the district court instructed the jury on constructive possession. The ShotSpotter alert, spent cartridge casings near where Calloway was standing, and Calloway's brief foray into the wooded area upon seeing Officer Jamison showed Calloway's knowledge of the gun later found in those woods; Calloway's DNA on the gun and its magazine demonstrated his dominion and control. Calloway also placed his knowledge of the gun squarely at issue through his friend Bryant's testimony that Calloway "never knew" about the gun despite his proximity to it. Evidence of Calloway's prior gun conviction was thus admissible under Rule 404(b), and because the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, its admission did not violate Rule 403.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion by Limiting Cross-Examination of a Former DFS Employee About the Forensic Laboratory's Loss of Accreditation.

A. Additional Background

1. DFS—Misconduct Investigations and Accreditation Loss

a. Agency Structure

DFS is an executive-branch agency of the D.C. government, established by the D.C. Council in 2012 "to provide high-quality, timely, accurate, and reliable forensic science services and public health laboratory services[.]" D.C. Code § 5-1501.02(a). The agency includes three divisions: forensic science laboratory, crime scene sciences, and public health laboratory. *See* "About the DFS," DFS Website, at https://dfs.dc.gov/page/about-dfs (last visited March 27, 2023). Prior to 2021, DFS's forensic laboratory housed units dedicated to five disciplines, including a forensic biology unit (DNA), firearms examination unit (ballistics evidence), latent fingerprint unit, forensic chemistry unit (drug analysis), and digital evidence unit (cell-phone extractions). SNA International, "D.C. Department of Forensic Sciences Laboratory

Assessment Report" (SNA Report) at ES-1 (Dec. 8, 2021).[5] Each of these units received forensic testing accreditation from the American National Standards Institute National Accreditation Board. *Id.* The firearms examination unit was responsible for test-firing guns, evaluating firearms evidence for entry into the National Integrated Ballistic Information Network, and examining guns, bullets, and casings to make common-source determinations based on toolmark comparisons. *Id.* at 43.

DFS's crime scene sciences division assists law-enforcement partners (typically, MPD) by collecting, processing, and preserving forensic evidence. *See* "Crime Scene Sciences Division," DFS website, at https://dfs.dc.gov/page/crime-scene-sciences-division (last visited Feb. 15, 2023). Unlike the forensic science laboratory, DFS's crime scene division never sought or received accreditation. SNA Report at 41.

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[5] SNA International is a consulting firm retained by the D.C. Deputy Mayor for Public and Safety and Justice in 2021 to conduct an audit of DFS's forensic laboratory following its loss of accreditation as a result of the events described in text below. SNA Report at ES-1. Its report was released publicly on December 12, 2021, and is available on DFS's website (JA 144).

b. The Investigations into Allegations of Misconduct Involving DFS Firearms Examiners and Management, and DFS's Loss of Accreditation.

In September 2019, the government became aware of allegations that DFS's firearms examination unit had employed improper examination and verification procedures, and that DFS management had sought to conceal this information from the government (JA 119-20). The next month, in partnership with District of Columbia Office of the Inspector General, the government initiated a formal criminal investigation (JA 120). Although the investigation concluded on January 31, 2020, without criminal charges being filed, the government was sufficiently concerned by evidence of mismanagement, poor judgment, and failures of communication in DFS's firearms unit to refer the matter to the D.C. Inspector General for additional administrative investigation (JA 45, 120). Additionally, in April 2020, the government and the Office of the Attorney General for the District of Columbia jointly retained a team of independent forensic experts to conduct an outside audit of DFS (JA 45, 127). DFS declined to participate in the independent audit (JA 127).

Among other matters, the government asked the auditors to investigate whether four DFS firearms examiners had erroneously concluded that spent shell casings recovered from two crime scenes had been fired from the same gun (an "identification" finding) (JA 127-28). The dispute arose because four independent firearms examiners retained by the government reached the opposite conclusion—that the two shootings involved different guns (an "exclusion" finding) (JA 128-29). When the government notified DFS of the independent exclusion finding in January 2020, DFS initially stood by its own examiners' identification finding (*id.*). On May 22, 2020, however, the DFS director informed the government that the first DFS examiner had made "an administrative error"—examining photographs from the wrong file—and that the examiner who had originally verified her work had since "examine[d] the evidence again" and "changed his conclusion from an identification to an inconclusive"—in other words, that it could neither be determined nor ruled out that the same gun was fired at both crime scenes (JA 129-30). On May 27, 2020, DFS's firearms unit issued a new report in which two additional examiners reported an inconclusive finding (*id.*). The government's independent auditors evaluated this report and expressed

concern that the report's ultimate finding was not supported by its underlying documentation (JA 130).

After DFS refused to provide additional information to the government, the government received authorization from the Honorable Todd E. Edelman, the Superior Court judge presiding over the homicide case at the heart of the dispute, to serve a subpoena *duces tecum* on DFS (JA 130). In response, DFS asserted privilege, but Judge Edelman overruled DFS's assertion and ordered it to produce key documents to the government on November 10, 2020 (*id.*). Those documents showed that DFS was actually aware in early 2020 that its examiners' identification finding was erroneous, even as DFS continued to insist to the government that it was correct (*id.*). And they also showed that the DFS firearms unit had re-examined the evidence in April 2020 and actually agreed with the independent examiners' exclusion finding—but that DFS management had then exerted pressure on its examiners to report an inconclusive finding only (JA 46, 131-32). Moreover, in addition to telling the government in May 2020 that the re-examination yielded an inconclusive finding, DFS also provided this misinformation to the accreditor for its forensics laboratory (JA 132). In response to these disclosures, the D.C.

Inspector General opened a new criminal investigation in December 2020 (JA 134).

On March 18, 2021, the government's independent auditors issued a final report, which castigated DFS's firearms examination unit and management (JA 133). The auditors recommended that the firearms examination unit "immediately cease performing casework," and advised that its "analytical results" were unreliable (*id.*). The auditors also warned of "very serious, and perhaps more troubling, problems associated with DFS management" (*id.*).

> DFS management not only failed to properly address the conflicting results reported to the DFS by the [government], but also engaged in actions to alter the results reached by the examiners assigned to conduct a reexamination of the evidence. DFS management then misrepresented the various activities undertaken and analytical conclusions reached to their clients and stakeholders . . . . In the opinion of the audit team, such actions by management indicate a lack of adherence to core principles of integrity, ethics, and professional responsibilities. Management has cast doubt on the reliability of the work product of the entire DFS laboratory. (JA 47, 133.)

On April 2, 2021, DFS's accreditor suspended the accreditation of its forensics laboratory, based on "credible evidence" that DFS had "deliberately concealed information from" the accreditor, "violated accreditation requirements," and "engaged in misrepresentations and

fraudulent behavior" (JA 133). On May 2, 2021, the accreditor formally withdrew the forensic laboratory's accreditation (*id.*). DFS's director resigned, and DFS disbanded its firearms examination unit. SNA Report at ES-1, 43. As of this date, the remaining units in DFS's forensic laboratory have not regained accreditation.

2. The District Court Allows Calloway to Question DFS Witnesses Whether They Know About the Investigations and Accreditation Loss, But Not About Why DFS Lost its Accreditation.

Before trial, the government notified the district court and Calloway that it intended to call three DFS employees as fact witnesses: Edward Shymansky, who collected the gun and cartridge casings at the crime scene; Catryna Palmer, who collected the DNA swabs from the gun and magazine that were sent to Signature Science for analysis; and Melissa Gervasoni, who obtained a buccal swab from Calloway (JA 43). Because none of these witnesses worked in the firearms examination unit or had any connection to the misconduct investigations or withdrawn accreditation, and all "performed largely routine tasks during the evidence's chain of custody," the government filed a motion in limine to

set reasonable limits on cross-examination about the investigations and accreditation loss (JA 43-44).[6] The government acknowledged that "limited" cross-examination about "potential testimonial bias" would be appropriate if Calloway could "establish that [a] DFS witness[ ] is aware of" the investigations and accreditation loss, but maintained that "[s]uch questioning [sh]ould be limited to the defendant inquiring about whether the witness would be motivated to testify falsely against the defendant in order to curry favor with the government" (JA 48-49).

Therefore, the government requested that the district court limit questioning to facts "carefully tailored" for "exploring potential bias in the witness's testimony" (JA 50):

> (1) [W]hether the witnesses are aware of the investigation; (2) whether the witnesses believe that he or she is a subject or target of that investigation; (3) the potential penalty the witnesses believe he or she would face as a result of the investigation, whether criminally or related to her employment; and (4) whether the witness is aware that the Department of Forensic Sciences lost its scientific accreditation by the ANSI National Accreditation Board as to

[6] The government also stated that, in March 2020, a firearms examination unit analyst had compared the gun to the cartridge casings found at the scene and determined that the casings were consistent with being expelled from the gun (JA 43). The government explained, however, that it would not call any firearms unit witness or elicit any testimony about that unit's work (JA 44).

> certain subunits within the agency and the fact DFS intends to regain its accreditation through additional compliance. (JA 49-50.)

The government argued that going beyond these limits and questioning witnesses "about allegations at DFS that do not involve them risks confusing and misleading the jury," and that it would be "inflammatory and entirely speculative" for Calloway to argue "corruption by proxy" based on unrelated misconduct by others at DFS (JA 48-49).

Calloway did not file a written response to the government's motion. At a pretrial motions hearing, Calloway did not state any opposition to the limits requested by the government; instead, defense counsel told the district court that he would not "take this down some rabbit hole with DFS," and that "if there is an issue, I'll approach" (JA 112). The district court granted the government's request to preclude Calloway from bringing up "institutional bias or corruption" at DFS in his opening statement (*id.*). The government also advised the court that it would raise the issue on direct examination by asking the witnesses about their awareness of "the larger ongoing investigation at DFS," but wanted to "avoid this being a side show about the ongoing investigations at DFS" (JA 113). Calloway did not object (*id.*).

The government ultimately called Palmer and Shymansky as trial witnesses; the parties stipulated that Gervasoni collected Calloway's buccal swab (JA 436). Palmer worked at DFS from 2014 to 2021, but at the time she testified had recently left the agency and started a new job outside government (JA 663-64). Although Palmer started within DFS's crime scene sciences division, she transferred in 2018 to the fingerprint unit's evidence-processing component, where her "role was to just process items of evidence within a laboratory for potential DNA recovery and latent prints" (JA 665). She estimated that she had swabbed "[w]ell over 100" guns for DNA (JA 671). Palmer testified that, on October 12, 2018, she received the gun and magazine recovered from Oxon Run Park by Shymansky, took photographs, swabbed for DNA, and processed for fingerprints (JA 671-72, 674, 681-82). Swabbing was a quick process—"maybe a minute"—performed in a sterile laboratory, involving application of wet and dry swabs to exterior surfaces of the gun and magazine (JA 671, 683-86). Palmer packaged and sealed the swabs to prevent contamination prior to testing and submitted them to DFS's central evidence unit (JA 688). Finally, she documented her work in a

brief report issued the same date, which was admitted into evidence (JA 667; SA 1).

On direct examination, the government—as it stated it would do at the motions hearing—asked Palmer whether she "was aware that" DFS "had lost its accreditation"; Palmer responded, "yes" (JA 665-66). The government then asked whether she was "aware of any investigation going on into any specific individuals" at DFS; Palmer replied, "no" (JA 666). She also responded "no" to questions about whether her awareness of DFS's loss of accreditation affected her "performance in this case" and "testimony today" (*id.*). Palmer also testified that the crime scene sciences division was never accredited and, to her knowledge, did not have to be, and that her evidence processing unit was "a newly formed unit" in 2018 and thus "at that time, it didn't have to be" accredited (*id.*).

Calloway also questioned Palmer about accreditation on cross-examination:

> Q. Now, you said yesterday that DFS was accredited and lost their accreditation, is that right?
>
> A. I was aware of the accreditation loss, yes.
>
> Q. And do you know when DFS lost its accreditation?
>
> A. To my knowledge it was earlier this year, 2021.

> Q. Okay. Now you said you had been working there since 2014, without saying what was discussed, was the fact that accreditation was being evaluated something that was discussed by people who worked at DFS? Were you aware of this?
>
> [Objection sustained.]
>
> Q. When did you first become aware of the fact that DFS's accreditation might be at risk?
>
> A. When it hit the news.
>
> Q. When did it hit the news?
>
> A. Oh, goodness. I don't recall the exact date it was first reported.
>
> Q. Again, did you follow what was going on?
>
> A. If it showed up on a news article, yes.
>
> Q. Okay. Do you know why DFS lost its accreditation?
>
> [Objection sustained.] (JA 326-27.)

In a bench conference, defense counsel argued that "[t]he fact that [DFS] lost [accreditation] is really inconsequential if the jury doesn't have the benefit of why they did," and "the nature of the issues at DFS are fair" because evidence "was housed at DFS for some period of time" (JA 328). He acknowledged, however, that "[a]s we discussed, even at the motions hearing, [ ] this is a limited cross, I respect that," and stated that he did not intend to ask "even five more" questions about the issue (*id.*).

Although Palmer "may not know" why DFS lost its accreditation, defense counsel argued that it would be "extremely proper" to ask her the reason "so the jury is not speculating and wondering what it was" (*id.*). The government opposed "getting into the factual details of this investigation" and reminded the court:

> [W]e filed [the motion in limine] to limit her cross-examination and understanding of . . . the DFS investigation to testimonial bias only, not to get into the facts of the actual investigation itself, which is exactly what we raised. It is on [p]age [ ] 9 and 10 of our motion[ ], where we suggested four very limited questions about [ ] what her knowledge about DFS's accreditation process was and about the investigation, and whether that affects her testimony which is proper here. The defense didn't file an opposition to that. And they've waited until now to litigate the issue. We discussed this and the Court ruled. (JA 328-29.)

Defense counsel replied that Calloway "would have been fine with the Court's ruling," but "didn't expect the government to open the door" and ask Palmer whether she was aware that DFS had lost its accreditation; he added, "If this was being brought up for the first time on cross-examination, that would be a different animal" (JA 329). The district court was unmoved by Calloway's arguments (*id.*).

On redirect, Palmer was asked to "describe the difference between analysis and processing" at DFS (JA 332). Palmer described her role,

processing, as "more . . . mechanical. It is just swabbing and [ ] processing the evidence for prints. We are not doing an actual analysis of any swabs that were collected or fingerprints that would have been recovered." (*Id.*) Palmer also testified, as she had on direct examination, that the crime scene sciences division was not part of the accreditation process, and that her evidence processing unit was "brand new" in 2018 and therefore was not accredited (JA 333).

The district court permitted Calloway limited re-cross examination, but did not allow him to return to the accreditation issue (JA 336-37).

> [Defense counsel]: [The prosecutor] said only—well, he didn't say that. I think he said your part of DFS was not accredited and never sought accreditation; is that right?
>
> The Court: No, that is not what he said. Try that again.
>
> [Defense counsel]: I will. What was the question that [the prosecutor] asked you about—
>
> The Court: That's not covered in recross anyway so sit down. Call your next witness.
>
> [Defense counsel]: I have one additional question.
>
> The Court: You can sit down. Call your next witness. You are not covering things on redirect. (JA 337.)

B. Standard of Review and Applicable Legal Principles

This Court reviews limits on cross-examination for abuse of discretion. *United States v. Tucker*, 12 F.4th 804, 822 (D.C. Cir. 2021). "Under the Confrontation Clause, a trial court 'may limit cross-examination only after there has been permitted, as a matter of right, a certain threshold level of cross-examination,'" but "[t]hat threshold is satisfied 'so long as defense counsel is able to elicit enough information to allow a discriminating appraisal of a witness's motives and bias.'" *Id.* (quoting *United States v. Hall*, 945 F.3d 507, 513 (D.C. Cir. 2019)). A Confrontation Clause "violation occurs 'only when the court bars a legitimate line of inquiry that might have given the jury a significantly different impression of the witness's credibility.'" *Id.* (quoting *United States v. Miller*, 738 F.3d 361, 375 (D.C. Cir. 2013)).

"Otherwise, district courts 'retain wide latitude' to 'impose reasonable limits on cross-examination' under the Federal Rules of Evidence." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *See also United States v. Hemphill*, 514 F.3d 1350, 1360 (D.C. Cir. 2008) ("[A] trial court retains broad discretion to control cross-examination"; "[i]n particular, the court may prevent questioning that

does not meet the basic requirement of relevancy, as well as other factors affecting admissibility." (internal quotation marks omitted)). "Rule 403 allows courts to exclude evidence 'if its probative value is substantially outweighed by a danger of unfair prejudice' or 'confusing the issues.'" *Tucker*, 12 F.4th at 822. Moreover, a district court "enjoys broad discretion" to "disallow cross-examination that is repetitive, irrelevant, unduly prejudicial, collateral to the issues in the trial, or outside the scope of direct examination." *United States v. Hite*, 769 F.3d 1154, 1171 (D.C. Cir. 2014).

C. Discussion

1. The District Court Imposed Reasonable Limits on Cross-Examination.

The district court did not abuse its discretion in preventing Calloway from asking Palmer "why DFS lost its accreditation"—which would, based on Palmer's answers to prior defense questions about her knowledge of the matter, simply have elicited a description of what she had read about it in "the news" (JA 326). Such testimony would have had marginal probative value—at best—in elucidating Palmer's "motivation in testifying," but posed a substantial risk of unfair prejudice by

confusing the jury and wrongly suggesting that misconduct by other individuals at DFS could be imputed to Palmer's "performance" in collecting evidence (Br. 25).

Other district courts have imposed similar limits on cross-examination of DFS witnesses "who merely collected, rather than tested, evidence," and who are not "themselves the subject of the [ ] allegations of misconduct" that led to accreditation loss. *United States v. Moore*, 589 F. Supp. 3d 87, 89-90 (D.D.C. 2022) (Boasberg, J.). As now-Chief Judge Boasberg explained in *Moore*,

> [I]t is far from clear that evidence relating to the alleged misconduct at DFS is at all probative given the facts of this case. Recall that activity at the agency is far afield from the actual work conducted by the witnesses here. Significantly, the alleged misconduct primarily involved issues with firearms and ballistics analysis in the [firearms examination unit] and other issues related to scientific analysis, while none of the witnesses here is in the [firearms examination unit], and their role in this case largely involved routine evidence collection, as opposed to actual testing. In light of that reality, it is not at all apparent that the witnesses have any personal knowledge of the alleged misconduct, much less that any such knowledge would be relevant to evaluating the veracity of their testimony here.

Id. at 92 (citation omitted). Like Judge Lamberth in this case, Chief Judge Boasberg "limited cross-examination . . . to the following areas: (1) the witness's knowledge of the ongoing investigation; (2) whether the

witness believes that she is the subject of the investigation; [ ] (3) the potential penalty the witness believes she could face as a result of the investigation, either criminally or related to employment"; and (4) "whether the witness was aware that DFS has lost its scientific accreditation as to certain scientific units within the agency." *Id.* These parameters are "tailored to assess" potential bias—whether a witness "would be motivated to testify falsely against [a defendant] in order to curry favor with the government in light of the pending [Inspector General] investigation"—without "lead[ing] to a mini-trial on the far-ranging allegations against and investigations or DFS" that would be "quite likely to confuse the jury about how the allegations and subsequent investigations relate to the limited role of the DFS witnesses in this case[.]" *Id.* at 92-93.

Calloway argues that the "loss of accreditation—and the investigation that led to it—provided fertile grounds" to impeach Palmer's "testimony" and "evidence processing" (Br. 25). As to Palmer's testimony, there is no reason to believe that additional cross-examination on these matters would have "given the jury a significantly different impression of [her] credibility" on the stand. *Tucker*, 12 F.4th at 822.

Palmer was not personally implicated in the investigations or accreditation loss, and she performed "routine evidence collection, as opposed to actual testing." *Moore*, 589 F. Supp. 3d at 92. Moreover, she collected the evidence in 2018, predating the investigations and accreditation loss, and documented her work in a contemporaneous report that was entered into evidence at trial. By the time Palmer testified at trial, she no longer worked for DFS and had found gainful employment elsewhere, so any motivation to curry favor based on the investigation of DFS was especially attenuated. *Cf. United States v. Wilson*, 605 F.3d 985, 1006 (D.C. Cir. 2010) ("[T]he fact that [the witness] was being investigated provided th[e] potential motive" to "curry favor with the government"; but "[e]ven assuming the subject matter of the investigation was probative of bias, the district court would properly have excluded cross-examination pursuant to Rule 403[.]"). For that reason, even a question that might arguably have some bearing on a current DFS employee's potential motivation to testify—for example, whether accreditation was "something that was discussed by people who worked at DFS" (JA 327)—could not reasonably be expected to elicit a probative answer in the case of a former employee, and could only serve to distract

and confuse the jury. *See Hite*, 769 F.3d at 1171 (district court has "broad discretion" to "disallow cross-examination that is repetitive, irrelevant, unduly prejudicial, collateral to the issues in the trial, or outside the scope of direct examination").

Whatever Palmer had learned secondhand about why DFS lost its accreditation, it could not meaningfully impact the jury's assessment of her credibility. Calloway's claim that this was "fertile ground" for cross-examination is speculative, as he essentially acknowledges (Br. 25 ("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 for testifying." (emphasis added)).

Calloway also argues that he should have been allowed to elicit through Palmer additional details about DFS's accreditation loss because it might have "reasonably impacted [her] performance" and "evidence collection" (Br. 23, 25). Because Palmer collected evidence in this case before the investigations commenced, and well before DFS lost accreditation, these events cannot have had any impact on her performance here.

What Calloway appears to be implying instead is that the misconduct and incompetence by others at DFS would be a legitimate basis for the jury to discredit Palmer's integrity and competence. Calloway's corruption-by-proxy argument is a nonstarter; this Court has already rejected a variant of this claim in *United States v. Kelsey*, 917 F.3d 740 (D.C. Cir. 2019). *Kelsey* held that a district court did not abuse its discretion in precluding cross-examination of a fact witness from DFS's DNA unit about serious "mixture analysis" problems impacting her unit's analytic work, where the witness testified only about bench work "that predated the problems with mixture analysis [at DFS]" and there was no evidence that the mixture-analysis problems impacted her bench work. *Id.* at 749. The problems Calloway focuses on here are even further afield than in *Kelsey*, because they originated in a separate unit, and implicated upper management, not rank-and-file evidence collectors. *See Moore*, 589 F. Supp. 3d at 93 ("[I]t would be 'unduly prejudicial' to permit cross-examination about the misconduct of other employees and units at DFS when there was not reason to think that the witnesses had any connection to the misconduct."). Both the First and Tenth Circuits have rejected similar efforts to tar law-enforcement witnesses with the

corrupt acts of others in their agencies, where no evidence linked the witness to the corruption. *See United States v. Gonzalez-Vazquez*, 219 F.3d 37, 45 (1st Cir. 2000) ("The district court's unwillingness to allow [defendant] to question [police witness] about the corruption of other police officers did not prevent the jury from obtaining 'a reasonably complete picture of the *witness'[s]* veracity, bias, and motivation.'" (emphasis in original)); *United States v. Gault*, 141 F.3d 1399, 1403-04 (10th Cir. 1998) (defendant was not entitled to cross-examine DEA analyst about colleague's misconduct). *See also Moore*, 589 F. Supp. 3d at 93 (quoting Judge McFadden) ("[I]t's not enough to say that corruption and mismanagement are endemic at the DFS. Rather, we need to be talking about specific allegations tying specific employees to some sort of impropriety.").

Under Rule 403, therefore, additional cross-examination about the loss of accreditation beyond the limited inquiry authorized by the district court would not have been probative of any legitimate contested issue in the case, and carried with it a substantial risk of "unfair prejudice" and "confusing the issues," *Tucker*, 12 F.4th at 822—for example, by wrongly suggesting to the jury that the incompetence and misconduct of others at

her agency could be imputed to Palmer, or inviting the jury to discount her testimony simply because of where she used to work. Moreover, "[e]ven if the DFS witnesses had first-hand knowledge of the alleged misconduct and could provide probative testimony on the topic, there is a substantial likelihood that questioning on the topic would lead to a mini-trial on the far-ranging allegations against and investigations of DFS." *Moore*, 589 F. Supp. 3d at 93. This was no idle or "marginal" risk, as Calloway suggests (Br. 26). Despite failing to file an opposition to the government's motion in limine and assuring the court at the motions hearing that he would not "take this down some rabbit hole with DFS" and would "approach" if "there is an issue," Calloway sought to elicit hearsay testimony from Palmer about misconduct by others at DFS without approaching the bench. And Calloway's subsequent arguments illuminated his mid-trial stratagem to attack Palmer's performance solely because she had worked at DFS—effectively, incompetence-by-association. *See, e.g.*, JA 328 (arguing at bench conference that "the nature of the issues at DFS are fair" because the evidence "was housed at DFS for some period of time"); JA 752 (arguing in closing that DNA evidence was like a "pie" baked with "rotten apples" from DFS).

Calloway claims that the government "opened the door" on direct examination (Br. 22), ignoring the government's motion in limine and his own failure to oppose it. The purpose of a motion in limine is "to narrow the issues remaining for trial and to minimize disruption at trial." *United v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999). *See also Williams v. Johnson*, 747 F. Supp. 2d 10, 14 (D.D.C. 2010) ("Motions in limine are designed to narrow the evidentiary issues at trial."). To that end, the government's motion proposed a set of "carefully tailored" questions to "explor[e] potential bias in the witness's testimony" (JA 49-50). *See also Moore*, 589 F. Supp. 3d at 92 (agreeing that limits identical to those imposed in this case were "appropriate" and "allow[ed] the jury to assess the witnesses' personal knowledge" and "its potential effect on their testimony"). *Cf. United States v. Montague*, 958 F.2d 1094, 1096 (D.C. Cir. 1992) ("The government may anticipate that the defense will impugn the motive of a witness on cross examination in framing its direct."). The government's questions on direct remained within those limits; Calloway's attempt to elicit hearsay about "why DFS lost its accreditation" did not. Moreover, the government explicitly advised the Court and Calloway at the motions hearing that it would front the issue

on direct, without objection from Calloway. Had Calloway instead wished to keep DFS's accreditation problems out of the trial altogether, he could have said so; this was not information that helped the government's case.

Calloway also argues—for the first time on appeal—that he should have received additional leeway to cross-examine Palmer about the misconduct of others at DFS because of "'allegations of examination errors' in Ms. Palmer's unit" (Br. 25 (citing JA 136)).[7] Besides being unpreserved—Calloway never mentioned this proposed ground of questioning to the district court—this argument demonstrates why the

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[7] Calloway is referring to the following: As part of its investigation, the D.C. Inspector General interviewed numerous DFS employees; the government provided reports of these interviews in discovery (JA 135-37). During one such interview in March 2021—referenced by Calloway (Br. 25)—a confidential source made "new allegations of examination errors" in the latent fingerprint unit and "potential concealment of those errors by DFS managers and senior leadership" (JA 136). Specifically, the source alleged that "DFS recently discovered a 'systemic issue' with [Fingerprint Analysis Unit] analysts making examination errors and DFS managers are trying to cover up these issues as well" (*id.*).

In April 2021, DFS disclosed that it was reviewing the work of its fingerprint examiners based on competency and reliability concerns (JA 140-43). As a preliminary step in latent fingerprint analysis, examiners must determine "whether each latent fingerprint exhibits sufficient ridge characteristics to be suitable for further examination" and comparison to known samples. SNA Report at 52. But DFS examiners "did not reliably determine suitability, which may have resulted in missed identifications or exclusions." *Id.*

district court was right to curtail cross-examination "on the far-ranging allegations against and investigations of DFS." *Moore*, 589 F. Supp. 3d at 93. The "allegations" made by a confidential source in March 2021 about errors made by fingerprint examiners and "potential concealment of those errors by DFS managers and senior leadership" have nothing to do with Palmer, who was not a fingerprint examiner. The fact that Palmer performed a different function in the same unit when she processed evidence in this case more than two years prior to the allegation being made does not provide a sufficient connection to make such questioning proper. *Cf. United States v. Lin*, 101 F.3d 760, 768 (D.C. Cir. 1996) ("[C]ounsel must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness," and "must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates."). It could only have served to confuse and distract the jury by "smuggl[ing] in" the larger "allegations of misconduct at DFS." *Moore*, 589 F. Supp. 3d at 94.

Finally, Calloway contends that the district court abused its discretion when it "cut off" re-cross-examination of Palmer (Br. 24-25).

But "[r]ecross-examination is an area where trial courts have long exercised wide discretion in controlling the scope and the form of questions employed," and a defendant has "a right to re-cross examination only where," unlike here, a "*new matter* is brought out on re-direct examination." *United States v. O'Neal*, 844 F.3d 271, 275 (D.C. Cir. 2016) (emphasis added) (internal quotation marks omitted). Calloway focuses on Palmer's redirect testimony that her evidence-processing unit was not accredited in 2018 because "at that time we were a brand new unit" (JA 333). But Palmer provided substantially the same testimony on direct examination; she stated that her unit was not accredited because "it was a newly-formed unit[,] [s]o it didn't have to be" (JA 666). Since redirect did not cover a "new matter . . . brought out on re-direct" the district court acted well within its "wide discretion" in curtailing recross, *O'Neal*, 844 F.3d at 275—particularly where defense counsel first misstated what the government had asked (JA 337 ("I think [the prosecutor] said your part of DFS was not accredited and never sought accreditation")), then began asking Palmer to remind him what

the government had asked her (*id.* ("What was the question that [the prosecutor] asked you about—")).[8]

2. Any Error Was Harmless.

Even assuming the district court abused its discretion in curtailing Palmer's cross-examination, any such error was harmless. Because the district court merely "limit[ed] cross-examination" about DFS and did not wholly "bar[] a legitimate line of inquiry," *Tucker*, 12 F.4th at 804, there was no error rising to a constitutional level, and this Court may affirm because the limits did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Wilson*, 605 F.3d at 1014.

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[8] To the extent that Calloway is complaining about the manner in which the district judge ended recross, we note that defense counsel—having requested and received the unusual opportunity to conduct recross—used that opportunity to ask about matters already raised on direct. It was therefore understandable that the court cut off the repetitive questioning, even if it did so somewhat abruptly. In any event, whatever impatience the court displayed would not be grounds for reversal. *Cf. Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (noting that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display[,]" are not evidence of reversible bias, nor are a "judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration").

But even if assessed as constitutional error, it was harmless beyond a reasonable doubt. *Id.*

Signature Science, not DFS, performed the DNA analysis in this case and developed profiles from the gun and magazine swabs that matched Calloway's DNA. Conversely, "the duties performed by each of the DFS employees in this case consisted of largely routine tasks involving the collection and processing of items of evidence." *Moore*, 589 F. Supp. 3d at 90. Palmer documented her work in a contemporaneous report that was admitted into evidence during her direct examination (JA 667; SA 1). The report is consistent with Palmer's testimony that she took both wet and dry swabs of the gun and magazine and submitted the swabs to DFS's central evidence unit (*id.*). Palmer's report predates the DFS investigations and loss of accreditation, so it would rebut any inference that these later events shaded Palmer's trial testimony. *Cf. Montague*, 958 F.2d at 1096 (discussing admissibility of prior consistent statements "to rebut an express or implied charge" of "improper influence or motive"). Moreover, as the government pointed out in closing, nobody from DFS had any contact with Calloway before the gun and magazine were collected and swabbed, and the swabs were transferred to Signature

Science (JA 762). In other words, there was no evidence suggesting any mechanism by which Calloway's DNA could have transferred onto these items at DFS. The only explanation that is consistent with the evidence is that Calloway's DNA was left on the gun and magazine *before* DFS collected them.[9]

II. The District Court Did Not Abuse Its Discretion in Admitting Rule 404(b) Evidence of Prior Gun Possession to Show Knowledge, Intent, and Lack of Mistake or Accident.

A. Standard of Review and Applicable Legal Principles

Under Federal Rule of Evidence 404(b), "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in

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[9] "[T]he proper measure of 'harm' under the [harmless-error] standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict," *United States v. Johnson*, 231 F.3d 43, 47 (D.C. Cir. 2000), based on "the totality of evidence" at trial. *Wilson*, 605 F.3d at 1013. "As [this Court has] said may times before, it is the evidence before the jury that determines whether a conviction survives harmless error review." *United States v. Green*, 254 F.3d 167, 173 (D.C. Cir. 2001). Thus, the fact that Michelle Bonnette, the Signature Science DNA analyst, "refused to testify for the Government in another case" in September 2022, "nine months after" Calloway's trial, is not relevant to the harmless-error analysis, as Calloway appears to argue incorrectly (Br. at 39-40), because this information was not "before the jury." *Green*, 254 F.3d at 173.

order to show that on a particular occasion the person acted in accordance with the character," but such "evidence may be admissible for another purpose," including "knowledge," "intent," "absence of mistake, or lack of accident." The "Rule is actually one of inclusion rather than exclusion"; other-crimes evidence "is only prohibited if it is offered for the impermissible inference that a defendant is of bad character resulting in bad conduct." *United States v. Cassell*, 292 F.3d 788, 792 (D.C. Cir. 2002) (internal quotation marks omitted). Therefore, this Court's "Rule 404(b) analysis begins with a determination of whether the evidence is probative of some issue other than character." *Id.* The Court "will not sustain a Rule 404(b) objection if the evidence of other crimes is relevant, relates to something other than character or propensity, and supports a jury finding that the defendant committed the other crime or act." *Id.* However, "otherwise relevant evidence, including evidence of other crimes, 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice'" under Rule 403. *United States v. McCarson*, 527 F.3d 170, 173 (D.C. Cir. 2008). This Court reviews the district court's "Rule 404(b) decision for abuse of discretion,

and afford[s] it much deference on review." *Cassell*, 292 F.3d at 792 (citation and internal quotation marks omitted).

"[E]vidence of a prior conviction for possession of contraband is relevant (and admissible under Rule 404(b)) when, as here, a defendant is charged with constructive possession of the same type of contraband"—an illegal firearm. *McCarson*, 527 F.3d at 173. *See also Cassell*, 292 F.3d at 793 ("[I]n cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged."). "Constructive possession is established when a person, though lacking [ ] physical custody, still has the power and intent to exercise control over [an] object." *Henderson v. United States*, 575 U.S. 622, 626 (2015). "A successful conviction, then, includes proof of a physical element (dominion and control over the actual weapons) as well as a mental element (knowing possession)." *Cassell*, 292 F.3d at 793. *See also United States v. Garner*, 396 F.3d 438, 443 (D.C. Cir. 2005) ("Because the dominion and control must be knowing, mere proximity or accessibility to contraband is not enough and there must be

testimony connecting the defendant with the incriminating circumstances." (internal quotation marks omitted)).

B. Discussion

1. The 404(b) Evidence Was Relevant on Non-Propensity Grounds, and Its Probative Value Was Not Substantially Outweighed by the Danger of Unfair Prejudice.

The district court did not abuse its discretion by admitting evidence of Calloway's prior gun possession under Rule 404(b), as relevant to show knowledge of, and intent to possess, the gun recovered from Oxon Run Park, and the absence of mistake or accident (JA 105, 110, 440). Responding to the sounds of gunshots, Officer Jamison saw Calloway separate from his companions and briefly enter a wooded area of the park. A later search of the same area recovered a gun concealed within those woods, near where the officer had seen Calloway. Calloway's DNA was found on the gun and its magazine. Cartridge casings found where the officer first spotted Calloway's group were consistent with being fired from the gun. No witness placed the gun in Calloway's hand, however. *Compare United States v. Linares*, 367 F.3d 941, 946-47 (D.C. Cir. 2004) (holding that government's case was purely one of actual, not

constructive possession, where three eyewitnesses saw Linares holding gun). The government's evidence, therefore, showed "a paradigmatic constructive possession scenario in which contraband (here, a firearm) is found in proximity to a defendant who may or may not have been *knowingly* in a position to, or have had the right to exercise dominion or control over the [firearm]." *Garner*, 396 F.3d at 438 (emphasis in original) (internal quotation marks omitted).

This Court and other federal circuits have found constructive possession based on similar evidence, involving contraband found in proximity to where police saw a defendant and "evasive action" suggesting an effort to hide or discard the contraband—including where, as here, police recover the contraband outdoors. *United States v. Williams*, 952 F.2d 418, 420 (D.C. Cir. 1991). In *Williams*, the defendant tried to escape from the rear window of an apartment as police arrived to execute a search warrant, then "tossed from that window" guns, ammunition, and drugs into a back yard. *Id.* Because "Williams' attempt to dispose of the evidence supports the inference that he had the right to exercise dominion or control over the drugs," there was sufficient evidence of constructive possession to sustain his conviction. *Id. See also,*

e.g., United States v. Gaines, 859 F.3d 1128, 1129, 1132-33 (8th Cir. 2017) (finding sufficient evidence of "constructive possession" of gun, and holding that 404(b) evidence of gang membership was admissible to show "knowledge, intent, and motive," where police approached Gaines' group "in a parking lot," Gaines "made a motion toward" his waist and "ducked down out of the officer's sight next to a vehicle," and police found gun underneath the car); *United States v. DeLeon*, 641 F.2d 330, 332-33, 335-36 (5th Cir. 1981) (jury could infer DeLeon's possession of bag of drugs, "either actual or constructive," where agents pursued fleeing truck in which DeLeon was passenger but briefly lost sight of it, recovered the bag "in some bushes on the passenger side of the street on the route traveled by the pickup," and "jury might infer that it was DeLeon who tossed the bag from the window of the truck to the side of the road"). Relying on this Court's precedents, the D.C. Court of Appeals has recognized that "[e]vidence showing [a] defendant's 'connection with a gun'"—such as DNA evidence—"or 'evasive conduct coupled with proximity' may suffice to establish constructive possession." *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017) (quoting *United States v. Alexander*, 331 F.3d 116, 127 (D.C. Cir. 2003)).

Moreover, although Calloway now argues that the evidence "can support only an actual possession theory" (Br. 31), the parties' joint proposed jury instructions included both actual and constructive possession theories (SA 30). Calloway moved for judgment of acquittal on "the element of possession" generically, pointing out that "no one saw [him] with a firearm," and that there was "inadequate evidence of *either* actual or constructive possession" (JA 474 (emphasis added)). And, after the district court denied that motion, Calloway did not object to the final jury instructions, which again included theories of both actual and constructive possession (SA 47). Calloway does not challenge those jury instructions on appeal. *Compare Linares*, 367 F.3d at 947-48 (prior gun conviction was inadmissible under Rule 404(b) where government proceeded solely on actual possession theory and "the district court declined to instruct on" constructive possession), *with Garner*, 396 F.3d at 445 (distinguishing *Linares* because, although government "ultimately elected to focus on [an] actual possession theory, foregoing a jury

instruction on constructive possession," the latter theory "was not only viable under the facts but also still in play").[10]

Calloway himself put constructive possession even further "in play" through the testimony of his friend Bryant. *See Garner*, 396 F.3d at 445 (describing ways in which "Garner put knowledge of the gun at issue from the start of trial"). Bryant testified that he and Calloway drove together to the park with a gun in the car, but claimed that Calloway "never knew" about the gun (JA 446, 457-58)—a "paradigmatic constructive possession scenario." *Id.* at 443. Through Bryant's testimony, Calloway also tried to explain away the gunshots (Bryant claimed he and "Sis" fired the gun, and Calloway "never seen nothing" (JA 457-58)), his DNA on the gun (Bryant asserted that he and Calloway "may [have] touched hands" before Bryant touched the gun, and Bryant's "palm was sweaty" (JA 469-70)), and the concealment of the gun in the wooded area (Bryant claimed

[10] Calloway suggests that the government needed "prompting" from the district court at the motions hearing to articulate a constructive possession theory (Br. 32), ignoring that the government's motion in limine clearly argued constructive possession (JA 27-28 ("Because this case rests on the defendant's constructive, rather than actual possession of the firearm, the defendant's prior possession and use of a firearm establish that the defendant acted with the requisite intent, knowledge, and lack of mistake.").

that he threw it (JA 470-71)), in ways that would reconcile his proximity to the gun with a lack of knowledge. *See Garner*, 396 F.3d at 443 (jury "face[s] paradigmatic constructive possession scenario" where gun "is found in proximity to a defendant who may or may not been knowingly in a position to . . . exercise dominion or control"). Calloway's knowledge of the gun was squarely at issue, and a "failure to prove that element" would have been fatal to the government's case. *Linares*, 367 F.3d at 947. The 404(b) evidence of Calloway's prior gun possession thus had significant probative value. *See Cassell*, 292 F.3d at 793 (404(b) evidence that defendant charged with unlawful possession also "possessed the same or similar things at other times is often quite relevant to his knowledge and intent").

Calloway relies on *United States v. Linares*, 367 F.3d 941; as he acknowledges, however, that case involved "only actual—rather than constructive—gun possession" (Br. 30). In *Linares*, the direct evidence, "presented through three eyewitnesses," showed that an accomplice "handed Linares a gun, that Linares later fired it several times, and that still later he held it out his car window and tossed it away—all the while aware of his actions." 367 F.3d at 946. The Court explained that "[i]f the

jury believed these eyewitnesses, then Linares possessed the gun knowingly; if it did not, then it should have acquitted based on the government's failure to prove [actual] possession rather than its failure to prove knowledge." *Id.* Here, by contrast, there was no direct evidence that Calloway held, fired, or tossed away the gun in Oxon Run Park. To be sure, the jury could draw those inferences from the abundant circumstantial evidence and find that Calloway had actual possession of the gun. But even if the jury was not convinced beyond a reasonable doubt that Calloway had "direct physical control" of the gun, *Henderson*, 575 U.S. at 626—for example, because it was willing to entertain the notion that Bryant fired and tossed the gun—it could still find that Calloway "knew of, and was in a position to exercise dominion and control over" the gun because Calloway was the major contributor to the DNA mixtures on the gun and its magazine, and he ducked into the woods near where the gun was later recovered just as police arrived. *Cassell*, 292 F.3d at 88.

As Calloway concedes, Rule 404(b) evidence of prior gun possession is admissible "where the trial evidence supports *both* actual and constructive possession" (Br. 33 (emphasis in original)). That will often

be true, as it is in this case. For example, in *United States v. Garner*, 396 F.3d 438, an officer saw Garner, the passenger in a stopped car, remove a gun from his waistband and place it under his seat. *Id.* at 439. *Garner* approved the admission of Rule 404(b) evidence of prior gun possession to show knowledge and intent because, unlike *Linares*, the evidence "did not force the jury to a disjunctive choice between actual possession or no possession at all." *Id.* at 442. Even if the jury harbored doubt that the officer saw Garner "handling the gun" ("through a tinted window and smoke-filled compartment"), it could "nevertheless convict Garner based on the undisputed testimony that the gun was found under Garner's seat when the car was searched," and "Garner's movements toward the area where the gun was later found"—"a paradigmatic constructive possession scenario." *Id.* at 443-44. Calloway's conclusory attempt to distinguish *Garner*—"[t]here was simply no evidence of constructive possession here" (Br. 33)—falls into the same trap that Garner did: wrongly assuming that evidence can only establish actual or constructive possession "disjunctive[ly]," and cannot support both theories. To the contrary, the evidence cited by Calloway as supporting "only" actual possession—including "the ShotSpotter notification," Officer Jamison's testimony that

Calloway "disappear[ed] into a nearby wooded area" where the gun was later recovered "for no more than five seconds," and Calloway's DNA on the gun and magazine (Br. 31-32)—also demonstrates that Calloway constructively possessed the gun because he "knew of, and was in a position to exercise dominion and control over" it. *Cassell*, 292 F.3d at 792.

Because the evidence showed constructive possession of the gun, Calloway's prior gun conviction was admissible under Rule 404(b). *McCarson*, 527 F.3d at 222; *Garner*, 396 F.3d at 443; *Cassell*, 292 F.3d at 795. Calloway also argues that the district court abused its discretion by admitting the 404(b) evidence under Rule 403 (Br. 34-36), but Rule 403 "tilts, as do the rules as a whole, toward the admission of evidence in close cases, even when other crimes evidence is involved." *Cassell*, 292 F.3d at 795. Moreover, the district court "is in the best position to perform [Rule 403's] subjective balancing, and its decision should be reviewed only for grave abuse." *Id.* Calloway cites no analogous precedent holding that otherwise admissible 404(b) evidence of prior gun possession must nevertheless be excluded under Rule 403; indeed, this Court has recognized more than once that such evidence is "highly probative" of a

defendant's knowledge, intent, and lack of mistake or accident, and that an appropriate limiting instruction "can sufficiently protect a defendant's interest in being free from undue prejudice." *McCarson*, 527 F.3d at 223; *Cassell*, 292 F.3d at 796.

Here, the 404(b) evidence had substantial probative value on the disputed issue of Calloway's knowledge and intent—even more so once Bryant testified that Calloway "never knew" about the gun despite its proximity. And the district court twice gave appropriate limiting instructions, both when the evidence was admitted and again during final jury instructions. There is no "compelling or unique evidence of prejudice in this case that warrants upsetting the [district] court's determination to admit the evidence," so "the district court's decision [should] stand[ ]." *Cassell*, 292 F.3d at 796 (internal quotation marks omitted).

Calloway nevertheless argues that Rule 403 should have barred evidence of his prior gun conviction because he had already stipulated to a prior felony conviction and there "was no need for the jury to learn that he had previously been convicted in not just one but two cases" (Br. 34). This is a non sequitur, because the evidence was admitted primarily to

show Calloway's knowledge, intent, and lack of mistake of accident, and only secondarily to show that he knew he had a qualifying prior conviction under § 922(g)(1).

Calloway also argues that the limiting instruction was insufficient, because it should have "explained that [Calloway's] prior gun possession was only allowed to be considered for a constructive possession theory" (Br. 35). But Calloway did not object to the limiting instruction, so his claim is subject to plain-error review. *See United States v. Lieu*, 963 F.3d 122, 130 (D.C. Cir. 2020); *United States v. Fraser*, 448 F.3d 833, 841 (6th Cir. 2006). Here, there was no error at all, let alone one that was "clear or obvious." *United States v. Reynoso*, 38 F.4th 1083, 1092 (D.C. Cir. 2022). Calloway has not identified any binding precedent—or any authority at all—holding insufficient a limiting instruction like the one given twice by the district court, which stated that the jury could only consider evidence of the defendant's prior gun possession for the limited purposes of knowledge, intent, and lack of mistake or accident. To the contrary, the district court in *Garner*, another case involving viable theories of both actual and constructive possession, gave a very similar limiting instruction. 396 F.3d at 440 (jury could consider the evidence

"only to help it decide whether the government had proved . . . that [Garner] acted knowingly and on purpose and not by mistake or accident").

Nor has Calloway shown that any such error affected his "substantial rights," or "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Reynoso*, 38 F.4th at 1092. Calloway describes "an unfettered risk" that the jury would consider the evidence in determining whether he "actually—not constructively—possessed the gun" (Br. 35). But any such risk was fettered by the limiting instruction the district court gave, which restricted the jury's use of the evidence to knowledge, intent, and lack of mistake or accident; "[t]he jury is presumed to [have] follow[ed] th[os]e instructions." *United States v. Hall*, 610 F.3d 727, 742 (D.C. Cir. 2010). In any event, Calloway's argument is entirely speculative—as discussed below, the government did not even mention the 404(b) evidence in closing, let alone argue that it supported actual possession—and insufficient to carry his burden under the third and fourth prongs of plain-error review.

2. Any Error in Admitting the Evidence Was Harmless.

Even assuming the district court erred in admitting evidence of Calloway's prior gun possession under Rules 404(b) and 403, any such error did not have a "substantial and injurious effect or influence in determining the jury's verdict" and was therefore harmless. *Linares*, 367 F.3d at 952. *See generally* Fed. R. Crim. P. 52(a) ("Any error . . . that does not affect substantial rights must be disregarded."). "[I]t is the evidence before the jury that determines whether a conviction survives harmless error review." *United States v. Green*, 254 F.3d 167, 173 (D.C. Cir. 2001).

The other evidence against Calloway was overwhelming. Calloway was the only person Officer Jamison witnessed entering the wooded area at Oxon Run Park where the gun was found, and Calloway's DNA matched the major contributor to DNA mixtures found on both the gun and the magazine, providing powerful evidence that Calloway handled both items. *Cf., e.g., Kelsey*, 917 F.3d at 750-51 (any error in admitting photo-array evidence was harmless "[i]n light of overwhelming evidence" against Kelsey, including DNA evidence that "strongly supported the conclusion that Kelsey was the perpetrator"); *United States v. Shaw*, 891 F.3d 441, 453 (3d Cir. 2018) (potential evidentiary error was harmless

"given the truly overwhelming quantity of legitimate evidence against [Shaw], including . . . DNA evidence"); *United States v. Locklear*, 631 F.3d 364, 370 (6th Cir. 2011) (misjoinder of felon-in-possession and bank robbery counts was harmless where incriminating evidence "was loaded with Locklear's DNA").

By contrast, the role of the 404(b) evidence was slight and the government did not emphasize it. The evidence was admitted after the government read five other stipulations at the close of its case, and takes up less than three transcript pages, including the limiting instruction requested by Calloway (JA 439-41). Moreover, the government "did not mention" the 404(b) evidence in its closing and rebuttal arguments, "thus mitigating any negative effect." *United States v. Mathis*, 216 F.3d 18, 28 (D.C. Cir. 2000). *See also United States v. Moore*, 651 F.3d 30, 76 (D.C. Cir. 2011) (potential error was harmless where government "made no mention of [the challenged] testimony in opening or closing").

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this brief contains 11,448 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Erica Hashimoto, Esq., eh502@georgetown.edu, on this 27th day of March, 2023.

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