Case No. 23-5077

United States Court of Appeals
for the Tenth Circuit

United States of America, Plaintiff/Appellee, v. Justin Dale Little, Defendant/Appellant.	Appeal from the United States District Court, Northern District of Oklahoma D.C. No. 4:21-cr-00162-MWM (Judge Michael Mosman)

Appellant Justin Little's Reply Brief

Oral Argument Requested

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I. The district court erroneously denied suppression on multiple grounds.

A. Oklahoma state police lacked authority to arrest Little and execute state search warrants on a federal reservation.

This Court's caselaw published in November 2017 established that the state lacked authority in April 2018 to arrest Justin Little without a warrant, interrogate him, and execute warrants to search his truck because the offense occurred within the Muscogee (Creek) Nation. OB-13–18. The government agrees the state lacked jurisdiction. AB-18. The only dispute is the remedy for these Fourth Amendment violations. The government asserts that the good faith reliance exception to suppression applies because: (1) Oklahoma's "long historical practice" included state investigations on federal reservation land; and (2) Oklahoma courts did not regard *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017) as binding, because the mandate had not issued. AB-19.

Neither argument shows good faith reliance. Suppression of all fruits of the state police conduct, including the interrogations, the rifle, and information concerning identifying stickers on his truck, was

required. OB-19. The government has not argued that the suppression denial was harmless beyond a reasonable doubt, so a new trial is required. OB-19–20.

1. Historical practice alone cannot establish good faith reliance.

The government may invoke the good faith reliance exception to the exclusionary rule when police act in objectively reasonable reliance on binding precedent. *Davis v. United States*, 564 U.S. 229, 239–41 (2011). The government cannot invoke that exception when existing precedent holds that those actions are illegal. *United States v. Herrera*, 444 F.3d 1238, 1253–54 (10th Cir. 2006).

Here, the government cites no precedent that supported the state officers' actions in April 2018, relying instead on state authorities' own practice. AB-19. But this Court has already instructed that the "long-standing practice of the criminal-justice system in Oklahoma . . . does not define the law." *United States v. Budder*, 76 F.4th 1007, 1016 (10th Cir. 2023). Therefore, Oklahoma's own practice cannot establish good faith reliance here. AB-18–19.

This Court's recent decision in *United States v. Pemberton*, 94 F.4th 1130 (10th Cir. 2024) differs given the timing of events here. In *Pemberton*, the defendant was convicted of murder in state court in 2004. *Id.* at 1133. "Following the *McGirt* decision and related decisions in Oklahoma," the site of the murder and state investigation straddled the Creek and Cherokee Nations reservations. *Id.* But the government established good faith reliance. *Id.* at 1136–42. Officers reasonably relied on state search warrants because "the officers did not seek and execute a state warrant 'in the face of clearly established law recognizing that such a warrant would be beyond the jurisdiction of the state court." *Id.* at 1139 (cleaned up). For the warrantless arrest, "there was no clear legal precedent from the Supreme Court or the Tenth Circuit expressly contradicting the presumption of legitimacy of those practices" by state authorities.[1] *Id.* at 1140. Thus, the "traditional notions of state sovereignty typically would validate the police practices here, and the police conduct did not deviate from a state's usual

[1] To the extent *Pemberton* suggests that Oklahoma historical practice alone established the legality of the investigation, it contradicts *Budder*, which controls. *See United States v. Rosales-Miranda*, 755 F.3d 1253, 1261 (10th Cir. 2014) (panels must follow "earlier, settled precedent over a subsequent deviation therefrom" (cleaned up)).

constitutional exercise of jurisdictional authority, an objectively reasonable basis exists to conclude that state officials acted with a good faith belief in the lawfulness of their conduct." *Id.* at 1142.

In contrast here, *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), was published in November 2017—before state authorities investigated, arrested, and executed warrants in April 2018. Thus, *Murphy* was "clearly established law" establishing the absence of Oklahoma jurisdiction and "Tenth Circuit [precedent] expressly contradicting the presumption of legitimacy" in the state's actions. *Pemberton*, 94 F.4th at 1140, 1142.[2]

United States v. Patterson, No. 21-7053, 2022 WL 17685602 (10th Cir. Dec. 15, 2022), a nonprecedential decision, addressed good faith reliance. But *Patterson* relied on a subjective inquiry into the mind and training of the particular officer there to find good faith reliance on legally improper training. 2022 WL 17685602, at *5–7; OB-17. Yet the good faith inquiry asks whether officers' actions were "objectively reasonable," comporting with the "general trend of preferring objective

[2] *Murphy* was published in 2017—long after the state's investigation 2004 investigation in *Pemberton*—which may explain why this Court did not address *Murphy* in *Pemberton*.

tests of law enforcement reasonableness over subjective inquiries into the knowledge or motivations possessed by individual officers." *United States v. Knox*, 883 F.3d 1262, 1272 (10th Cir. 2018) (cleaned up). Regardless, the government here did not present evidence that officers were trained to ignore *Murphy*, to the extent such facts are relevant.

The government has not demonstrated that officers acted in objective good faith in violating *Murphy* by arresting and interrogating Little and searching his home and truck.

2. The mandate has no legal effect on the precedential nature of a published decision.

The stay of the mandate in *Murphy* did not affect *Murphy*'s precedential value. OB-16; *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (stay of a mandate "merely delays the return of jurisdiction to the district court to carry out our judgment in that case" and "in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established by [the published decision in the matter] as binding authority"). Rather, it affected only when jurisdiction was reestablished in the district court. OB-16. It has nothing to do with the precedential value of a published decision.

The government cites no authority for its mandate argument. AB-19. *Bell v. Thompson*, 545 U.S. 794, 806 (2005), stands for the uncontroversial proposition that the denial of certiorari "usually signals the end of litigation" for that case. Similarly, *Davis*, 564 U.S. at 241 only establishes the relevance of "binding appellate precedent"; it does not hold that police can disregard that precedent during the pendency of Supreme Court review.

Patterson also provides no authority for the mandate argument. *Patterson* states that "Oklahoma courts, including the district court in this case, did not regard *Murphy* as binding because the Tenth Circuit's mandate in that case had not issued." 2022 WL 17685602, at *5. Those state cases post-date the April 2018 conduct here and provide no support for suggesting *Murphy* was non-binding. *Id.* at *5 n.8. And that the state appellate court came to an opposite conclusion in *McGirt* after this Court's *Murphy* decision does not affect the federal Fourth Amendment inquiry here, nor does it assist the government in proving good faith reliance for the April 2018 conduct. *McGirt v. Oklahoma*, Case No. PC-2018-1057 (Okla. Crim. App., Feb. 25, 2019) (unpublished). The district court in *Patterson* also cited no support for the proposition

that the stay of mandate deprived *Murphy* of "the force of law" before *McGirt*. *United States v. Patterson*, No. CR-20-71-RAW, 2021 WL 633022, at *5 (E.D. Okla. Feb. 18, 2021). Rather, this Court recognizes that *Murphy* established the law even before *McGirt*. *See Allen v. Crow*, No. 22-6141, 2023 WL 5319809, at *3 n.3 (10th Cir. Aug. 18, 2023); *Johnson v. Louthan*, No. 22-5064, 2022 WL 4857114, at *3 (10th Cir. Oct. 4, 2022).

Finally, even if Supreme Court review is relevant, the Supreme Court granted certiorari on May 21, 2018, a month after the conduct here. *Royal v. Murphy*, 138 S. Ct. 2026 (2018). Officers were not acting in good faith *reliance* on any binding authority. They, instead, violated this Court's law that bound them at the time and was eventually affirmed by the Supreme Court. Suppression was required.

3. The government does not argue harmlessness.

It is undisputed that the fruits of the illegal arrest and warrant execution include Little's interrogation, the rifle, and evidence of the white truck sticker. OB-19. The government does not argue the admission of the fruits was harmless beyond a reasonable doubt, and a review of the record indicates it is not. *United States v. Chavez*, 976

F.3d 1178, 1204 n.18 (10th Cir. 2020); *United States v. Samaniego*, 187 F.3d 1222, 1225–26 (10th Cir. 1999); OB-19–20. A new trial is required.

B. State police arrested Little without probable cause.

To support Little's warrantless arrest, the government had to prove a "substantial probability" existed that Little committed the offense. OB-21, 25; *Bledsoe v. Carreno*, 53 F.4th 589, 614 (10th Cir. 2022). The government agrees this inquiry depends on facts known at the time of the arrest. AB-20. With only those facts, officers lacked probable cause.

The core of the district court's finding, and the government's position, is that, before his arrest, police reviewed surveillance video following Little's "particular truck" to "where the shooting actually occurred." ROA, Vol. I, at 368; AB-20–22. But by presenting conflicting testimony—Detective Melissa Brown's hearing testimony that officers reviewed all surveillance and Brown's trial testimony that they reviewed only the grainy photograph from the aquatic center—the government did not meet its burden. OB-22–23. To avoid remand, the government manufactures consistency between the testimony about the review of surveillance. AB-21–22. Under the government's strained

reading, Brown claimed only that police did not "have" surveillance footage at the time of the arrest. AB-21–22 (citing ROA, Vol. I, at 633–34, 636). Taken in full, the record does not support this reading.

Brown provided a chronology of the investigation at trial. ROA, Vol. I, at 631–36. She confirmed that, before arresting Little, she did not "have all that surveillance footage" and instead only had the "still photo from the aquatic center parking lot." ROA, Vol. I, at 636. When confirming the pre-arrest information, she agreed she only had "what [she] had heard from Hannah [and] the people that responded to the police department, the still shot of the surveillance footage [she] had, and the various other pieces of evidence that [she had] been able to collect by that point." ROA, Vol. I, at 636–37.

Although the government distinguishes between having the footage and reviewing it, AB-21–22, Brown used the terms interchangeably at trial. ROA, Vol. I, at 634 (using "had" to describe "looking at the video footage"). The record does not otherwise support that she reviewed footage before the arrest and later obtained digital copies. AB-20. At the interrogation, which the government cites, AB-20, Brown conceded she "ha[d]n't seen the video" yet and the aquatic center

photograph was "all [she] got." Trial Exhibit 32 at 31:32–31:50; *see also* Trial Exhibit 32 at 34:15–34:40 (Brown conceding they would watch the video "in the morning").

Thus, considering the "entire record developed from the trial," *United States v. Corral*, 970 F.2d 719, 723 (10th Cir. 1992), Brown's "contradictory statements" about reviewing surveillance failed to establish probable cause for arrest, *United States v. Wolfe*, 435 F.3d 1289, 1300 (10th Cir. 2006). The district court's failure to meaningfully address suppression when re-raised in light of the new contradiction at trial was error. OB-23.

The remaining evidence does not establish probable cause, and the government does not meaningfully argue otherwise. OB-23–24. The government ignores several deficiencies with the cited statements. AB-20–21. Most important, Hannah Watkins did not witness the shooting. Although Watkins speculated about Little's involvement, the government ignores exculpatory remarks she made. *See Bledsoe*, 53 F.4th at 614–15 (exculpatory evidence weighs against probable cause); AB-21. Watkins acknowledged anyone could have committed the killing; Little behaved normally afterward; and she was unaware of any threats

or incidents between Little and Johnathon Weatherford. OB-23–24 (citing Suppression Exhibit B at 3:10–40, 6:30–47).

The government also does not elaborate how vague statements by Weatherford's ex-girlfriend, Jana Robinson, and their friend provided "particularized" suspicion. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003); OB-24; AB-20. Neither person detailed the supposed altercations between Little and Weatherford nor did they say when any threats occurred. OB-24. The government's own record references concede the lack of specificity. AB-20 (citing ROA, Vol. I, at 104–05, 124). Police had to later issue search warrants for Little's social media account to even learn what was said. ROA, Vol. I, at 124.

The government also lacked physical evidence. OB-25. The grainy photograph from the aquatic center neither identified Little's truck nor placed it at the shooting. OB-22, 25 (citing ROA, Vol. I, at 96–97). And police did not learn about the sticker on Little's truck that purportedly placed him near the shooting, AB-20, until reviewing surveillance in "the days following the shooting." ROA, Vol. I, at 81, 635–36.

The government does not dispute that the fruits of Little's arrest included his statements and all physical evidence recovered from his

truck and home, nor argue the suppression denial is harmless beyond a reasonable doubt. OB-19–20, 25. A new trial is required.

C. Officers lacked consent to enter Little's home.

The parties agree officers needed consent to enter Little's home without a warrant. OB-25–26; AB-22. Little made two arguments about consent below: (1) the government did not prove officers obtained free and voluntary consent to enter the home or seize the rifle; and (2) his mother lacked actual or apparent authority to consent. OB-25–26. Little advances the first argument on appeal, including that the government submitted no evidence—testimonial or otherwise—of the officer's initial entry into the home. OB-25–28. But like in its litigation below, the government focuses on actual and apparent authority and then claims the rifle was seized with consent. AB-22–24. The government does not address—let alone identify evidence—to show that officers obtained free and voluntary consent to enter the home in the first place.

It is undisputed the government bears the burden of proving consent. OB-26; AB-22. But the government never provided evidence of consent to enter Little's home. Brown did not testify about the entry. ROA, Vol. I, at 365–74. And her body camera started recording only

after officers were already inside. OB-27 (citing Suppression Exhibit J). The absence of consent evidence invalidates the search. *See United States v. Warwick*, 928 F.3d 939, 942, 946 (10th Cir. 2019) (focusing on consent before entry); OB-27.

The government also failed to establish consent to enter the living room. OB-27–28. First, its arguments about the voluntary nature of this consent, AB-23, were not made below, ROA, Vol. I, at 311–12, and thus waived. *See United States v. Braxton*, 61 F.4th 830, 835 n.3 (10th Cir. 2023). Regardless, unlike with the permission given to take Little's rifle, AB-23, Little's mother never expressly allowed officers inside the living room. *Compare* Suppression Exhibit J at 2:22–2:25 (seizure of the rifle), *with* Suppression Exhibit J at 1:20–1:40 (entry into the living room). She could have believed—as with the seizure of Little's truck—she had to let them inside. OB-27. The government also minimizes her emotional state. AB-23. Little's mother was "at a loss of words" given her son's arrest—a fact weighing against voluntariness. Suppression Exhibit J at 1:00–1:20; OB-27–28.

The bodycam does not render the district court's failure to address consent harmless. AB-23–24. As explained, there was no footage of the

initial entry, and the bodycam demonstrates the lack of voluntary consent for entry into the living room. *Supra*, at 12–13.

The government extensively relied on the rifle—the fruit of the illegal search—throughout trial. OB-28. Yet the government did not prove officers obtained free and voluntary consent to enter the home or seize the rifle. Thus, the lack of consent requires a new trial.

D. Officers repeatedly violated Little's Fifth Amendment rights.

1. Officers coerced Little's statements.

Admission of coerced statements requires reversal of Little's conviction. OB-29. The government's arguments against coercion fail. AB-25–28.

First, Little's youth and inexperience with the criminal process meant it was more likely his "will was overborne." *Yarborough v. Alvarado*, 541 U.S. 652, 667–68 (2004) (cleaned up); OB-29. The government references his military service but cites no caselaw making that fact favor voluntariness. AB-25–26. The tenor of the interrogation and absence of impairments do not favor voluntariness either. AB-26. Little was distressed throughout. *Infra*, at 16.

Second, promises of leniency in exchange for inculpatory statements render a confession coerced. OB-30. Officers here did more than just describe potential penalties. *Contra* AB-26. When the interrogation became accusatory, Brown primed Little with false promises of "a whole different ballgame" if he confessed. Suppression Exhibit C at 1:13:55–1:16:15. Officers persisted with such assurances, including:

- repeated references to lesser charges, Suppression Exhibit Q at 49:55–51:20 (negligent manslaughter); *id.* at 1:02:51–1:03:35 (reckless discharge of a firearm); *id.* at 1:00:35–1:00:55 (the "best charge");
- descriptions of reduced sentences, *id.* at 50:10–51:40 (probation, a suspended sentence, or the "lightest possible time in jail"); *id.* at 1:02:51–1:03:35 ("a month" for reckless discharge of a firearm);
- comparisons to defendants who avoided jail time, *id.* at 49:55–51:05 (drunk drivers who accidentally kill "famil[ies] full of people" and "never do a day in jail"); and
- mitigation for his military service and the need for him to raise his son, *id.* at 50:55–51:55.

Because these promises went beyond "limited assurance[s]" and required Little to "confess[] to killing by mistake," they impaired his "capacity for self-determination." *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006) (cleaned up).

Third, the government misunderstands the argument about psychological manipulation. AB-27. Deception here substantially affected Little. OB-31. Little was "in shock" because he had never been in trouble and was "devastated" with the news of Weatherford's death. Suppression Exhibit C at 8:01–8:08, 25:10–26:02. Predictably, the exaggerations about evidence against him "freaked him out" even more. Suppression Exhibit O at 36:40–37:55; OB-31.

Fourth, officers claimed Little could spend time with his son only if he cooperated. OB-31–32. The "psychological pressure" from those threats is coercive. *United States v. Jacques*, 744 F.3d 804, 811 (1st Cir. 2014); OB-31–32. Little's demeanor did not suggest a lack of distress. AB-26–27. He confirmed he was scared throughout. *Supra*, at 16.

Fifth, Officer Jason Weis's physical contact was coercive. OB-32 (citing *United States v. Young*, 964 F.3d 938, 942 (10th Cir. 2020)); *see also United States v. Guillen*, 995 F.3d 1095, 1123 (10th Cir. 2021) (referencing "physical force against the suspect" (cleaned up)). Just after, Little said he felt threatened, which demonstrates the effect of the contact. Suppression Exhibit O at 33:30–34:05. Brown, in fact, removed

Weis from the interrogation, apologized for his behavior, and promised it would not happen again. Suppression Exhibit Q at 10:00–10:35.

These circumstances together demonstrate coercion, requiring suppression.

2. Officers ignored Little's invocation of his right to counsel.

Little expressed his desire for an attorney that required the interrogation to cease. OB-33. The government's attempt to rewrite the record is unavailing.

The government cites Little's willingness to talk to officers at the beginning of the second interrogation. AB-28. Although Little initially claimed he was willing to talk, he then immediately clarified that he first "wanted to talk to a lawyer." Suppression Exhibit Q at 10:52–11:00. The absence of qualifications provided "the requisite level of clarity" for his request. *Davis v. United States*, 512 U.S. 452, 459 (1994). Although Little continued with the interrogation, AB-28, ambiguity "cannot be established by showing only that he responded to further police-initiated custodial interrogation." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Indeed, Little's later-invocation of his right to counsel,

which the government concedes was "sufficiently clear," mirrored his initial request. AB-29–30. Little unequivocally wanted to speak with a lawyer first before speaking to officers. *Compare* Suppression Exhibit Q at 10:40–11:00, *with* Suppression Exhibit Q at 1:14:12–1:15:06.

3. Officers failed to provide *Miranda* rights before the second interrogation day.

It is undisputed that Little's inexperience with the criminal process and the passing time between interrogations favored full *Miranda* warnings. OB-35. In claiming that the officer change did not alter the interview dynamic, the government ignores context. AB-24–25. Brown removed Weis to change the tenor of the interrogation. *Supra*, at 16–17; OB-35. The similar subject matter and surroundings for the interrogations, AB-24–25, do not overcome the remaining circumstances, especially when Little wanted to speak to a lawyer. OB-35.

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The government has not argued harmlessness for any Fifth Amendment violation. AB-24–30. Because it extensively relied on these interrogations at trial, a new trial is required. OB-20, 36; *Supra*, at 7–8.

II. Multiple prejudicial and unconstitutional evidentiary rulings require a new trial.

A. Highly prejudicial and dissimilar prior acts evidence.

1. The evidence was not intrinsic.

Little's purported prior acts with other men Watkins had dated was not intrinsic to the offense. OB-38–39. The government claims these acts are "directly related to the factual circumstances of the charged murder because they provide contextual and background information." AB-31–32. This argument contradicts the caselaw, which requires that intrinsic evidence be "directly connected to the factual circumstances of the crime *and* provide[] contextual or background information to the jury." *United States v. Cushing*, 10 F.4th 1055, 1075 (10th Cir. 2021) (emphasis added); *United States v. Kimball*, 73 F.3d 269, 272 (10th Cir. 1995) (facts about defendant's prison record were intrinsic when the suspect wore clothes like those the defendant wore when released from prison and had the defendant's prison number). The purported conduct with Watkins's prior relationships happened years before this offense.

2. The evidence was not admissible to prove motive.

The prior acts were too dissimilar and remote in time to the offense to be admissible for motive under Rule 404(b), especially because identity was the primary dispute. OB-40–43. The government ignores that the evidence was admitted only for motive. ROA, Vol. I, at 440 n.7. The government, instead, believes the evidence could be considered for all Rule 404(b) purposes because the jury instructions erroneously said so. AB-33. The government also claims Little waived this issue by not objecting to the jury instruction. AB-33–34. The government conflates evidentiary error with instructional error, the latter of which is addressed below. *Infra*, at 28–29. The court never reconsidered the purpose for which the evidence was admitted—motive.

Regardless, the evidence did not satisfy any Rule 404(b) purpose. OB-41–42. And *United States v. Veneno*, 94 F.4th 1196 (10th Cir. 2024) does not show otherwise. AB-34. In *Veneno*, the defendant challenged his girlfriend's identification of him as her assaulter. 94 F.4th at 1208–09. This Court admitted a prior assault he committed against her at

"the same place, in the same way, and for the same reason," which made her identification more reliable. *Id.* at 1201, 1209.

By contrast here, the evidence consisted of events from years prior involving different people and different acts. Because similarity to the charged offense is the "lynchpin" for Rule 404(b) admissibility, the evidence should have been precluded for any purpose. OB-40. The evidence should have been precluded under Rule 403 too, especially because the jury instruction provided no limits. OB-41–43.

The government does not argue this error was harmless. OB-43–44. A new trial is warranted.

B. Violation of Confrontation Clause by denying recross-examination of Watkins.

1. This claim was not forfeited.

Rather than address the merits, the government asserts Little forfeited this Confrontation Clause claim by not making an offer of proof for denied recross-examination. AB-44. Precedent does not support forfeiture of this argument, however, which challenges a complete ban on recross-examination of Watkins.

United States v. Roach says only that an offer of proof is "generally necessary" to preserve cross-examination rights. 896 F.3d 1185, 1192 (10th Cir. 2018). The inquiry is instead contextual, needing only some "objection at trial" to the limitation. *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010). Little raised the issue here by asking for recross-examination after redirect. ROA, Vol. I, at 597. The district court then precluded recross-examination, excusing Watkins before any further explanation could be made. ROA, Vol. I, at 597.

Roach and related authorities also address only "excluded line[s] of . . . questioning," not complete prohibitions on recross-examination. 896 F.3d at 1192. Offers of proof may be necessary to provide the district court with the purpose for specific questions. *Id.* (cleaned up). But for a "blanket rule" against recross-examination, offers of proof are often "futile, and indeed possibly harmful." *United States v. Riggi*, 951 F.2d 1368, 1377 (3d Cir. 1991). They "risk alienating the trial court and jury" with repeated explanations and "casting the defendant[] in a combative and adverse light." *Id.* In light of these considerations, this claim was preserved. *Id.*

2. Little prevails under any standard of review.

At any rate, Little succeeds even under plain error review. A defendant can "argue error in an opening brief and then allege plain error in a reply brief after the Government asserts waiver." *United States v. Leffler*, 942 F.3d 1192, 1198 (10th Cir. 2019); *see also United States v. Courtney*, 816 F.3d 681, 683 (10th Cir. 2016) (recognizing that "the interests at stake in a criminal case" justify this rule). The circumstances here favor considering this claim under plain error, should the Court find the issue not preserved. Little was cut off before he could make any argument below. *Leffler*, 942 F.3d at 1198 (identifying, as relevant, opportunities to develop the claim); ROA, Vol. I, at 597. And he has identified where "the precise issue" arose. *Leffler*, 942 F.3d at 1198–99 (requiring some attempt to address issue preservation); OB-44–46 (citing ROA, Vol. I, at 596–97).

In failing to address the merits, AB-44, the government has conceded Little has shown plain error. Watkins disputed another motive for the killing—Weatherford's drug dealing—for the first time on redirect. OB-45–46. In not providing Little an opportunity to cross-examine Watkins' new assertions, the district court plainly violated his

Confrontation Clause rights. OB-45–46. Because the government used Watkins' new assertions to discredit one of Little's main defenses, the error prejudiced Little and affected his substantial rights. *See United States v. Robertson*, 473 F.3d 1289, 1293 (10th Cir. 2007). It also impaired Little's ability to test the truthfulness of an important witness, impugning "the ultimate integrity of the fact-finding process." OB-46 (quoting *Riggi*, 951 F.2d at 1376). A new trial is required.

C. Erroneous admission of the rifle.

The district court denied Little's request to exclude the rifle. ROA, Vol. I, at 463–64, 495. The scope was attached to the rifle and therefore challenging the admission of the rifle encompassed the scope. Supp. ROA, Exhibit 46–48. This pretrial ruling was final, and all objections thereto were preserved. ROA, Vol. I, at 731. Thus, plain error and waiver do not apply. *United States v. Williams*, 934 F.3d 1122, 1132 (10th Cir. 2019); AB-40–41, 43.

Any minimal probative value of the rifle was outweighed by unfair prejudice. OB-47–48. The issue is not chain of custody, AB-40–41, but that the government failed to establish the rifle's relevance: that this was the rifle seized from Little's home. OB-47–48. Relevancy is a low

bar. AB-40–41. And it would not have required more than confirming with Brown that the rifle the government presented at trial was seized from Little's home. Failing to present such evidence means the rifle should have been precluded. The government does not argue this error was harmless, and it was not. OB-48.

D. Erroneous admission of a bullet.

The admission of the bullet on relevancy grounds was plain error without proof this bullet was seized from Weatherford; the error is not harmless. OB-48.

E. Erroneous admission of a handgun not alleged to be the murder weapon.

Evidence about a handgun not alleged to be the murder weapon was also irrelevant, prejudicial, and not harmless. OB-49. The government argues that the parties stipulated to admission of the photographs. AB-43 (citing *United States v. Aptt*, 354 F.3d 1269, 1280 (10th Cir. 2004) (finding waiver when counsel stated that "[a]ll the exhibits are stipulated to")). But a stipulation resembling the one in *Aptt* did not occur. The government cited "an agreement to preadmit" the photographs, which only excused the government from laying a

foundation; any preadmitted exhibits not discussed at trial would not be sent to the jury. ROA, Vol. I, at 721–22. This unusual record renders the issue forfeited, not waived. With forfeiture, Little succeeds under plain error review. OB-49.

F. Erroneous admission of Watkins's hearsay.

Little identified three hearsay statements, the admission of each requiring a new trial. OB-50–52. Yet the government discusses only two, and in doing so, misapprehends caselaw and the resulting prejudice. AB-38–40.

First, the government effectively concedes plain error in the admission of Watkins's text messages disparaging Little. AB-38–40 (failing to discuss this issue). Hearsay includes a witness's own prior written messages. OB-51 (citing *United States v. Caraway*, 534 F.3d 1290, 1295 (10th Cir. 2008)). This testimony undermined the fairness of the trial by portraying Little as a jealous liar, hurting his credibility and providing him motive for the killing. OB-51–52.

Second, Watkins's out-of-court statement about wanting to date Weatherford does not qualify for its effect on the listener.[3] OB-51–52. Although Watkins mentioned Little's response, AB-39, her testimony was "not so circumscribed" to the effect on Little. *United States v. Graham*, 47 F.4th 561, 567 (7th Cir. 2022). Watkins explained "the need" to have the conversation and then focused on what she said. ROA, Vol. I, at 546–47. The government has not disputed that those open-ended questions made her believable and thus invited the jury to accept her recitation of the conversation as true. OB-50–51 (citing *Graham*, 47 F.4th at 567). It is also uncontroverted that this error was prejudicial. OB-51 (explaining that the government used this statement to establish Little's jealousy and rebut Watkins's involvement with other partners).

Third, the government agrees Watkins was prohibited from testifying as to statements she made about Little committing the shooting. AB-39. Yet the government misreads her testimony. Although the government directed Watkins not to "referenc[e] Mr. Little," she

[3] Because Little objected pretrial and the district court definitively denied the objection, ROA, Vol. I, at 489, 495, plain error review does not apply. *See United States v. Blechman*, 657 F.3d 1052, 1064 (10th Cir. 2011); AB-39.

specifically claimed, "[o]ther than him," she knew of no one who wanted to hurt Weatherford. ROA, Vol. I, at 556. The government has not met its burden of demonstrating harmlessness. *See United States v. Yarbrough*, 527 F.3d 1092, 1102 (10th Cir. 2008). It does not dispute that directly inculpatory statements are highly prejudicial, OB-52, thus having "a substantial influence on the outcome of the trial." *United States v. Irvin*, 682 F.3d 1254, 1263 (10th Cir. 2012) (cleaned up).

A new trial is required for each hearsay violation.

III. Jury instruction errors require a new trial.

Numerous plain jury instruction errors occurred. First, although the district court solicited objections to proposed instructions before voir dire to give a sense of the final instructions, the court did not receive approval to provide those proposed instructions to the jury before the defense rested. ROA, Vol. I, at 717–19. Without the ability to challenge the final instructions in light of all evidence, this Court can review de novo, OB-53–54, though Little meets the plain error standard too.

Second, the Rule 404(b) limiting instruction was plainly erroneous and prejudicial. OB-54–55. Little did not waive this issue. He proposed the stock instruction from this Court that provides all potential

purposes in brackets, indicating the instruction should be tailored to the admitted purposes, which was only motive. ROA Vol. I, at 454. Little did not stipulate to the instruction that provided all purposes. He simply did not object, rendering the issue forfeited, not waived. ROA, Vol. II, at 7–11; *compare with United States v. Wells*, 38 F.4th 1246, 1254 (10th Cir. 2022) (stipulating with the government to the wording of an instruction waives the issue).

Third, "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). Little argued that evidence he was in the area at the time of the shooting did not prove he was the shooter. OB-55–56. His request for an instruction that his mere presence was insufficient to convict was legally correct and erroneously denied. *Contra* AB-53.

Fourth, Little preserves for further review his challenge to the reasonable doubt instruction. OB-56–57; *see United States v. Petty*, 856 F.3d 1306, 1310 (10th Cir. 2017).

Fifth, the credibility instruction amounted to commenting on the evidence in a manner that favored the government. OB-57–58. Instructing the jury what is "common" differs from telling the jury to use its own judgment when evaluating testimony to determine what is "common" or deserving of less weight. OB-58.

If the Court agrees any of these instructional errors are plain, the government does not dispute that the third and fourth prongs of plain error are met. OB-58–59. A new trial is warranted.

IV. The government plainly committed misconduct during closing argument.

Closing arguments—the government concedes—are crucial in determining a defendant's guilt. OB-60 (citing *Herring v. New York*, 422 U.S. 853, 862 (1975)). The government here invented facts, vouched, and provided opinions about Little's guilt. OB-60–66. The defense of this misconduct is unpersuasive.

A. Repeated references to prejudicial facts not in evidence.

The government agrees prosecutors cannot reference facts not in evidence, AB-46–48, yet Little has identified three instances of such misconduct, OB-60–63.

First, the government admits it overstated the evidence concerning individuals implicating Little. AB-46. Brown never provided the information implicating Little.[4] ROA, Vol. I, at 636–37, 775–75, 779. As for Weatherford's ex-girlfriend, Brown never stated who she implicated or what she said. ROA, Vol. I, at 840–41, 851–52. But in closing, the government claimed that everyone "in unison," including Weatherford's ex-girlfriend, thought Little had motive, opportunity, and means. ROA, Vol. II, at 51–52, 88. Such "pronounced and persistent" misconduct, with "weak" evidence of guilt, rendered the trial unfair. *United States v. Christy*, 916 F.3d 814, 824 (10th Cir. 2019) (cleaned up). Because these assertions were "beneficial in some appreciable measure to the government's case," the stock instruction about arguments not being evidence could not "mitigate the harm." *United States v. Starks*, 34 F.4th 1142, 1174 (10th Cir. 2022); *contra* AB-47.

Second, the prosecutor violated the order precluding reference to "unsubstantiated suspicions" that Little interfered with Watkins's relationships. ROA, Vol. I, at 436. It is immaterial whether Watkins

[4] The government's speculation that the prosecutor mistakenly referenced evidence from the suppression hearing is unsupported by the record and legally insignificant. AB-46.

referenced these incidents anyway. AB-47. The order prevented the government from doing so. OB-62.

Third, the government has no evidence that Little had a dark jacket like that of the individual following Weatherford before the killing. AB-47–48. When Little properly highlighted this evidentiary gap, ROA, Vol. II, at 71, the government could not invent "facts not in evidence" to respond. *United States v. Morrow*, 79 F.4th 1169, 1184 (10th Cir. 2023). Unlike in *United States v. Vann*, 776 F.3d 746, 760 (10th Cir. 2015), AB-48, the government lacked even circumstantial evidence to support its assertion.

B. Vouching for the credibility of its witness.

The government confuses credibility arguments based in evidence, with assertions that rely on "the imprimatur of the Government." *Starks*, 34 F.4th at 1173. The government had no evidence that Justin Lackey lacked motivation to exaggerate his supposed altercation with Little. ROA, Vol. II, 82–83; *contra United States v. Anaya*, 727 F.3d 1043, 1057 (10th Cir. 2013) (finding such evidence in the direct examination of the witness). Rather, Lackey disliked Little. OB-64. To assure the jury it could still trust Lackey, the government had to

"implicitly indicate" it could "verify the truthfulness" of his testimony through the prosecutor's reassurance. *United States v. Magallanez*, 408 F.3d 672, 680 (10th Cir. 2005) (cleaned up).

C. Improper comments on guilt.

The government twice claimed Little acted inconsistently with its personalized understanding of innocent behavior. OB-64. Little has not claimed this misconduct affected the presumption of innocence. AB-49–50. Rather, the prosecutor improperly expressed "his personal belief as to the Defendant's guilt." *United States v. Meienberg*, 263 F.3d 1177, 1180–81 (10th Cir. 2001).

The government's flight analogy is misplaced. AB-49–50. A defendant's flight is specific evidence a defendant has something to hide. *United States v. Akers*, 215 F.3d 1089, 1102–03 (10th Cir. 2000). But here, the prosecutor provided theories of how innocent people act—untethered from evidence—to contrast with Little's behavior. "[I]nterjecting [these] personal beliefs" was misconduct. *United States v. Young*, 470 U.S. 1, 8–9 (1985).

D. This misconduct amounts to plain error.

The government ignores the third and fourth plain error prongs, AB-45–50, which Little satisfies. The "cumulative prejudicial effects" of the misconduct affected his substantial rights and the fairness of his trial. *Starks*, 34 F.4th at 1175. The misconduct (1) bolstered the theory that Little was jealous; (2) connected Little to the crime scene; (3) inflated the evidence implicating Little; and (4) induced the jury to trust the government's beliefs about Little's guilt. OB-65. The government's case was otherwise weak. *Infra*, at 34–35; OB-68–69.

V. These errors cumulatively require a new trial.

The cumulative effect of trial errors affected Little's due process rights and therefore require a new trial. OB-66–67.

VI. The evidence was insufficient to convict.

The government presented insufficient evidence to convict Little, as its case consisted of "nothing more than piling inference upon inference." OB-67–69 (quoting *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013)). To argue otherwise, the government overstates and mischaracterizes the evidence.

First, the government argues that multiple people came forward with incidents between Weatherford and Little. AB-56. But Brown never described those incidents, meaning they had minimal relevance to the offense. ROA Vol. I, at 636–37, 779. Second, the government misleadingly states that, when arrested, Little wore "dark pants and a T-shirt," AB-58, omitting that he was wearing a light gray T-shirt and not the "dark clothing" worn by the suspect. Supp. ROA, Exhibits 31–33. Third, the government overstates the definitiveness of the surveillance evidence, AB-57, which shows a generic white truck resembling Little's. Supp. ROA, Exhibits 34–41B, 43–45. Fourth, the ballistics evidence, AB-58, revealed only that the bullet came from one of millions of commonly owned rifles. ROA, Vol. II, at 22.

VII. Mandatory life imprisonment here is unconstitutional.

The prohibition on mandatory life sentences should apply to Little who was 24 at the time of the offense. OB-69. Little preserves this issue for further review.

Conclusion

This Court should vacate and remand for new trial.

Dated: April 22, 2024

Respectfully submitted,

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Certificate of Compliance

I hereby certify that, to the best of my knowledge and belief, formed after a reasonable inquiry, this brief is proportionally spaced and contains 6,498 words and therefore complies with the applicable type-volume limitations.

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Certificate of Service

I hereby certify that on April 22, 2024, I electronically filed the foregoing using the court's CM/ECF system which will send notification of the filing to the following:

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