"THE FEDERAL CORNER"

A Primer on Confrontation Clause Objections

Buck Files

On July 2, 2019, a panel of the United States Court of Appeals for the Fifth Circuit held that the defendant's rights under the Confrontation Clause were violated when a law enforcement officer testified that he *knew* that Jones had received a large amount of methamphetamine because of what the officer was told by a confidential informant. This error was not invited by the defense and was not harmless. *United States v. Coy Jones,* 930 F.3d 366 (5th Cir. 2019)[Panel: Circuit Judges Higginbotham, Smith and Higginson (Opinion by Judge Higginson)]

Coy Jones came to the attention of law enforcement officers during their investigation of Eredy Cruz-Ortiz, a suspected methamphetamine dealer. On two occasions, officers observed Jones meet with Cruz-Ortiz. Each time, Jones entered Cruz-Ortiz' vehicle and left holding a bag. On neither of these occasions was Jones stopped, searched or arrested.

Special Agent Royce Clayborne received a tip from a confidential informant that a drug deal would occur at a location where they had earlier seen Jones with Cruz-Ortiz. Jones arrived and met an individual identified as Cruz-Ortiz' roommate. Jones gestured to him and both vehicles drove off together. No one was able to observe any exchange of items between Jones and the other driver.

Some of the officers followed Jones. When a deputy sheriff attempted to stop Jones for a traffic violation, he sped up and the officers lost sight of him. Eventually, Jones stopped and the officers arrested him and searched his truck; however, they found no drugs or firearms. Law enforcement officers searched both sides of the road where Jones had been driving and eventually found a pistol and a Ziploc bag containing 982 grams of methamphetamine. At trial, one of the officers testified that the gun and the methamphetamine were found in the area where the officers had lost sight of Jones as he fled.

Joseph was subsequently charged with possession with intent to distribute 500 grams or more of methamphetamine, conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, possessing a firearm as a convicted felon and possessing a firearm in furtherance of a drug trafficking offense. In the district court, Jones filed pre-trial motions to compel the disclosure of the identity of the government's confidential informant and to exclude testimony related to the confidential informant. United States District Judge Sam Sparks of the Western District of Texas denied these motions.

After a four-day jury trial, Jones was convicted and, later, sentenced to a term of 300 months' imprisonment, the mandatory minimum for his offenses. At that same sentencing hearing, Judge Sparks found that Jones had violated his supervised release on a 2010 federal conviction and sentenced him to 18 months' imprisonment on the revocation to run consecutively to his 300 month sentence. Jones appealed his convictions and the revocation of his supervised release. Judge Higginson's opinion reads, in part, as follows:

> Prior to and during trial, Jones made multiple objections to the government's use of information from its confidential informant. We focus our Confrontation Clause analysis on the following series of exchanges with Agent Clayborne. The first occurred on direction examination:
>
> **Prosecutor:** [B]ased on the information you'd received, Coy Jones had received a large amount of methamphetamine?
> **Defense:** Objection. *Hearsay*. (emphasis added by author)
> **Prosecutor:** I'll withdraw the question.
> **The Court:** That objection is overruled.
> **Prosecutor:** I'll withdraw the question, your Honor.
> **The Court:** All right.
> **Prosecutor:** Why did you follow Coy Jones as opposed to the other guy?
> **Agent Clayborne:** Well, we knew that Coy Jones had just received a large amount of methamphetamine.
> **Prosecutor:** And once you knew that he had received that methamphetamine, what did you do?
> **Agent Clayborne:** We were coordinating a traffic stop of the vehicle driven by Coy Jones, which is the white truck.
> **Prosecutor:** And why did you want to stop that vehicle?
> **Agent Clayborne:** Because it had methamphetamine, we wanted to seize it and arrest Coy Jones.
>
> On cross-examination, defense counsel questioned Agent Clayborne regarding his asserted knowledge that Jones had received methamphetamine:
>
> **Defense:** [Y]ou didn't see any interaction between Mr. Jones and the silver truck, right?
> **Agent Clayborne:** That's correct.
> **Defense:** But you testified that you *knew* Jones had received a large amount of methamphetamine.
> **Agent Clayborne:** That's correct.

Defense: But you didn't *know* that, right? You hadn't seen anything. You hadn't seen an exchange of methamphetamine or money.
Agent Clayborne: But I *knew* it was.
Defense: You believed it, but you didn't *know* it.
Agent Clayborne: I *knew* it. I mean, if you're asking me, I *knew* it. (emphasis added by author)

Defense counsel then moved on to other questions. On re-direct examination, the government returned to the subject of Agent Clayborne's knowledge of Jones's methamphetamine possession:

Prosecutor: [Defense counsel] also asked you, let me characterize this, sort of confronted you about when you said you knew a drug deal had gone down, but you had not seen anything. Do you recall that?
Agent Clayborne: That's correct.
Prosecutor: How did you *know* that a drug deal had, in fact, occurred? (emphasis added by author)
Agent Clayborne: So once we saw or the other units saw what looked like a drug deal, *I made a phone call to my confidential source, who then made some phone calls himself and got back to me that the deal had happened.* (emphasis added in the opinion).
Prosecutor: Based on that information, you decided to stop Coy Jones?
Agent Clayborne: That's correct.

Defense counsel asked to approach the bench and renewed the motion for disclosure of the confidential informant. Counsel argued that Agent Clayborne testified about the content of what the informant said and that Jones had the right to confront the witnesses against him. The district court stated that the testimony regarding the confidential informant came in response to defense questions on cross-examination and that the defense opened the door to the testimony. The court also denied Jones's renewed motion to turn over reports on the confidential informant.

[Implicating the Confrontation Clause]

'Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant.' *Taylor v. Cain*, 545 F.3d 327, 335 (5th Cir. 2008). An officer's testimony need not repeat the absent witness's exact statement to implicate the Confrontation Clause. Rather, '[w]here an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that the

defendant was guilty of the crime charged, Confrontation Clause protections are triggered.' *Kizzee*, 877 F.3d at 657 (quotation omitted).

Agent Clayborne testified that he *knew* that Jones had received a large amount of methamphetamine because of what the confidential informant told him he heard from others. The jury was not required to make any logical inferences, clear or otherwise, to link the informant's statement (double hearsay) to Jones's guilt of the charged offense of methamphetamine possession. The government reinforced this connection during both opening and closing statements. In opening remarks, the prosecutor described the May 3, 2017, surveillance and stated: 'Of course, the information the agents have at this point is that Coy Jones is now in possession of a large amount of methamphetamine, so they follow Coy Jones.' (emphasis added in the opinion)

[The Government's Closing Argument at Trial]

In closing arguments, the prosecutor told the jury:

And then, as you heard from Agent Clayborne when the defense asked him, how do you know the drug deal happened? Well, the informant told me. *We called the informant and said, did the deal happen and he said, yep, it sure did*. And that's why they chose to follow Coy Jones because they knew he had the drugs. (emphasis added by author)

[The Court Responds to His Argument at Trial]

In light of this testimony and argument, we differ with the government's assertion that the informant's statements did not directly identify Jones. Both Agent Clayborne and the prosecution 'blatantly link[ed]' Jones to the drug deal and 'eliminated all doubt' as to who the informant was referring to. *Gray v. Maryland*, 523 U.S. 185, 193–94 (1998).

[The Government's Argument at the Fifth Circuit]

The government does not dispute that the confidential informant's statements regarding the drug deal are inadmissible under the Confrontation Clause as substantive evidence of Jones's guilt. It argues instead that the informant's statements were not introduced for their truth, but simply to explain the actions of law enforcement officers.

[Judge Sparks' Jury Instructions]

The district court instructed the jury that testimony regarding the confidential informant 'was admitted only to explain why law enforcement was conducting various surveillance operations,' and could not be used 'as evidence the defendant, or anyone else, actually engaged in a drug transaction.'

[The Court Tells Us What Officers May Testify To]

Testifying officers may refer to out-of-court statements to 'provide context for their investigation or explain "background" facts,' so long as the 'out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer's actions.' *Kizzee*, 877 F.3d at 659. We have made clear that '[w]hen such evidence comes into play, the prosecution must be circumspect in its use, and the trial court must be vigilant in preventing its abuse.' *United States v. Evans*, 950 F.2d 187, 191 (5th Cir. 1991); *see also United States v. Sosa*, 897 F.3d 615, 623 (5th Cir. 2018) ('[C]ourts must be vigilant in ensuring that these attempts to "explain the officer's actions" with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth.') (quoting *Kizzee*, 877 F.3d at 659).

[The Confrontation Clause]

Such vigilance is necessary to preserve the core guarantees of the Confrontation Clause. A witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect or how the officer was able to obtain a search warrant. *See Kizzee*, 877 F.3d at 659–60 (holding that a detective's testimony that he was able to obtain a search warrant for the defendant's house after questioning a witness about drug purchases violated the Confrontation Clause); …

* * *

[The Testimony Violated the Confrontation Clause]

'Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment—where a nontestifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay.' *Kizzee*, 877 F.3d at 659; *see also United States v. Vitale*, 596 F.2d 688, 689 (5th Cir. 1979) (explaining that testimony regarding a tip is permissible 'provided that it is simply background information showing the police officers did not act without reason and, in addition, that it does not point

specifically to the defendant'). Because Agent Clayborne's testimony about his conversation with the confidential informant 'point[ed] directly at the defendant and his guilt in the crime charged,' it was not a permissible use of tipster evidence. *Evans*, 950 F.2d at 191. Thus, the introduction of this statement at trial violated the Confrontation Clause.

[The Government Unsuccessfully Argues "Invited Error"]

The government contends that, to the extent its use of the confidential informant's statements exceeded permissible non-hearsay purposes, Jones invited the error. This argument falls short for two independent reasons. First, defense counsel did not ask Agent Clayborne *how* he knew that Jones had received the methamphetamine, and thus did not invite him to answer that question. Rather, the defense simply pointed out an inconsistency between Agent Clayborne's testimony that he did not observe a drug transaction and his confident assertion that he knew Jones had received the drugs. 'We narrowly construe counsel's statements in applying the invited error doctrine.' *United States v. Franklin*, 838 F.3d 564, 567 n.1 (5th Cir. 2016). In this case it was the prosecution, not the defense, that elicited the hearsay testimony by asking Agent Clayborne how he knew that the drug deal had occurred. *Cf. United States v. Jimenez*, 509 F.3d 682, 691 (5th Cir. 2007) (finding invited error when the challenged 'testimony was first elicited by Contreras' own attorney on cross-examination after he repeatedly asked Delauney to explain the basis for his suspicions about Contreras'). The government has pointed to no authority suggesting that the defense raising general doubts on cross-examination about the basis of an officer's knowledge permits the prosecution to directly elicit incriminating hearsay testimony on re-direct examination.

Second, it is undisputed that defense counsel was not informed before trial that the confidential informant provided law enforcement with after-the-fact information that the drug deal went through. For invited error to permit 'waiver of the Sixth Amendment right to confrontation, a purposeful rather than inadvertent inquiry into the forbidden matter must be shown.' *United States v. Taylor*, 508 F.2d 761, 764 (5th Cir. 1975); *see also United States v. Salazar*, 751 F.3d 326, 332 (5th Cir. 2014) ('Invited error applies, however, only where the error can be attributed to the actions of the defense.'). The Sixth Amendment guarantees defendants the right to confront all accusers, whether present or absent at trial. *See Crawford*, 541 U.S. at 50–51. A defendant may cross-examine the government's witnesses and probe seeming inconsistencies without risking the unwitting admission of incriminating hearsay. *See Taylor*, 508 F.2d at 764 (finding no invited error when defense counsel 'had no way to know that asking about the

sawed-off rifle would lead the witness into the [challenged] statement'). To hold otherwise would eviscerate the protections of the Confrontation Clause by forcing defendants to choose between their right to vigorously cross-examine testifying witnesses and their right to confront out-of-court accusers.

[The Government Argues That the Error is Harmless Beyond a Reasonable Doubt]

We may nonetheless affirm Jones's conviction if the Confrontation Clause error was harmless beyond a reasonable doubt. *See United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008); *Chapman v. California*, 386 U.S. 18, 24 (1967). To meet this standard, the government bears the burden to show that there was 'no reasonable possibility that the tainted evidence might have contributed to the jury's verdict of guilty.' *Lowery v. Collins*, 988 F.2d 1364, 1373 (5th Cir. 1993).

* * *

Our harmlessness inquiry focuses 'on the evidence that violated [Jones's] confrontation right, not the sufficiency of the evidence remaining after excision of the tainted evidence.' *Id.*; *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004)

* * *

Here, the inadmissible evidence was highly incriminating.

* * *

We have repeatedly found harmful error under similar circumstances.

* * *

[Conclusion]

The government has therefore failed to meet its burden to show harmless error… Under these circumstances, we cannot say that there is no 'reasonable possibility that the evidence complained of might have contributed to the conviction' for firearm possession. *Chapman*, 386 U.S. at 24. We thus vacate the judgment of conviction on all counts and remand for a new trial.

[My Thoughts]

- Thanks to Ed Mallett, a past president of both NACDL and TDCLA, for alerting me to this case.

- Confrontation issues have been with us forever and can be confusing. Forty-one years ago, I was an attorney of record for one of the defendants in a conspiracy case being tried in the court of Chief Judge Joe Fisher of the United States District Court for the Eastern District of Texas. When I made my second Confrontation Clause objection, he was heard to say to his law clerk, "Go check out this confrontation thing." Unfortunately, the law clerk did; Judge Fisher ruled correctly; and, we lost an appellate issue.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 233rd column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com.